II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 23 October 2007

on the State aid C 34/06 (ex N 29/05, ex CP 13/04) which the Federal Republic of Germany is planning to implement for the introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia

(notified under document number C(2007) 5109)

(Only the German version is authentic)

(Text with EEA relevance)

(2008/708/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 26 January 2004, the Commission requested information from the Federal Government regarding press reports about public support to the introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia (hereafter also NRW). The Federal Government replied to this request by letter dated 23 March 2004, registered on the same day. The Commission services met on 2 June 2004 with the authority in charge of the present measure, the *Landesanstalt für Medien Nordrhein-Westfalen* (the media authority of North Rhine-Westphalia, hereafter LfM) and on 10 December 2004 with representatives of the government of the *Land* of North Rhine-Westphalia.

[1] OJ C 204, 26.8.2006, p. 9, State aid C 34/06 (ex N 29/05) — Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty.

(2) By letter dated 13 January 2005, registered on the same day, the Federal Government notified the Commission in accordance with Article 88(3) of the EC Treaty of a measure concerning the financing of the roll-out of DVB-T in North Rhine-Westphalia. The Federal Government notified for reasons of legal certainty.

(3) By letter dated 10 March 2005, the Commission requested additional information to which the Federal Government replied, after extension of the deadline, by letter dated 29 April 2005, registered on the same day. The Commission services met with representatives of the media authority and of the *Land* of North Rhine-Westphalia on 23 June 2005 where the latter submitted additional information.

(4) On 9 November 2005, the Commission adopted a final decision declaring the public funding of DVB-T in Berlin-Brandenburg incompatible with the common market ([2]). In view of the similarities between the two cases, the Commission and Germany agreed to suspend the notification procedure ([3]) in order to allow the authorities to assess the implications of the Berlin-Brandenburg decision for the present case. At the same time, the notification procedure was also suspended with respect to another similar measure concerning the *Land* of Bavaria which was notified to the Commission on 8 December 2004 ([4]).

(5) By letter dated 12 April 2006, the Commission requested Germany to determine its position in the pending notification procedure within one month. By letter dated 12 May 2006, registered on the same day, Germany informed the Commission that it does not intend to withdraw or modify the notified measure concerning NRW.

(6) By letter dated 19 July 2006, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([5]). The Commission invited interested parties to submit their comments on the measure.

(7) Germany responded, following the extension of the deadline, by letter dated 4 October 2006, registered on the same day, to the request for comments in the opening decision. The Commission also received comments from the European Satellite Operators Association (ESOA) ([6]), the *Verband Privater Kabelnetzbetreiber e. V.* (ANGA) ([7]) and ish NRW GmbH (ish) ([8]).

(8) By letter of 19 December 2006, the Commission forwarded those comments to Germany, requesting observations. The authorities submitted their observations, following an extension of the deadline, by letter dated 16 February 2007, registered on the same date. On 19 April 2007, the Commission held a meeting with LfM to allow for a last exchange of views before finalising its assessment. By email dated 24 May 2007, the Commission sent a further informal request for information to which the German authorities responded by email dated 5 July 2007, registered on 6 July 2007.

([2]) C 25/04 Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Berlin-Brandenburg — Germany, 9 November 2005 (OJ L 200, 22.7.2006, p. 14).
([3]) By letters of 2 December 2005, 9 December 2005 and 12 December 2005.
([4]) The formal investigation procedure was also opened in this case on 19 July 2006 (C 33/06, ex N 576/04). The Bavarian authorities subsequently decided to limit the measure to de minimis aid for local broadcasters and to withdraw the notification (by letters of the Federal Government dated 22 June 2007 and 11 July 2007).
([5]) Cf. Footnote 1.
([6]) By letter dated 20 September 2006, registered on 22 September 2006.
([7]) By letter dated 21 September 2006, registered on 22 September 2006.
([8]) By letter dated 25 September 2006, registered on 3 October 2006.

II. DETAILED DESCRIPTION OF THE MEASURE

1. *BACKGROUND*

Digitisation of television broadcasting

(9) The notified measure concerns the introduction of digital terrestrial television in North Rhine-Westphalia. It is to be seen against the background of the digitisation of broadcasting, which concerns all commonly available transmission platforms for television signals, i.e. cable, satellite and terrestrial transmission.

(10) The prime benefit of digitisation is the increased transmission capacity on all platforms achieved by a more efficient use of the frequency spectrum. This may enable the offering of new or improved broadcasting services and the switch-off of analogue terrestrial TV could permit the release of frequencies which could be relocated to new uses and the potential arrival of new entrants could increase market competition and innovation. In view of these advantages, the Commission actively supports digitisation ([9]). The process is currently taking place in Germany as well as in other EU Member States and the overall objective is to complete analogue switch-off throughout the EU by the beginning of 2012 ([10]).

Digitisation in Germany and in North Rhine-Westphalia

(11) In order to promote the digitisation of broadcasting transmission in Germany, the Digital Broadcasting Initiative (*Initiative Digitaler Rundfunk*, IDR) was launched at the end of 1997 by decision of the Federal Government, following a decision by the Minister-Presidents of the *Länder*. Under this initiative, the Federal Government, the *Länder* and various other market participants drew up recommendations on digitisation. An initial IDR report was approved by the Federal Government in August 1998 and was followed by an overall plan for the introduction of digital broadcasting, called *Startszenario 2000* ([11]). Among others, this plan stated that the digitisation of cable, satellite and terrestrial broadcasting would be completed in Germany by 2010 at the latest.

(12) In North Rhine-Westphalia, the switchover project has been led by LfM. According to Section 27(1) of the Media Law of North Rhine-Westphalia (*Landesmediengesetz Nordrhein-Westfalen*) ([12]), LfM has the task of supporting and guiding the switchover from the analogue to the digital transmission (*die LfM unterstützt und begleitet die Umstellung der analogen auf digitale Übertragung*). In the context of the digital switchover, it has to ensure the provision of a variety of programme offers by means of the interplay of the different transmission means at appropriate conditions (*Versorgung mit vielfältigen Programmangeboten durch das Zusammenspiel der verschiedenen Übertragungswege zu angemessenen Bedingungen*). Another general task of LfM consists in the supervision of the commercial broadcasters.

Terrestrial broadcasting in Germany and North Rhine-Westphalia

(13) Against the background of the digitisation of cable, satellite and terrestrial transmission, the present measure deals only with the switchover on the terrestrial platform. In general, terrestrial transmission concerns two types of operators which may or may not be integrated: network operators which take care of the transmission of broadcasting signals, and broadcasters which produce and package content.

([9]) COM(2002) 263 final, 'eEurope 2005: An information society for all', COM(2003) 541 final, 'Communication from the Commission on the transition from analogue to digital broadcasting (from digital "switchover" to analogue "switch-off")' and COM(2005) 204 final, 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'.

([10]) COM(2005) 204 final 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting', cf. Footnote 9.

([11]) Federal Ministry of Economic and Technological Affairs (2000): Einführung des digitalen Rundfunks in Deutschland, 'Startszenario 2000', Sachstandbericht und Empfehlungen der Initiative 'Digitaler Rundfunk' zur Digitalisierung von Hörfunk und Fernsehen unter Berücksichtigung der Verbreitung über Kabel, Satellit und TV-Sender.

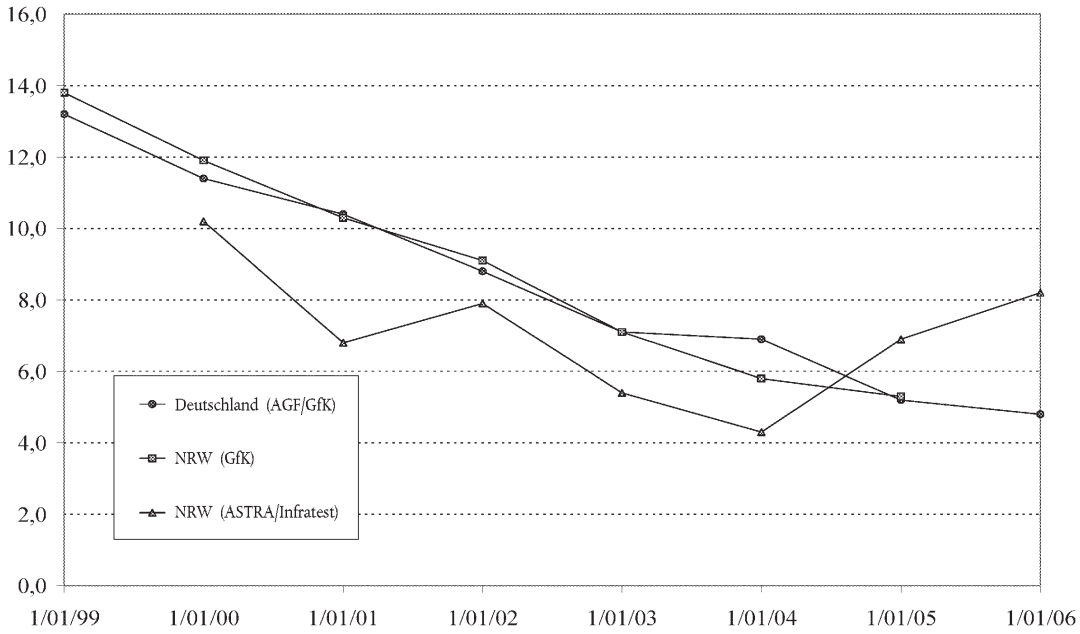
([12]) Landesmediengesetz Nordrhein-Westfalen in der Fassung vom 2. Juli 2002. (Gesetz- und Verordnungsblatt für das Land NRW vom 30. Juli 2002, Nr. 20, S. 334), modified in 2004 (Gesetz- und Verordnungsblatt für das Land NRW vom 17. Dezember 2004, Nr. 45, S. 774) and 2007 (Gesetz- und Verordnungsblatt für das Land NRW vom 29. Juni 2007, Nr. 13, S. 192).

(14) Since the emergence of cable and satellite in the 1980s, the market share of terrestrial broadcasting has fallen sharply in Germany as a whole. Based on the information provided by the German authorities, cable TV networks were rolled out, with important State support, during the 1980s ([13]). The German authorities submit that virtually every household in Germany is capable of receiving free-to-air television programmes by satellite.

(15) This decline in market share is depicted in the following figure which was also included in the opening decision.

Figure 1

Market share of terrestrial platform countrywide and in NRW ([14])



(16) Starting in 2004, following the digital switchover, the declining market share of the terrestrial platform was stabilised and the trend has been reversed since 2005. Based on information contained in the Digitisation Report 2007 ([15]), the household reception figures in Germany in mid-2007 were: 53,7 % cable, 42,5 % satellite, 11,5 % terrestrial (2 % increase as compared to 2006). According to the report, the share of digital terrestrial television has considerably increased: 3,6 million households use DVB-T, nearly twice as many as in the preceding year. In line with the Report, terrestrial transmission has reached a digitisation of nearly 90 %. The Digitisation Report also provides a regional breakdown of television reception over DVB-T ([16]). According to these data, the market shares of household reception in NRW in the 'core areas' (*Kerngebiete*), which only comprise areas where DVB-T is available, increased from 9,5 % in 2005 to 16,5 % in 2007 (see figure 2).

([13]) The notification submitted by the German authorities refers to a public investment of around EUR 15 billion for the setting up of the cable infrastructure in the 1980s.

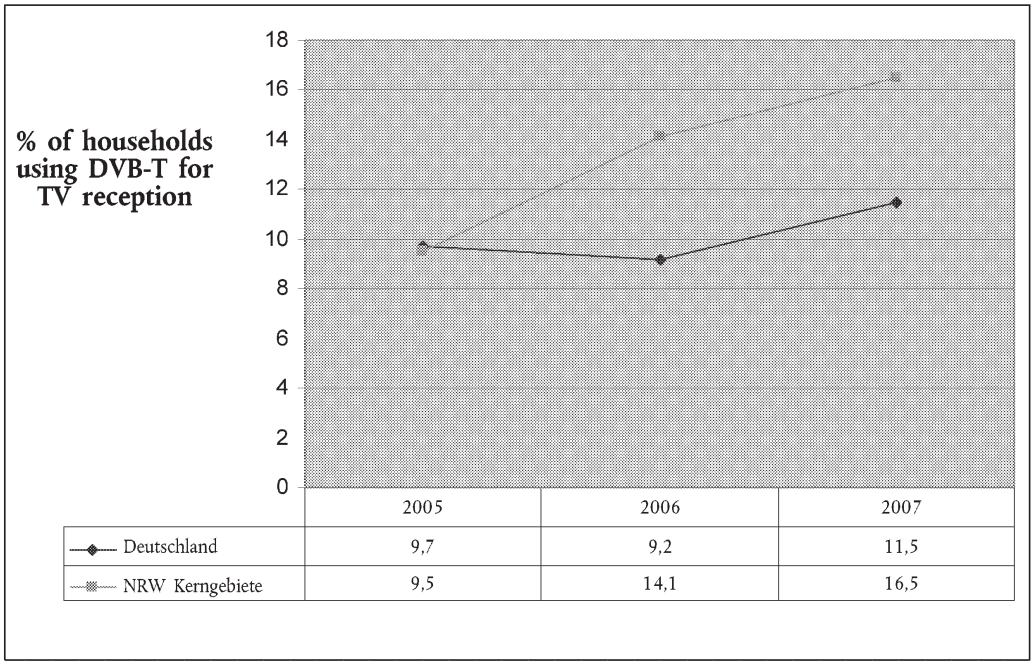
([14]) Arbeitsgemeinschaft Fernsehforschung (AGF) is a cooperation of the main German broadcasters to gauge TV viewing behaviour. SES/ASTRA is the largest satellite operator in Germany and publishes, every year, the German Satellite Monitor on the importance of the different TV transmission platforms. In Figure 1, the data collected by ASTRA/Infratest at the end of a each year, e.g. at the end of 2005, are related to the first of January of the subsequent year, e.g. 1.1.2006, to make them comparable with the data collected by AGF/GfK which are collected at the beginning of each year.

([15]) Digitalisierungsbericht 2007 — Gemeinsame Stelle Digitaler Zugang (GSDZ), Arbeitsgemeinschaft der Landesmedienanstalten (ALM).

([16]) Page 56 of the Digitalisierungsbericht 2007.

Figure 2

Market share of the digital terrestrial platform in Germany and NRW after the switchover



	2005	2006	2007
Deutschland	9,7	9,2	11,5
NRW Kerngebiete	9,5	14,1	16,5

Terrestrial switchover process in North Rhine-Westphalia

(17) From a technical point of view, the development of digital terrestrial transmission requires the update of transmission equipment by the network operator and the allocation of frequencies to be used for transmission. In order to reap the benefits of digitisation, existing analogue transmissions need to be phased out. In the period where analogue and digital broadcasts are operated in parallel (the simulcast period), switchover may actually aggravate spectrum scarcity ([17]). There is a need for the market players to agree on a common date for switching on digital and switching off analogue transmission so as to overcome the lack of frequency spectrum and to minimise the costs of parallel transmission. In view of the complexity of the terrestrial switchover, the *Startszenario 2000* envisaged a gradual introduction of DVB-T in the different *Länder*, starting with those areas with higher population density ([18]).

(18) As a first initiative in North Rhine-Westphalia, on 27 November 1998, LfM decided to launch a DVB-T test project (*DVB-T Feldversuch*) which took place in Cologne in the years 1999 and 2000 ([19]). In view of the objectives of the *Startszenario 2000*, the authorities in North Rhine-Westphalia have later on agreed to cooperate with the competent authorities in the Northern *Länder* of Lower Saxony (*Niedersachsen*), Schleswig-Holstein, Hamburg and Bremen and to carry out the digitisation of terrestrial transmission simultaneously in order to gain efficiencies.

(19) On 20 October 2003, LfM; the public service broadcasters (PSBs) ARD, ZDF and WDR Cologne ([20]); the commercial service broadcasters (CSBs) RTL Television (RTL), VOX Film und Fernseh-GmbH & Co. KG (VOX) and ProSiebenSat.1 Media AG (ProSiebenSat.1) signed a general agreement on the introduction of DVB-T in North Rhine-Westphalia (*Vereinbarung zur Einführung des digitalen*

([17]) Commission Communication on the transition from analogue to digital broadcasting, cf. Footnote 9.
([18]) This strategy is referred to as 'Strategie des inselweisen Umstiegs'.
([19]) At the time, the media authority was still called Landesanstalt für Rundfunk Nordrhein-Westfalen.
([20]) ARD stands for Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, ZDF for Zweites Deutsches Fernsehen, WDR Cologne for Westdeutscher Rundfunk Köln.

terrestrischen Fernsehens (DVB-T) in Nordrhein-Westfalen). The agreement identified the two areas of Cologne/Bonn and Ruhr/Düsseldorf where DVB-T was to be launched next after the successful switchover in the area of Berlin-Potsdam, and defined a binding timetable for the switchover. The agreement did not contain any specific details about the envisaged funding measure. It merely noted that 'as support measure, the LfM is providing funding for the technical infrastructure for DVB-T transmission in North Rhine-Westphalia'. In addition, the annex contained a reference to the elaboration of a funding concept for citizens on social grounds ([21]).

(20) The general agreement of 20 October 2003 was completed by a cooperation agreement (*Kooperationsvereinbarung zur Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Nordrhein-Westfalen*) signed by the same parties (WDR also representing the broadcasters of ARD) as well as the *Land* of North Rhine-Westphalia on 10 December 2003. The cooperation agreement defined common principles for communicating about DVB-T and designated the bodies responsible for the execution of the agreement, in particular a steering committee (*Lenkungsausschuss*) for decision-making and a project office (*Projektbüro*) for execution. The project office was set up by contract between LfM (LfM Nova GmbH), WDR (also representing the broadcasters from ARD) and ZDF of 14 January 2004.

(21) The overall transmission capacity of the DVB-T network comprises six multiplexes ([22]) conceived to carry a total of 24 programme channels both in the Cologne/Bonn and the Düsseldorf/Ruhr areas. In order to start digital terrestrial transmission, the frequencies needed to be allocated by means of licences both to broadcasters for the transmission of their programmes, and network operators for the operation of the DVB-T platform. Regarding the broadcasting of programmes, both in the Cologne/Bonn and the Düsseldorf/Ruhr areas, one multiplex was granted to each of the public service broadcasters (ARD, ZDF and WDR). The capacity reserved for commercial service broadcasters has been tendered by LfM and the respective DVB-T licences were allocated on 14 May 2004. Concerning the operation of the network, the Telecommunications and Postal Regulatory Authority (*Regulierungsbehörde für Telekommunikation und Post, RegTP* — now *Bundesnetzagentur für Elektrizität, Telekommunikation, Post und Eisenbahn, BNetzA*) granted the licences in 2004 (for more details on the allocation procedures, see recitals 24-30 below).

(22) In line with the dates fixed in the general agreement of 20 October 2003, digital terrestrial transmissions were launched on 24 May 2004 in the Cologne/Bonn area and on 8 November 2004 in the Düsseldorf/Ruhr area. The analogue terrestrial transmission (ATT) of the CSBs was halted as of the respective launch dates. The ATT of the PSB channels ARD-Das Erste, ZDF and WDR continued in parallel for a simulcast phase of about five months until it was switched off in the Cologne/Bonn area on 8 November 2004 and in the Düsseldorf/Ruhr area on 4 April 2005. On 19 November 2004, LfM issued a directive on the financial support for DVB-T (*Förderrichtlinie DVB-T*) taking effect retroactively as of 3 May 2004.

(23) Following the start in the Cologne/Bonn and Düsseldorf/Ruhr areas, DVB-T is being continuously rolled-out to other areas of North Rhine-Westphalia. On 29 May 2006, DVB-T transmissions were launched in two more areas (Wuppertal and Ostwestfalen-Lippe). On 12 June 2007 DVB-T started in Münsterland and it is foreseen to launch digital terrestrial television in Aachen and South Westphalia in November 2007. Contrary to the Cologne/Bonn and Düsseldorf/Ruhr areas, the switchover in these zones is being carried out only by the public service broadcasters, without the participation of CSBs ([23]).

([21]) The annex states that 'Für die betroffenen sozial schwächeren Mitbürgerinnen und Mitbürger soll ein Förderkonzept entwickelt werden'. However, on the basis of the information available to the Commission, such a funding concept based on social grounds has not been put in place by LfM.

([22]) A multiplex corresponds to a frequency block which in NRW is used for four programme channels.

([23]) In one part of the Düsseldorf/Ruhr area (Oberbergischer Kreis), the switchover was in fact carried out without the participation of the CSBs.

Award of DVB-T broadcasting licences for CSBs

(24) In accordance with Section 52a(1) of the State Broadcasting Treaty ([24]), Section 28 of the Media Law of NRW states that 'for the first allocation of digital terrestrial broadcasting capacities, priority shall be given to those broadcasters with programme channels which are broadcast in the given transmission area in analogue form.'

(25) On 14 November 2003, LfM issued the rules for the allocation of the terrestrial broadcasting transmission capacity (*Zuweisungssatzung*). However, the digitisation also required the use of the existing analogue terrestrial television channels, which were allocated to RTL Television (by the *RTL Television GmbH*), VOX/DTCP (by *VOX Film-und Fernseh GmbH & Co. KG* which also belongs to the RTL group with *DTCP GmbH*) and SAT1 (*Sat1 Satelliten Fernsehen GmbH*, hereafter ProSiebenSat.1). The respective analogue licences were granted in 2002 and 2003 by LfM and would have ended on 21 July 2008 for RTL Television, 31 January 2007 for VOX and 31 October 2010 for SAT1. By letters of 13 November 2003, LfM requested the commercial broadcasters RTL, VOX and ProSiebenSat.1 to confirm in writing their willingness to return their analogue channels in order to be able to proceed with the allocation of the transmission capacity. Further to the receipt of the confirmation by the broadcasters ([25]), the announcement of LfM dated 4 December 2003 for the first allocation of DVB-T transmission capacities to commercial broadcasters concerning the Cologne/Bonn and the Düsseldorf/Ruhr areas was published in the Bulletin of the *Land (Landesministerialblatt)* on 30 December 2003 ([26]).

(26) The tender covered the part of the transmission capacity reserved for CSBs, i.e. three multiplexes or 12 programme channels in each of the target areas. The tender specifications spelled out the selection criteria in case there would be more applicants than programme channels available and a decision would have to be made between the different applicants (*Vorrangentscheidung*). In line with the provisions of the Media Law of NRW, the criteria included the contribution of a programme channel to a balanced overall programme offer (*Programmvielfalt*) and to pluralism of broadcasters (*Anbietervielfalt*) as well as the presence of a broadcaster in the ATT network ([27]). The tender did not specify the costs of transmitting a programme channel via DVB-T nor any intention to financially support the switchover. The deadline for submitting offers was 3 March 2004.

(27) LfM received a total of 21 offers from broadcasters and media service providers in response to the tender announcement. ProSiebenSat.1 and the RTL group applied with a set of programs (*Programmbouquets*) for one multiplex each ([28]). On 23 April 2004, the Media Commission (*Medienkommission*) of LfM decided on the allocation of the programme channels reserved for CSBs. On the basis of this decision, LfM issued an order for the allocation of the respective DVB-T licences on 14 May 2004. According to the decision, a multiplex was allocated to each of the commercial broadcasting groups RTL and ProSiebenSat.1, and the capacity of the remaining one multiplex was allocated to broadcasters of individual programme channels: VIVA (VIVA Fernsehen GmbH), CNN (Turner Broadcasting Systems Deutschland GmbH), Eurosport (Eurosport S.A.), and onyx.tv/Terra Nova (Onyx Television GmbH) ([29]).

([24]) Staatsvertrag über den Rundfunk im vereinten Deutschland of 31 August 1991, last amended with effect from 1 March 2007.

([25]) By letter of RTL dated 17 November 2003, by letter of VOX dated 5 December 2003 and by letter of ProSiebenSat1, dated 23 December 2003.

([26]) 'Erstmalige Zuweisung von Übertragungskapazitäten für die landesweite digitale terrestrische Verbreitung bzw. Weiterleitung von Fernsehprogrammen und Mediendiensten im DVB-T Standard in Nordrhein-Westfalen, Bekanntmachung der LfM vom 4. Dezember 2003', published in Landesministerialblatt of 30 December 2003.

([27]) The provision that programme channels present in the respective ATT network need to be given priority when awarding licences for DVB-T is based on Section 52a(1) in the State Broadcasting Treaty and referred to in Section 28 (1) of the NRW Media Law.

([28]) In their reply of 23 March 2003, the German authorities indicated that the possibility for the Media Commission of LfM to allocate entire multiplexes to the broadcasters RTL Group and ProSiebenSat.1 is based on Section 28 of the Media Law of North Rhine-Westphalia which gives priority to those programme channels already broadcast in analogue.

([29]) The licence was granted to Onyx Television GmbH knowing that as of 20 May 2004, it is going to change its programming and broadcast a documentary channel called TerraNova instead of its music channel onyx.tv.

(28) According to Section 12 paragraph (2) of the Media Law of North Rhine-Westphalia, also referred to in the tender announcement, first-time licences can be awarded for a period of between 4 and 10 years. By order of the LfM of 14 May 2004, the licences were granted to ProSiebenSat.1, RTL and CNN respectively for five years, to VIVA until 2 December 2008, to Eurosport S.A. for three years and to TerraNova until 17 June 2009. However, as of 1 July 2007, TerraNova left the DVB-T platform and was replaced by Tele 5 (TM-TV GmbH) ([30]) which was chosen by LfM out of seven applicants. Table 1 provides an illustration of the switchover process in the Cologne/Bonn area, including a simulcast period for PSBs but not for CSBs as indicated in recital 22 above.

Table 1

Terrestrial transmission in Cologne/Bonn before and after switchover

Transmission channel	Analogue TV	Network service area as of 4.4.2005	Programmes as of 24.5.2004	Programmes as of 8.11.2004	Programmes as of 4.4.2005
K 05	*Sat.1*		*ARD — Simulcast*	X	X
K 26	*ZDF*	countrywide	ZDF Bouquet	ZDF Bouquet	ZDF Bouquet
K 29	*ZDF*	D	*ZDF — Simulcast*	RTL Bouquet	RTL Bouquet
K 34	*VOX*		ZDF bouquet	X	X
K 36	*RTL*	E			Viva/Eurosport/CNN/ Terra Nova (Tele5 as of 1.7.2007)
K 43	*ARD*	C	RTL/VOX/ProSieben/ Sat.1	Pro7Sat.1 Bouquet	Pro7Sat.1 Bouquet
K 49	*WDR*	B	*WDR — Simulcast*	WDR Bouquet	WDR Bouquet
K 65	X	A	ARD Bouquet	ARD Bouquet	ARD Bouquet
K 66	X		N24/Kabel 1/RTL II/ Super RTL	Viva/Eurosport/CNN/ Terra Nova	X

Explanations: The network services for the DVB-T transmission channels K26, K29, K36 and K43 are provided by T-Systems, while the transmission channels K49 and K65 were allocated to WDR but transmission is also partly provided by T-Systems. Analogue transmissions are in italics. A 'bouquet' means a set of four programmes transmitted over one digital multiplex. The allocation of DVB-T channels to broadcasters in the Düsseldorf/Ruhr area is not presented in this table. The switchover in the Cologne/Bonn area was completed on 8 November 2004 but there were some minor technical adjustments concerning the allocation of channels on 4 April 2005 due to the switchover in the Düsseldorf/Ruhr area. Following the simulcast period, transmission channels K05, K65 and K66 are currently, according to the information available to the Commission, not used for television transmission. The overview is only provided for illustrative purposes.

Award of DVB-T network licences

(29) At the request of the State Chancellery (*Staatskanzlei*) of the *Land* of North Rhine-Westphalia, the Telecommunications and Postal Regulatory Authority (*RegTP*) launched an open procedure for frequency allocation (*Frequenzzuteilungsverfahren*) on 4 February 2004 ([31]). Similarly to the broadcasters, the operators of the analogue terrestrial network have previously renounced their analogue licences which were unlimited in time. The overall need of digital transmission was broken down into five network service areas (*Versorgungsbedarfe* A to E) which correspond to the individual transmission channels (multiplexes in digital mode). The relevant legislative act (*Verfügung*) did not note that there was one additional, countrywide service area which had already been published on 27 November 2002 ([32]). This service area was allocated to T-Systems, a subsidiary of Deutsche Telekom, and serves to transmit the ZDF programme channels.

([30]) See the announcement on LfM's website: http://www.lfm-nrw.de/presse/index.php3?id=537
([31]) Official Gazette RegTP No 3/2004, Act No 3/2004, p. 82.
([32]) Official Gazette RegTP No 23/2002, Act No 36/2002, p. 1695.

(30) In the allocation procedure in North Rhine-Westphalia, T-Systems applied for the frequencies for the service areas C, D and E which correspond to the multiplexes dedicated to commercial service broadcasters, and WDR for the frequencies for the service areas A and B, which were reserved for public service broadcasters. Since there was only one application for each of the five service areas, *RegTP* allocated the frequencies through the application procedure and did not need to launch the second stage of the frequency allocation procedure, i.e. the tender procedure. Since T-Systems and WDR were already operators of the ATT network and thus possessed a telecommunications authorisation, this requirement for allocating the frequencies through the application procedure was also met. The rights for operating the DVB-T network were granted for about twenty years until 31 December 2025.

2. *THE SUPPORT MEASURE IN DETAIL*

(31) The subjectmatter of the notification is the financial assistance envisaged to be provided by LfM to CSBs for the digital terrestrial transmission of their programme channels in the areas of Cologne/Bonn and Düsseldorf/Ruhr. The German authorities estimated that by means of the introduction of DVB-T in these areas, around 14 million inhabitants are able to receive DVB-T out of the overall population of around 18 million in the *Land* ([33]).

(32) The legal basis for this assistance is Section 40(1)(2) of the State Broadcasting Treaty (*Rundfunkstaatsvertrag*) and Section 88(3) of the Media Law of North Rhine-Westphalia, pursuant to which the *Land* media authorities and, in the present case, LfM are charged with promoting, among other things, the development of the technical infrastructure for broadcasting and projects for new broadcasting technologies out of their share of the licence fee (*Rundfunkgebühr*). LfM's budget is essentially financed by the 2 % of the public service broadcasting licence fee collected in North Rhine-Westphalia in accordance with Section 40 read in conjunction with Section 55 of the State Broadcasting Treaty (*Rundfunkstaatsvertrag*), Sections 10 and 11 of the State Treaty on the Financing of Broadcasting (*Rundfunkfinanzierungs-Staatsvertrag*) and 116(1) of the Media Law of North Rhine-Westphalia ([34]). The licence fees are collected from private households by the German TV licensing office (*Gebühreinziehungszentrale*) and transferred to the beneficiary organisations such as the LfM.

(33) The directive on the financial support for DVB-T (*Förderrichtlinie DVB-T*) ([35]) issued on 19 November 2004 sets out the general terms of the financial assistance granted by LfM to the commercial broadcasters. Article 2 of the directive states that the financial assistance concerns the transmission fees paid by the broadcasters to the network operator. In line with Article 3, beneficiaries may be those commercial broadcasters or media service providers which have received digital terrestrial transmission capacities. Article 4 foresees that the financing is provided in the form of grants. Article 5(1) limits the duration of the financing to five business years. Article 5(2) specifies that 'The financing shall not exceed in average 30 % of the transmission fees payable for the operation of the network and is granted in a decreasing scale. It starts in the first business year with 40 % of the transmission fees payable for the operation of the network and decreases by five percentage points each business year so that the share of financing amounts to just 20 % in the fifth business year.' In addition, Article 5(3) provides that 'The savings arising from the switch-off of analogue transmissions will be deduced from the funding'.

(34) The details concerning the concrete implementation of the directive on the financial support were set out in the notification. In the case of the broadcasters of the programme channels Viva, Eurosport, CNN and Terra Nova (as of 1 July 2007, Tele5) which did not participate in the analogue terrestrial transmission, the envisaged financial support is the same: it decreases gradually by 5 % from 40 % of the DVB-T transmission fees in the first year to 20 % of the transmission fees in the fifth year, in line with Article 5(2) of the directive on financial support.

([33]) Answers of the German authorities dated 2 May 2005.
([34]) 45 % of these funds are transferred to the NRW Film Foundation.
([35]) See recital 22.

(35) In the case of the RTL group and ProSiebenSat.1, the CSBs previously present on the analogue terrestrial platform, the notification does not foresee the application of the decreasing share of assistance provided in Article 5(2) of the directive on financial support. In the case of these broadcasters which were allocated one entire multiplex each, the calculation of the subsidy is based on the difference between the overall amount of transmission fees in analogue and in digital mode in North Rhine-Westphalia as well as in other *Länder* of Northern Germany. According to the German authorities, thereby, the calculation method intends to take into account the savings arising from the switch-off of analogue transmissions as provided in Article 5(3) of the directive on the financial support.

(36) In the notification, the German authorities also provided information about the envisaged amount of funding based on the estimated DVB-T transmission fees. At the same time, they highlighted that the calculation of the public support would be based on the actual transmission fees charged by the network operator to the CSBs at the time the financing is granted. In accordance with the Federal Telecommunications Law (*Telekommunikationsgesetz*), transmission fees are only fixed by the regulatory authority *BNetzA* if the network operator is found to have significant market power at the relevant market. In July 2006, *BNetzA* has defined the relevant market for the transmission of broadcasting signals in line with the European regulations. As a result, the network operator concerning the CSBs, T-Systems was only considered to have significant market power in the market for terrestrial radio transmission over FM (*terrestrische Radioübertragung via UKW*) ([36]). Therefore, it remains free to fix the amount of the transmission fees for commercial broadcasters on the DVB-T platform.

(37) In the notification, the German authorities estimated that the DVB-T transmission fees of a multiplex would amount to EUR 2,7 million per year. The transmission fees of one programme channel were thus estimated at EUR 0,675 million per year and at EUR 3 375 million over the entire five year period of the scheme ([37]). These figures are lower than the analogue terrestrial transmission fees per programme channel.

(38) Based on these data, the overall financial support granted to the individual programme channels Viva, Eurosport, CNN and Terra Nova (as of 1 July 2007, Tele5) was envisaged to amount to a total of EUR 4 050 000. The level of financing foreseen over the five years per programme channel is shown in Table 2.

Table 2

Estimated transmission fees and funding for Viva, Eurosport, CNN, TerraNova (Tele5)

(in EUR)

Years	Transmission fees per programme channel	Aid intensity	Amount of funding
1st year	675 000	40 %	270 000
2nd year	675 000	35 %	236 250
3rd year	675 000	30 %	202 500
4th year	675 000	25 %	168 750
5th year	675 000	20 %	135 000
Total amount per programme channel	3 375 000		1 012 500

([36]) The result of the market analysis was communicated to the Commission on 31.7.2006.
([37]) The actual figures charged by T-Systems to the CSBs for the digital terrestrial transmission are actually lower. According to the German authorities, the annual fees per programme channel (for example for 2005 and 2006) amount to about EUR 611 000.

(39) In the case of the RTL group and ProSiebenSat.1, the calculation provided in the notification is shown in Table 3. The other *Länder* of Northern Germany taken into account are jointly referred to as 'North' in the notification ([38]).

Table 3

Calculation by the German authorities of 'additional costs' for ProSiebenSat.1 and RTL ([39])

(in EUR)

	RTL group		ProSiebenSat.1	
	NRW	'North'	NRW	'North'
Analogue programme channels/Transmission fees in EUR per year	RTL, VOX	RTL	Sat1	Sat1, Pro7
	2,2 million	3,9 million	0,8 million	4,6 million
Digital programme channels/ transmission fees in EUR per year	RTL, VOX, RTL2, S.RTL	RTL, VOX, RTL2, S.RTL	Sat1, Pro7, N24, K1	Sat1, Pro7, N24, K1
	2,7 million	3,3 million	2,7 million	3,3 million
Differences in fees analogue/ digital	– 0,5 million	+ 0,6 million	– 1,9 million	+ 1,3 million
Overall balance	+ 0,1 million		– 0,6 million	

(40) Based on this calculation, LfM does not intend to grant a subsidy to the RTL group. On the one hand, the RTL group is found to have a positive overall balance. On the other hand, the notification states that the RTL group has explicitly renounced the financing in the context of the negotiations concerning the return of the analogue licences. As concerns ProSiebenSat1, it is considered to incur 'additional expenses' of up to EUR 600 000 per year and the German authorities foresee a funding of up to EUR 550 000 per year over the duration of five years (up to EUR 2,75 million in total). This represents around 28 % of the overall DVB-T transmission fees paid by ProSiebenSat.1 in North Rhine-Westphalia.

(41) In line with the above calculations for both groups of broadcasters, LfM's total budget for subsidising the DVB-T transmission of the CSBs over five years is estimated at EUR 6,8 million.

(42) LfM grants the financial assistance described above only to programme channels of CSBs. The PSBs finance the costs of DVB-T transmission out of the licence fee income accruing to them. According to the information submitted by the German authorities, WDR has at its disposal a project budget of about EUR 40,8 million for the period from 2001 until 2008 to cover the costs of the switchover. In the case of ZDF, the budget to achieve the countrywide switchover to DVB-T amounted for the period from 2001 to 2004 to EUR 36,8 million and to EUR 33,2 million between 2005 and 2008.

(43) The financing directive entered into force retroactively as of 3 May 2004. However, by decision of the Media Commission (*Medienkommission*) of LfM, the German authorities have undertaken not to implement the financing until the Commission's approval according to the State aid rules. Accordingly, no financing has been granted to the commercial broadcasters under the measure.

([38]) The notification does not specify how the overall transmission costs were calculated for the other *Länder* of Northern Germany.

([39]) Both in analogue and digital transmission, transmission costs are calculated per programme channel transmitted by the broadcaster concerned. The calculation method of the German authorities does not take into account the increase in the number of programme channels broadcast by the broadcasters in digital mode as compared to analogue terrestrial transmission, whereas this increase causes the higher overall transmission costs. Moreover, it does not include the broadcaster's revenues arising from the transmission of their programme channels. The Commission's assessment of the calculation method is presented in recitals 74, 123 and 171 of the present decision.

III. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(44) In the opening decision, the Commission took the preliminary view that the subsidies envisaged by LfM appear to meet all the criteria of Article 87(1) of the EC Treaty and thus to constitute State aid. The Commission considered that the measure appears to be granted through State resources and is imputable to the State. It was found that the subsidy appears to constitute an advantage for commercial broadcasters as direct beneficiaries and may also benefit indirectly the network operator T-Systems.

(45) The opening decision also raised doubts whether the procedures for the allocation of broadcasting and network licences could have minimised or eliminated the selective economic advantage deriving from the subsidy and could have prevented a distortion of competition. The Commission considered that the measure constitutes sectoral aid and appears to distort competition among the different transmission platforms (terrestrial, cable, satellite). It was noted that the measure may also distort competition among commercial broadcasters. In view of the international competition both among broadcasters and network operators, it was considered that the measure may affect trade between Member States.

(46) The Commission also expressed doubts as to the compatibility of the measure with the EC Treaty. The opening decision found that the conditions for the application of Articles 87(3)(c), 87(3)(d) and 86(2) of the EC Treaty do not seem to be met. In particular, the Commission considered that there appears to be no indication that in the market situation prevailing in North Rhine-Westphalia, the measure could be deemed to be appropriate, necessary and proportionate to overcome any specific market failure which may hamper the switchover to digital television. The opening decision took the view that the financial support is not related to any particular cultural content. The Commission also called into question whether the measure might be considered as a compensation for a service of general economic interest.

(47) Finally, the Commission initiated the formal investigation procedure also in order to give Germany and interested parties the opportunity to submit their comments on its provisional assessment of the measure described and to make available to the Commission any relevant information related to the measure.

IV. COMMENTS FROM INTERESTED PARTIES [40]

(48) ANGA (*Verband Privater Kabelnetzbetrieber e*. V.), the association of private cable network operators stressed that the financial support for DVB-T transmission distorts competition between the different

[40] ProSiebenSat.1 and Deutscher Kabelverband (DKV) did not submit comments with respect to the present procedure. For the sake of completeness, the Commission notes that these parties provided observations in the similar case concerning Bavaria (C 33/06, referred to in recital 4 above). In this case, ProSiebenSat.1, as one of the beneficiaries, stressed the importance of the funding, from a commercial viewpoint, for the digital switchover and for safeguarding the terrestrial platform. ProSiebenSat.1 maintained that in view of the decreasing share of terrestrial platform, it was considering switching off this mode of transmission. In view of the economic risks linked to the switchover (including the risk that terrestrial coverage decreases with the switchover), ProSiebenSat.1 argued that it would not have participated in DVB-T without the envisaged support. At the same time, the participation of large commercial broadcasting groups alongside with the PSBs was necessary to ensure consumer interest for DVB-T. ProSiebenSat.1 also claimed that any advantage would be passed on by the broadcasters to the network operator by means of the transmission fees. Finally, ProSiebenSat.1 stated that the financial assistance would serve to reduce the advantage of PSBs which had significant resources for the digitisation and would have a positive effect on infrastructure competition. Deutscher Kabelverband, on the other hand, supported the findings expressed by the Commission in the opening decision. DKV considered that the envisaged measure would distort competition between the different means of transmission and is not necessary for the introduction of DVB-T. DKV also highlighted other market-based alternatives for the financing of DVB-T. DKV claimed that the introduction of DVB-T led to customer losses for cable operators: the decrease of customers was 33 % higher in 2005 than in 2004. Moreover, DKV highlighted that on the basis of the ASTRA statistics, there has been a clear increase of terrestrial coverage in the different German Länder following the switchover to DVB-T. DKV also claimed that the measure would benefit Deutsche Telekom in the roll-out of its IPTV offer. Finally, DKV maintained that there was no public interest justification to favour DVB-T over the other infrastructures from the point of view of media plurality, the transmission of local and regional programmes or universal coverage.

means of transmission to the detriment of cable operators. They submitted that the introduction of DVB-T has already led to a loss of customers for cable operators in the *Länder* concerned. The migration of terrestrial customers to cable which took place following the switch-off of analogue terrestrial television has been very limited and by far did not compensate for the continuous loss of cable customers. In their view, the measure aims at reducing the share of cable transmission, despite the fact that there is already strong competition with satellite and broadband (IPTV) operators, as well as between the different operators within the cable sector. Moreover, ANGA contests the openness of the procedures for the granting of broadcasting and network licences. With regard to the award of broadcasting licences, they claim that the procedure favoured those undertakings already present in the analogue network (ProSiebenSat.1 and the RTL Group) by allocating them entire multiplexes, including for programmes which they have not broadcast in analogue. As regards the award of network licences, they submit that it was clear from the beginning that the licensees would be the public service broadcasters of ARD and T-Systems. They claim that the subsidies provide an advantage for Deutsche Telekom which might distort competition not only in the broadcasting sector, but also in the electronic communications sector, if Deutsche Telekom links the DVB-T offer of its subsidiary T-Systems with its broadband service offers for customers. Finally, they argue that there would be other market-based alternatives for the financing of DVB-T by means of the encryption of the programmes and charging customer fees.

(49) The comments submitted by *ish* (*ish NRW GmbH*), the main cable network operator in North Rhine-Westphalia, take a similar line to ANGA and generally support the position of the Commission in the opening decision. In its observations, *ish* claims having suffered significant customer loss (around 500 000 in 2005) due to the launch of DVB-T and in particular due to the 'free' subsidised reception of DVB-T compared to the subscription-based use of cable ([41]). This customer loss was not compensated by the limited customer increase following the switch-off of analogue terrestrial transmission. According to *ish*, the number of their customers could only be stabilised by high investments in the modernisation of cable infrastructure and the renewal of product structure. In their view, the subsidies aim at preserving a technology whose economic viability is doubtful, and which could be financed by other means such as encryption and customer fees. Similarly to ANGA, they consider that the measure would also reinforce the position of Deutsche Telekom in the broadband market. Finally, they take the view that the direct financial assistance increases the advantage of broadcasters transmitting over the terrestrial platform which they already enjoy in light of the *must carry* rules set out in Article 16 paragraph (2) of the Media Law of North Rhine-Westphalia (*Landesmediengesetz Nordrhein-Westfalen*), which obliges cable network operators to transmit on their network those programmes which have received a terrestrial broadcasting licence from LfM.

(50) ESOA (*European Satellite Operators Association*) also generally supports the views expressed by the Commission in the opening decision. They consider that LfM's financial assistance distorts competition between the different transmission platforms. As a matter of principle, they take the view that Member State policy interventions to promote the switchover should be transparent and justified, non-discriminatory and technologically neutral. They consider that the support of terrestrial transmission contributes to the foreclosure of other forms of transmission from the market. They highlight that satellite operators have introduced digital transmission by satellite without State support and point out that despite the significant investment required for the operation of satellites, this means of transmission has a number of advantages over terrestrial transmission (e.g. large and seamless reach, no high infrastructure costs).

V. **COMMENTS FROM THE FEDERAL REPUBLIC OF GERMANY**

(51) Germany considers that the measure does not constitute State aid. Moreover, it takes the view that even if aid was found to be present, it would be compatible with the common market. Besides the specific comments concerning the qualification and the compatibility of the measure, the written observations put forward general arguments concerning the Commission's policy and competences under the State aid rules.

([41]) According to ish, the reception of TV over DVB-T for 'free' was an important argument in the marketing campaign of the authorities to promote the introduction of DVB-T which made customers migrate from cable to DVB-T.

(52) As a matter of principle, the authorities take the view that the Commission has no right to interfere with the political decision of the Federal Government and the *Länder (politische Entscheidung von Bund und Ländern*) to maintain the terrestrial platform and to carry out its digitisation. Furthermore, in their opinion, the Commission is not entitled to assess in the place of the authorities of the Member States whether other measures might have been more appropriate. They also consider that the requirement of technology neutrality is not a suitable criterion to assess the compatibility of aid measures in the field of digital television. They call into question whether the Commission's position and the length of the investigation of the measure at hand is in line with its declared policy to support digitisation. The comments express the view that there is a lack of consistency in the decision-making of the Commission in particular with respect to the assessment of the grounds for compatibility. They consider that the guidance provided in the final decision on the measure in Berlin-Brandenburg is not applicable to the present case and would not provide sufficient indications to authorities for compatible measures which could help to preserve the terrestrial platform.

(53) Regarding the qualification of the present measure, the German authorities repeatedly stress that the envisaged payments constitute a compensation for a service of general economic interest and the Altmark criteria are met. At the same time, they maintain that the measure does not distort competition neither among broadcasters nor among the different transmission platforms. They emphasise that the procedures for the allocation of broadcasting licences by LfM as well as for the award of the network licences by RegTP were transparent and fully in line with the applicable national requirements. Despite the fact that the funding was not mentioned in the tender announcement concerning the granting of broadcasting licences, based on the general agreement of 20 October 2003, the German authorities maintain that all applicants knew about the envisaged funding measure.

(54) In response to the comments received from the cable industry, the German authorities call into question the alleged customer loss of the cable operators and contest the data submitted by *ish*. They maintain that even if there was a decrease in cable customers, this would not necessarily be due to the introduction of DVB-T. They point out that the TV cable networks have been built in the 1980s with State support, and cable transmission also benefits from regulatory advantages up to now (*Mietnebenkostenverordnung*). Moreover, the authorities submit that their overall approach is technology neutral and if needed, they would also be ready to support the digitisation of cable.

(55) Given the high market shares of cable and satellite, they take the position that there is no risk that DVB-T attracts broadcasters away from these platforms or influence consumers' choice. Rather than affecting their market position, they consider that the measure would exercise positive competitive pressure on cable and satellite operators and thereby promote the digitisation of these platforms too. At the same time, the comments also call into question whether cable, satellite and terrestrial transmission belong to the same market in view of the technological differences and the costs of switching from one means of transmission to another. In the opinion of the German authorities, terrestrial television is not in direct competition but rather complementary to satellite and cable.

(56) The German authorities consider that the measure does not provide an indirect advantage to the network operator T-Systems. They maintain that the potential advantage deriving from the funding to the network operator is neither demonstrable nor quantifiable (*weder nachweisbar noch quantifizierbar*) and is not sufficient to consider T-Systems as indirect beneficiary under the State aid rules. They claim that the guaranteed use of the network does not follow from the measure, but from the granting of broadcasting licences. Moreover, they consider that the measure does not necessarily enable T-Systems to charge higher fees and obtain more revenues. Furthermore, as to the effect of the measure on trade between Member States, the German authorities take the view that the sole fact that broadcasters and network operators are in international competition is not sufficient to establish the affectation of intra-community trade.

(57) If the measure would be considered State aid, the German authorities maintain that it should be declared compatible with the common market under Article 86(2), 87(3)(c) or (b) of the EC Treaty. They reiterate the position that the introduction of digital terrestrial television constitutes a service of general economic interest. In their view, the commercial broadcasters have been entrusted with this service by means of the attribution of the DVB-T transmission capacities.

(58) Moreover, regarding Article 87(3)(c) EC Treaty, the German authorities claim that the Commission has not given due consideration to the positive aspects of the introduction of DVB-T. In particular, the Commission did not take into account the contribution of DVB-T to media plurality, the suitability of the terrestrial platform to broadcast regional and local programmes, the innovation potential of DVB-T (above all for mobile reception) and the contribution of the measure to ensure DVB-T coverage in rural and remote areas. Moreover, the Commission did not consider the efficiencies achieved by LfM by promoting an early switchover and by coordinating this process with the *Länder* of Northern Germany. In their view, the fact that in other areas of North Rhine-Westphalia, DVB-T is being launched without the participation of commercial broadcasters indicates that private operators are not interested in participating in this platform without additional incentives. Overall, they consider that the measure is in line with the Commission Communication on the transition from analogue to digital broadcasting (hereafter the Switchover communication) ([42]). In their view, the funding addresses the difficulties identified by the Communication and compensates in part the significant short-term costs of the switchover also referred to in the Communication.

(59) In addition, the German authorities consider that the Commission should also examine the compatibility of the measure in light of Article 87(3)(b) EC Treaty. They take the view that the measure constitutes an important project of common European interest. In their view, this also follows from the Switchover communication and from the wide range of economic, social and political benefits associated with digitisation.

VI. **ASSESSMENT OF THE MEASURE**

1. *PRESENCE OF STATE AID PURSUANT TO ARTICLE 87(1) EC TREATY*

(60) The Commission has examined whether the measure can be qualified as State aid within the meaning of Article 87(1) of the EC Treaty, which provides that '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, insofar as it affects trade between Member States, be incompatible with the common market'. It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: (1) the measure has to be granted out of State resources and be imputable to the State, (2) it has to confer an economic advantage to undertakings, (3) the advantage has to be selective and distort or threaten to distort competition, (4) the measure has to affect intra-Community trade.

1.1. MEASURE GRANTED OUT OF STATE RESOURCES AND IMPUTABLE TO THE STATE

(61) In line with the settled case law of the European Court of Justice, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) of the EC Treaty, they must first be granted directly or indirectly through State resources, and, second, be imputable to the State ([43]). The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State ([44]). Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid ([45]).

([42]) COM(2003) 541 final, cf. Footnote 9.
([43]) C-345/02, Pearle and others, [2004] I-7139, paragraph 35 with reference to Case C-303/88 Italy v Commission [1991] ECR I-1433, paragraph 11 and C-482/99, France v Commission, Stardust Marine, [2002] I-4379, paragraph 24.
([44]) C-345/02, Pearle and others, [2004] I-7139, paragraph 34 with reference to PreussenElektra, paragraph 58; see also Joined Cases C-72/91 and C-73/91 Firma Sloman Neptun Schiffahrt AG [1993] ECR I-887, paragraph 19.
([45]) C-482/99, France v Commission, Stardust Marine, [2002] I-4379, paragraph 23.

(62) In the course of the procedure, the German authorities have argued that the funding is not granted out of State resources because it is financed out of licence fees collected from individual television viewers and thus the measure does not constitute a burden for the State budget. In their view, this follows from the judgments of the ECJ in the cases *PreussenElektra* ([46]), *Sloman Neptun* ([47]) and *Pearle and others* ([48]).

(63) The German authorities have not contested that LfM is a public body established by the State which performs a public task and the funding is granted out of its budget. LfM is a public authority established by the Media Law of North Rhine-Westphalia. The law defines the organisational structure of LfM and entrusts it with a wide range of public tasks in the field of broadcasting and frequency management. LfM is subject to legal supervision by the *Land* of North Rhine-Westphalia (*staatliche Rechtsaufsicht*) ([49]) and its annual budget is under the control of the Court of Auditors of the *Land* ([50]). The public task of relevance for the present case, the promotion of the technical infrastructure for broadcasting and of projects of new broadcasting transmission technologies, is laid down in the national State Broadcasting Treaty ([51]). More specifically, with respect to the digital switchover, the Media Law of North Rhine-Westphalia provides that LfM shall support and guide the switchover from analogue to digital transmission ([52]). LfM is therefore to be considered a public body established by the State to serve the general interest.

(64) Clearly, the financing foreseen under the present measure constitutes a burden for LfM's budget. The circumstance that the budgetary resources of LfM are stemming from the licence fee collected from private households does not in any event prevent the budgetary resources of LfM to be categorised as State resources. The fact that the subsidies are granted out of the budget of a public body is in itself sufficient to conclude that State resources are involved. Moreover, the licence fee is a compulsory levy imposed on owners of radio/TV sets and their collection follows procedures similar to those of tax collection. The level of the licence fee is decided jointly by the *Länder* Parliaments and fixed in the respective legal acts. The share of licence fees accruing to LfM is defined in the State Broadcasting Treaty, the State Treaty on the Financing of Broadcasting and the Media Law of NRW as described in recital 32 above. Thus, the licence fees constitute statutory levies which are under public control and which constitute State resources ([53]).

(65) On the basis of the above and in line with the established case law on parafiscal charges ([54]), the Commission takes the position that the present measure is granted out of State resources. This finding is in line with the case-law of the ECJ invoked by the German authorities. The cases referred to by the German authorities concerned different types of measures which did not involve an advantage granted out of the budget of public bodies.

(66) Furthermore, the German authorities also argued that the present measure is not imputable to the State. By reference to the cases *Stardust Marine* ([55]) and *Pearle and others* ([56]), they maintain that in itself, the fact that LfM is a public authority under a certain State control does not mean that the measure is imputable to the State. They claim that in accordance with the independence of LfM under German law (*Staatsferne der LfM*) the State had no influence over the present measure.

([46]) C-379/98, PreussenElektra, [2001] I-2099.
([47]) Joined Cases C-72/91 and C-73/91, Firma Sloman Neptun Schiffahrt AG/Bodo Ziesner, [1993] I-887.
([48]) C-345/02, Pearle and others, [2004] I-7139.
([49]) Media Law of North Rhine-Westphalia, Section 117.
([50]) Media Law of North Rhine-Westphalia, Sections 113 and 114.
([51]) State Broadcasting Treaty, Section 40(1)(2).
([52]) Media Law of North Rhine-Westphalia, Section 27(1).
([53]) Commission Decision in the Case E 3/205 'Aid to the German public service broadcasters' (OJ C 185, 8.8.2007, p. 1).
([54]) See for instance Case 173/73 Italy v Commission [1974] ECR 709, where the Court ruled that where the funds used for a measure are financed through compulsory contributions (e.g. parafiscal charges) and then distributed according to State legislation they must be regarded as State resources even if they are collected and administered by institutions distinct from the public authorities.
([55]) Cf. Footnote 45.
([56]) Cf. Footnote 46.

(67) The Commission considers that the independence of LfM under German law does not prevent the present measure from being considered imputable to the State from the point of view of the application of the State aid rules. The information provided by the German authorities indicates that the measure is granted by LfM in the framework of its public tasks as defined in the State Broadcasting Treaty and the Media Law of North Rhine-Westphalia. Although these provisions guarantee LfM a certain degree of autonomy for the purpose of safeguarding the independence of broadcasting, they provide limited discretion concerning the use of its budgetary resources.

(68) Notwithstanding the autonomy of LfM, it is — as stated out above — a public body whose activities are clearly guided by public policy considerations. The envisaged granting of non-repayable grants to commercial broadcasters in the measure at hand with no direct economic benefit to LfM cannot be considered as being driven by commercial considerations. These circumstances establish in the Commission's view the imputability of the funding granted by LfM to the State. The ECJ cases referred to by the German authorities concern different situations (levies collected for a purely commercial purpose in *Pearle and others,* and public undertakings carrying out commercial activities in *Stardust Marine*) and do not support the position of the German authorities.

(69) Based on the above considerations, the Commission considers that the present measure is granted out of State resources and is imputable to the State.

1.2. ECONOMIC ADVANTAGE TO UNDERTAKINGS

(70) In order to qualify as State aid under Article 87(1) of the EC Treaty, a measure has to confer an economic advantage to one or more undertakings. In the opening decision, the Commission took the preliminary view that the present measure appears to favour the commercial broadcasters which receive the funding as direct beneficiaries and may also benefit indirectly the operator of the DVB-T network concerning commercial broadcasters, T-Systems. In their submissions, the German authorities have argued that the measure does not confer an advantage neither directly to the commercial broadcasters, nor indirectly to the network operator.

Advantage to the commercial broadcasters

(71) The German authorities maintain that the financing does not constitute an economic advantage to the commercial broadcasters which receive funding under the measure. In the first place, they claim that the funding does not constitute an advantage because it merely compensates the broadcasters for the economic risks involved in their participation in DVB-T. Second, they argue that the measure only covers the 'additional costs' of digital terrestrial broadcasting as compared to the analogue mode.

(72) At the same time, the information submitted by the German authorities indicates that the measure subsidises the transmission fees paid by the commercial broadcasters to the network operator. These costs are inherent in the commercial operation of the broadcasters. By covering part of the fees, the measure relieves the broadcasters from expenses which are part of their normal operating costs. Therefore, independently from whether it is intended to compensate for 'economic risks' or alleged 'additional costs', the Commission considers that the envisaged public funding constitutes an economic advantage to the recipients.

(73) Moreover, the Commission notes that contrary to the argument put forward by the German authorities, the measure cannot be considered to cover genuine 'additional costs' of broadcasters in relation to DVB-T. On the one hand, this argument has not been substantiated concerning those broadcasters which have not been previously present on the analogue terrestrial platform and therefore did not incur costs in the analogue terrestrial transmission in NorthRhine-Westphalia. In their case, no cost comparison has been made and the German authorities have not provided any justification for the share of transmission fees covered by the measure.

(74) On the other hand, in the case of those commercial broadcasters previously present on the analogue terrestrial platform, the calculation method used by the German authorities cannot be considered as reflecting genuine additional costs relating to the switchover to digital terrestrial transmission. On a comparable basis per programme channel, the transmission fees are actually lower for DVB-T than in the analogue mode. The alleged 'additional costs' arise merely from the increase in the number of channels transmitted by these broadcasters (see Table 4 for an overview of the level of transmission fees in North Rhine-Westphalia and the envisaged subsidies).

Table 4

Overview of transmission costs per programme channel and planned public support in North Rhine-Westphalia — all figures in EUR

Broadcasters/ programme channels	Transmission costs per year		Overall difference digital/analogue transmission costs per year ([57])	Average planned public support per year ([58])	Average aid intensity
	analogue ([59])	digital ([60])			
RTL	1 351 640	675 000	– 676 640		
VOX	783 663	675 000	– 108 663		
RTL2	na	675 000	*675 000*		
SUPER RTL	na	675 000	*675 000*		
Total RTL	2 135 303	2 700 000	564 697	0	0
SAT 1	722 789	675 000	– 47 789		
Pro 7	na	675 000	*675 000*		
N 24	na	675 000	*675 000*		
Kabel 1	na	675 000	*675 000*		
Total P7Sat1	722 789	2 700 000	1 977 211	550 000	28 %
TerraNova	na	675 000	na	202 500	30 %
Eurosport	na	675 000	na	202 500	30 %
CNN	na	675 000	na	202 500	30 %
VIVA	na	675 000	na	202 500	30 %

(75) Third, the German authorities also put forward that the subsidy is a compensation for those broadcasters which renounced their analogue licences before the expiry date in order to allow for the launch of DVB-T. The Commission notes, in the first place that this argument cannot be applied to those broadcasters which have previously not been present on the analogue platform and were not in the possession of analogue licences.

([57]) As outlined in recital 74 the table shows that the comparison made by the German authorities between the costs of analogue and digital transmission is not objective as it does not take into account the increase in the number of programme channels which are driving the costs. For instance, ProSiebenSat.1 was present only with one programme, Sat1, on the analogue platform whereas it broadcasts four programmes on the digital platform. The table also shows clearly that the transmission costs for the programme Sat1 are lower in digital than in analogue mode. The differences in the transmission costs for the programmes of the RTL group and ProSiebenSat.1 group, shown in this column in italics, are included to show all elements of the total calculation for both broadcasting groups, which were — contrary to the other commercial broadcasters — present on the analogue platform.

([58]) For the annual amounts, see Tables 2 and 3. These figures are based on the estimated costs, the NRW authorities would recalculate these amounts based on the actual costs.

([59]) For those programmes in this column where 'not applicable (na)' is indicated, there was no analogue transmission.

([60]) These are the estimated transmission costs and not the actual costs.

(76) As regards the broadcasters which were present on the analogue platform, the submissions of the German authorities also state that the possession and the outstanding duration of the licences do not have a direct influence on the amount of the subsidy, given that in their view, the economic disadvantage due to the return of the analogue transmission capacities cannot be exactly determined. According to the authorities, the return of the analogue licences was instead taken into account in the context of the attribution of digital multiplexes to the broadcasters concerned ([61]). As a consequence, both the RTL group and ProSiebenSat.1 received a licence for four programme channels instead of two ATT programmes in the case of the RTL group and one ATT programme for ProSiebenSat.1. The fact that the subsidy is not related to the return of the licences is also indicated by the circumstance that only ProSiebenSat.1 is entitled to receive funding according to the calculation method submitted by the German authorities. Therefore, the Commission considers that the measure cannot be regarded as a compensation for the economic value of the outstanding duration of the analogue licences which were returned by RTL Television, VOX/DTCP and Sat1.

(77) Finally, by reference to the observations made by ProSiebenSat.1 in the Berlin-Brandenburg case ([62]), the German authorities also submit in their observations after the opening of the formal investigation procedure that in any case, following the logic of the opening decision by the Commission, the commercial broadcasters would transfer all the economic advantage conferred by the public funding to the network operator T-Systems in the form of transmission fees.

(78) The Commission notes that this argument contradicts those made by Germany concerning the presence of an economic advantage to the network operator, and has not been substantiated by the German authorities. As explained under recitals 80 to 88 below, the Commission considers that the network operator T-Systems would be able to draw an indirect benefit from the measure. However, there is no indication that this would imply a complete transfer of the economic advantage of the broadcasters arising from the direct financing of their normal operational expenses. Therefore, in the Commission's view, this argument cannot be accepted either.

(79) In addition, the Commission notes that the procedure for the allocation of the broadcasting licences described in recitals 24 to 28 cannot be considered as having eliminated or even reduced the economic advantage granted to commercial broadcasters. The tender announcement did not contain any reference to the funding. In the general agreement of 20 October 2003 between LfM, the PSBs and the commercial broadcasters present in the analogue platform, only a vague reference was made to possible support measures, without giving any details as to the envisaged financial assistance. Therefore, there was no possibility for the broadcasters to take the amount of financing into account when submitting their licence applications.

([61]) Letter of the German authorities dated 25 April 2005.

([62]) These comments referred to by the German authorities are essentially the same as provided by ProSiebenSat1. in the similar case concerning Bavaria, cf. Footnote 4.

Advantage to the network operator

(80) The German authorities maintain that the funding provided to the commercial broadcasters does not constitute an indirect advantage for the network operator T-Systems. In their opinion, the category of indirect beneficiary can only be used in exceptional circumstances. By reference to the ECJ cases Germany v Commission ([63]) and the Netherlands v Commission ([64]), they take the view that in order to qualify as indirect beneficiary under the State aid rules, the undertaking concerned has to benefit from an advantage which automatically follows from the measure. Moreover, they claim that the concept of indirect beneficiary can only be used if — unlike in the present case — the advantage can be demonstrated and quantified.

(81) In the circumstances of the present case, the German authorities argue that the measure does not necessarily enable the network operator T-Systems to charge higher transmission fees to the broadcasters than the market price. They maintain that the level of the transmission fees depends on a number of other factors and that in any case, the regulator (*BNetzA*, previously *RegTP*) controls any eventual misuse in relation to the transmission fees. In addition, linked to their previous argument concerning the advantage to broadcasters, the authorities argue that as broadcasters only receive compensation for 'additional costs' due to the switchover, they have no interest in paying higher transmission fees than the market price.

(82) The German authorities also contest that the measure would lead to guaranteed revenue for T-Systems. In their view, the 'guaranteed revenues' follow from the use of the network infrastructure which results from the attribution of broadcasting licences and not from the funding. Moreover, they also maintain that even if there was more interest for the use of the network due to the measure, the resulting additional revenues would be offset by the additional costs of the network services incurred by T-Systems.

([63]) C-156/98, Germany v Commission [2000] I-6857.

([64]) C-382/99, Netherlands v Commission [2002] I-5163.

(83) Contrary to the arguments put forward by the German authorities, the Commission considers that T-Systems would be able to draw an indirect advantage from the measure, taking into account that the measure subsidises directly the transmission fees paid by the commercial broadcasters to T-Systems, it is conditional upon the use of the DVB-T platform and specifically targeted to promote the platform operated by T-Systems.

(84) In the Commission's view, the restrictive interpretation of the category of indirect beneficiary proposed by the German authorities cannot be accepted. In both judgements referred to by the German authorities, the Court has upheld the qualification of the undertakings concerned as indirect beneficiaries. In Germany v Commission, the Court considered that the fact that the indirect advantage resulted from independent decisions by the direct beneficiaries did not eliminate the connection between the measure and the indirect advantage, which followed from the alteration of the market conditions by the measure ([65]). Given that in the present case, the aid has not been granted, it is indeed not possible to quantify the indirect advantage possibly accruing to T-Systems. However, in any case, the Commission is not bound to quantify the exact amount of the advantage in order to establish the presence of an economic advantage to an undertaking under the State aid rules.

(85) In the present case, the Commission considers that the funding of the transmission fees payable by the commercial broadcasters changes the conditions under which they operate, and enables them to bear eventually higher transmission fees. As outlined in recitals 73 and 74, the funding cannot be considered as covering real additional costs of commercial broadcasters in relation to the introduction of DVB-T. Although the level of the transmission fee indeed depends on a number of factors, the ability of commercial broadcasters to bear higher costs certainly constitutes one of the key commercial considerations from the point of view of the network operator for defining the level of the transmission fees. In line with the German Telecommunications Law (*Telekommunikationsgesetz*), *BNetzA* only exercises control over transmission fees charged by operators with significant market power. As indicated in recital 36, T-Systems has so far not been considered by *BNetzA* to have a significant market power with regard to terrestrial television transmission. Therefore, it remains free to fix the amount of transmission fees for commercial broadcasters on the DVB-T platform.

(86) With respect to the argument that the 'guaranteed revenues' for T-Systems arise from the attribution of the licences and not from the measure, the Commission acknowledges that the interest of the commercial broadcasters to be present on the platform and their willingness to bear the corresponding costs is already demonstrated by the high number of applications for the licences. However, the Commission considers that funding of part of their operational costs for a period of five years increases their willingness to pay even higher costs to be continuously present on the platform. Thereby, the measure may provide for additional revenues for T-Systems deriving form the transmission fees from commercial broadcasters. These revenues cannot be considered as fully offset by the network service provided in return without leaving any profit margin to the network operator which operates under market conditions.

(87) Based on the above, the Commission considers that T-Systems would be able to draw an indirect benefit from the support measure. The State funding of part of the transmission fees would enable T-Systems to obtain higher revenues as compared to a situation where no aid is present.

(88) In addition, the Commission notes that the procedure for the allocation of the network licences organised by RegTP cannot be considered as eliminating or even reducing the indirect advantage possibly arising from the measure for the network operator T-Systems. The relevant procedure did not make any reference to the funding measure envisaged by LfM. Therefore, T-Systems could not take into account the availability of such funding to commercial broadcasters when submitting its application for the network licence. In addition, T-Systems, the incumbent operator and owner of the analogue terrestrial network throughout Germany appears to have had a competitive advantage over potential new entrants for the allocation of the network licence. In a procedure launched in 2002, it has been already allocated a licence for operating a nation-wide DVB-T multiplex. Moreover, there were only about two months between the deadline for the frequency allocation procedure (17 March 2004) and the launch of the DVB-T operations (24 May 2004), which left little time for potential new entrants to roll-out the network to start DVB-T transmissions on time.

Applicability of the Altmark judgment

(89) In their submissions, the German authorities have also invoked the *Altmark* judgment ([66]) to argue that the envisaged payments do not constitute State aid but merely represent a compensation for a service of general economic interest. In this judgment, the Court stated that public service compensation does not constitute an advantage in the meaning of Article 87(1) of the EC Treaty if all of the following four conditions are met: (1) the recipient undertaking must actually have public service obligations to discharge and these obligations must be clearly defined, (2) the parameters of the compensation must be established in advance in an

([65]) C-156/98, Germany v Commission [2000] I-6857, paragraph 61.

([66]) C-280/00, Altmark Trans and Regierungspräsidium Magdeburg [2003] I-7747.

objective and transparent manner, (3) the compensation does not exceed the costs incurred in discharging the public service obligations, (4) in order to ensure the least costs to the community, the company which is to discharge public service obligations is chosen either pursuant to a public procurement, or if not, the level of compensation is determined based on the costs of a typical, well run undertaking.

(90) In accordance with the first *Altmark* criterion, it has to be assessed whether the beneficiary undertakings have clearly defined public service obligations to discharge.

(91) The German authorities maintain that the transmission of broadcasting programmes by the private broadcasters over the digital terrestrial platform constitutes a service of general economic interest, which is, according to the German authorities, in line with the Switchover communication. In their view, the general interest of DVB-T follows from the contribution of digital terrestrial television to the transmission of regional and local programmes, as well as to the promotion of innovation, media plurality and infrastructure competition between the different transmission platforms. In their view, this public service obligation is stemming from the Media Law of North Rhine-Westphalia which explicitly assigns LfM the general task of supporting and guiding the switchover from analogue to digital terrestrial television ([67]).

(92) The German authorities claim that by means of the attribution of the digital terrestrial broadcasting licences, the commercial broadcasters are entrusted with a service of general economic interest and are under the obligation to carry out this service. They argue that in view of the 'dual broadcasting system' including both public service broadcasters and private broadcasters in Germany, commercial operators also have a public interest role and are bound by legal obligations with respect to their programmes. Without public financial support, the authorities claim further, some commercial broadcasters (in particular ProSiebenSat.1) would not have participated in DVB-T in North Rhine-Westphalia. They argue that a lack of public funding would obstruct the provision of this service and would have put the existence of the terrestrial platform at risk ([68]).

(93) The Commission does not share the arguments submitted by the German authorities. The Commission does not call into question that the digitisation of broadcasting transmission is in the public interest. The presence of public interest objectives in relation to the switchover is however not sufficient to demonstrate the existence of public service obligations imposed on commercial broadcasters in relation to the transmission of their programmes over the digital terrestrial platform in North Rhine-Westphalia. Furthermore, the mere fact that commercial broadcasters are part of the dual broadcasting system in Germany or that their programmes are subject to legal obligations resulting from the broadcasting legislation in Germany does not lead to the conclusion that they have to discharge public service obligations as regards the transmission of their programmes over the digital terrestrial platform ([69]).

(94) In the Commission's view, the general provisions concerning the public tasks of LfM in relation to the switchover do not contain clearly defined public service obligations for commercial broadcasters. The Commission further notes that none of the official documents relating to the introduction of DVB-T in North Rhine-Westphalia (agreements concerning the switchover, official documents relating to the DVB-T licences) contain any such public service obligations. Also, the terms of the broadcasting licences do not contain any specific public service obligation ([70]). Moreover, contrary to what has been argued by the German authorities, the broadcasters do not have the obligation to transmit their programmes over DVB-T: as the example of TerraNova demonstrates, licences can be returned upon the decision of the broadcaster.

(95) Hence, as already stated in the opening decision ([71]), the German authorities seem to have made the argument that a service of general economic interest was present on an ad hoc basis, after the award of the licences and the launch of the transmission over the digital terrestrial network. In the Commission's view, rather than being public service obligations, the transmission of their programmes over the digital terrestrial network constitutes part of the normal commercial activities of the commercial broadcasters.

(96) Based on the above, the Commission considers that the present measure envisages support to normal business activities of commercial undertakings rather than a compensation for costs incurred in discharge of public service obligations. It follows that the first *Altmark* criterion is not fulfilled.

([67]) Section 27(1) of the Media Law of North Rhine-Westphalia.
([68]) This argument is assessed further in recitals 163-171.
([69]) As the Commission has already held in the past, general legal requirements do not qualify as public service obligations, see recital 87 of the Commission Decision in the Case C 2/03 'State funding of TV2/Denmark' (OJ L 85, 24.3.2006, p. 1), and recital 14 of Commission Decision 97/606/EC of 26 June 1997 on the exclusive right to broadcast television advertising in Flanders (OJ L 244, 6.9.1997, p. 18).
([70]) If the arguments put forward by the German authorities were accepted, any licence granted for broadcasting or for the operation of electronic communications services could qualify as the formal entrustment of a service of general economic interest.
([71]) See recital 75 of the opening decision.

(97) As regards the second *Altmark* criterion, the Commission finds that the parameters of the alleged 'compensation' have not been established in advance in an objective and transparent manner. The directive on the financial support was issued on 19 November 2004 (with a retroactive effect as of 3 May 2004), whereas the licences were allocated by order of 14 May 2004. Therefore, it cannot be considered as an advance definition of the parameters of the funding. Moreover, the Directive does not make clear how the funding would be calculated in the case of those broadcasters previously present on the analogue platform, which is only known to the Commission from the notification. Consequently, the parameters have not been established in a transparent manner. Furthermore, in the Commission's view, the calculation cannot be regarded as objective, given that the determination of the financial support for individual commercial broadcasters does not take into account the increase in the number of programme channels of those broadcasters previously present on the analogue platform and the potential additional advertising revenues from the presence on the terrestrial platform (see also recital 123). Therefore, the Commission considers that the second *Altmark* criterion is not met.

(98) As regards the third *Altmark* criterion which foresees that the compensation shall not exceed the costs incurred in discharging the public service obligations, the German authorities take the view that this criterion is only applicable in those cases where the costs, revenues and a reasonable profit can be calculated. They claim that in situations like the present case, when a start-up financing is granted to reduce the economic risks of the market participants, other criteria should apply to decide whether the measure constitutes State aid. In this context, they claim that the present measure is limited to the minimum necessary and forms part of a technology neutral policy.

(99) In the view of the Commission, the requirements of the *Altmark* judgment cannot be replaced by other considerations as outlined by the German authorities. As pointed out in recital 97 above, the envisaged public funding is not determined on objectively established criteria, taking into account the relevant revenues of the broadcasters and the funding does not correspond to genuine additional costs incurred by the commercial broadcasters (see recital 73 and 74 above).

(100) Finally, as regards the fourth *Altmark* criterion, the Commission notes that in view of the lack of clearly defined public service obligations, it cannot be established whether the level of compensation for the public service obligation corresponds to the costs of a typical, well run undertaking. The Commission notes that the German authorities have also not put forward any arguments in this respect. In fact, the subsidy covers part of the transmission fees fixed by the operator of the network for commercial broadcasters, T-Systems. Given that the network licences have been attributed without tender in the application procedure, the level of these transmission fees cannot be considered as having been subject to a competitive tender procedure.

(101) Based on the above, the Commission considers that none of the four criteria of the *Altmark* judgment is met in the present case.

1.3. SELECTIVITY AND DISTORTION OF COMPETITION

(102) In accordance with Article 87(1) of the EC Treaty, in order to qualify as State aid, the measure must be selective and distort or threaten to distort competition. In the opening decision, the Commission took the preliminary view that the measure constitutes sectoral aid as it favours the DVB-T platform over other transmission platforms. Moreover, the Commission was of the opinion that the different level of public funding may result in a distortion of competition among broadcasters participating in DVB-T in North Rhine-Westphalia. It took the view that the procedures for the allocation of the respective broadcasting and network licences did not exclude the selectivity and the distortion of competition arising from the measure.

Award of broadcasting and network licences

(103) The German authorities maintain that the measure does not distort competition because the respective broadcasting and network licences were attributed following open and transparent procedures in accordance with the relevant legal requirements at national level. According to this argument, the tendering has ensured that any broadcaster or network operator could, in principle, have benefited from the funding so that the measure cannot be regarded as selective.

(104) Regarding the attribution of the broadcasting licences, the German authorities argue that the priority treatment of broadcasters previously present on the analogue platform was a compensation for the return of their analogue licences and as such necessary to realise the switchover.

(105) Indeed, LfM organised an open procedure for the attribution of the broadcasting licences for all DVB-T channels reserved for commercial broadcasters, as described in recitals 24 to 28. The selection criteria referred to the plurality of programmes and the plurality of broadcasters, and foresaw a priority treatment of those broadcasters previously present on the analogue platform. In line with this priority treatment, ProSiebenSat.1 and RTL group have received entire multiplexes for a set of programmes. Out of the 21 applications received in response to the announcement, six applications have been retained.

(106) The Commission does not intend to call into question the compliance of the attribution procedure with the relevant national requirements. However, it considers that it does not eliminate the selectivity of the present measure from the point of view of the State aid assessment. First, only a limited number of broadcasters could be selected as a result of the procedure. In the selection procedure, priority was given to those broadcasters already present on the analogue platform ([72]). As a matter of fact, only those broadcasters having received a DVB-T licence can benefit from funding under the measure. Second, the attribution of the licences concerned specifically the transmission of broadcasting programmes on the DVB-T platform.

(107) Concerning the attribution of the network licences, the relevant procedure was organised by *RegTP*, as described in recitals 29 and 30. Since only one application was received for each of the five service areas defined in North Rhine-Westphalia (T-Systems for the areas concerning private broadcasters and WDR for the areas concerning the members of the ARD Group), the licences were attributed in the application procedure, without launching the tender procedure.

(108) Similarly to the allocation of the broadcasting licences, the Commission considers that from a State aid point of view, the procedure for the attribution of the network licences cannot be considered as excluding the selectivity of the measure. The procedure concerned specifically the operation of the DVB-T network in North Rhine-Westphalia. Moreover, T-Systems, as the incumbent operator, was in a particularly advantageous position to apply for the network licences.

Sectoral aid

(109) In the opening decision, the Commission took the preliminary view that the measure constitutes a sectoral aid to broadcasting via DVB-T insofar as the subsidy is only granted to broadcasters using the digital terrestrial platform and does not, for example, support the transmission over other transmission platforms.

(110) The German authorities maintain that the measure does not distort competition between cable, satellite and terrestrial transmission. They claim that these means of transmission are only to a limited extent in competition. In their view, terrestrial transmission is rather complementary to cable and satellite, as it also covers areas not served by cable, enables the transmission of regional and local programmes and can serve as a basis to develop mobile reception.

(111) They submit that given the high market share of cable and satellite and the low proportion of terrestrial television, the promotion of DVB-T could not affect the market position of the other platforms. According to the authorities, on the one hand, in view of its low share, terrestrial television is not able to attract broadcasters from the other platforms. On the other hand, the measure would also not affect the choice of consumers, in particular as there are technical, legal and financial obstacles to switch from one means of transmission to another. At the same time, they also argue that instead of replacing cable or satellite, the promotion of DVB-T will exercise a 'positive competitive pressure' on the other means of transmission, foster infrastructure competition and thereby facilitate the digitisation of other platforms too.

(112) The German authorities also contest the data provided by the cable operators concerning the effect of the introduction of DVB-T on the number of cable customers. The data at the disposal of LfM differ from those provided by *ish* and shows a lower decrease (81 000 households as opposed to 147 000 between 2003 and 2006). The German authorities maintain that even if there was a decrease in the number of cable customers, this would not necessarily be due to the introduction of DVB-T. In this respect, they also emphasise that the measure does not aim to harm cable. They highlight that the cable infrastructure was established with State support in the 1980s and still benefits from regulatory advantages including cable fees in the rent (*Mietnebenkostenverordnung*). They maintain that the overall funding concept is technology neutral: if necessary, they would also be ready to support the digitisation of cable. As an example of their alleged positive approach towards cable, they mention that on 17 February 2007, LfM agreed to the digitisation of the analogue cable channel of *ish* ([73]).

(113) The Commission considers that the considerations in recitals 110 to 112 do not call into question the qualification of the measure as sectoral aid which selectively supports broadcasters on the DVB-T platform and may also entail an indirect benefit selectively for the operator of the network T-Systems. The envisaged measure is specifically related to one sector of activity, the transmission of broadcasting signals and it selectively supports digital terrestrial transmission in particular. It is selective both as regards the demand side, the commercial broadcasters operating on the DVB-T platforms, as well as the supply side, i.e. the operator of the digital terrestrial network, T-Systems.

(114) The Commission is of the opinion that the different means of transmission of broadcasting signals, i.e. cable, satellite, terrestrial transmission and increasingly also IPTV are in direct competition. Even if the different transmission platforms have their strengths and weaknesses, they serve essentially the same

([72]) From the point of view of the selectivity of the measure, it is not relevant whether the priority treatment was justified.

([73]) The Commission has not received any information which would indicate that public funding was granted in this case.

function, i.e. the transmission of broadcasting programmes, and there is substitutability between them both at wholesale level from the point of view of the commercial broadcasters and from the point of view of the viewers at retail level. In Germany, cable, satellite and terrestrial platforms all offer a large number of free-to-air channels which points to a certain similarity of offer. More specifically, the current offer of a total of 24 digital terrestrial television channels appears comparable to the offer in analogue cable, which is the most common transmission platform in North Rhine-Westphalia, although digital cable is developing quickly.

(115) The relatively low share of terrestrial television as compared to cable and satellite in Germany in general and in particular in North Rhine-Westphalia does not eliminate the competitive relationship between the different transmission platforms. The information submitted by the cable operators indicates that the number of cable customers was affected by the launch of DVB-T in North Rhine-Westphalia. In addition, the cable operators note in their submission that there was a slight increase of cable customers following the switch-off of the analogue terrestrial network which also appears to show substitutability from the point of view of the end-users. When the German authorities claim that the measure will exercise a 'positive competitive pressure' on the other platforms and foster infrastructure competition, they themselves implicitly recognise the competitive relation between the different means of transmission. The fact that the cable infrastructure has also benefited from State support in the past, as well as the presence of certain regulatory advantages does not reduce the selectivity and the distortion of competition arising from the present measure.

(116) The distortion of competition inherent in the present measure may also affect other markets beyond television transmission. From the point of view of the broadcasters, the present sectoral aid measure helps to reach a wider audience and helps to attract advertisers. By attracting advertisers from other media, the promotion of DVB-T has also the potential to affect a number of companies in other media sectors.

(117) Moreover, with respect to the network operator, the promotion of the DVB-T network may also affect new markets. DVB-T has the potential for supplying pay TV services as shown by the developments in other Member States such as Italy, France, Sweden and the United Kingdom.

Distortion of competition among the broadcasters on the DVB-T platform

(118) In the opening decision, the Commission considered that the measure may distort competition among the different commercial broadcasters present on the DVB-T platform in that the share of the transmission costs covered is not the same for all CSBs.

(119) The German authorities maintain that the measure does not distort competition between the commercial broadcasters because the principles for defining the amount of the subsidy are the same. They claim that the differences in the funding are due to the different position of the broadcasters and the different burdens they have to bear as a consequence of the switchover to digital television.

(120) As described in recitals 34 to 40, the calculation of the subsidy is different for those broadcasters previously present on the analogue platform (the RTL group and ProSiebenSat.1 which have respectively four digital programme channels) and those broadcasters which only started transmitting over the terrestrial platform using DVB-T, which have one programme channel each.

(121) Concerning the broadcasters previously not present on the analogue platform, the financial assistance amounts to on average 30 % of the transmission fees per channel for five years, decreasing by 5 % each year from 40 % in the first year to 20 % in the fifth year. This applies in the same manner to all the four commercial broadcasters concerned.

(122) In the case of the RTL group and of ProSiebenSat.1, the subsidy is calculated based on the difference of their overall costs in analogue and digital terrestrial transmission in North Rhine-Westphalia as well as in the *Länder* of Northern Germany (see Table 3 and recitals 35, 39 and 40). According to the German authorities, the RTL group is not considered eligible because the decrease of its overall transmission costs in digital mode in the other *Länder* of Northern Germany covers the overall cost increase in North Rhine-Westphalia. Moreover, the German authorities maintain that RTL also did not ask for funding.

(123) The Commission considers that the method for the calculation of the subsidy cannot be considered objectively justified given that it is not based on a thorough account of the broadcasters' costs and the revenues in relation to the transmission over the digital terrestrial platform. Moreover, as already outlined in recital 74 above, for those broadcasters previously present in the analogue platform, the calculation method used cannot be considered as an objective way of calculating potential additional costs of digital transmission, given that it does not take into account the increase in the number of programme channels which are driving these costs. Furthermore, the calculation depicted in Table 3 is also

arbitrary as the RTL group and ProSiebenSat.1 had a different number of analogue programme channels in North-Rhine Westphalia and in Northern Germany, with different costs due to different geographic coverage. In fact, as also shown by the figures provided by the German authorities, in the present case, transmission costs per channel are lower in digital mode than on the analogue platform (see Table 4). As the German authorities have indicated, ProSiebenSat.1 and RTL have had the possibility to receive entire multiplexes in the procedure for the allocation of the broadcasting licences in view of the priority treatment granted to broadcasters present in the analogue platform, and as a compensation for the return of their respective analogue licences before the expiry date. In addition, the funding provides them with the possibility to broadcast more channels in North Rhine-Westphalia for more or less the same amount of overall costs as in analogue mode. The German authorities have not provided any explanation why the share of costs covered is different in the case of ProSiebenSat.1 and those broadcasters previously not present on the analogue platform.

(124) Based on the above, the Commission is of the opinion that the advantage arising from the allocation of the broadcasting licences for those broadcasters previously present on the analogue platform and the calculation of the subsidy which is not objectively justified introduces a distortion between those broadcasters previously present on the analogue platform and those which started transmission over the terrestrial platform only with the launch of the DVB-T platform.

1.4. EFFECT ON TRADE

(125) According to Article 87(1) of the EC Treaty, an intervention must be liable to affect trade between Member States in order to qualify as State aid. In the opening decision, the Commission considered that the measure may affect intra-Community trade as the commercial broadcasters are internationally active and the network operator is competition with international cable operators and media corporations, as well as satellite operators.

(126) The German authorities have maintained that the measure is not liable to affect trade between Member States. They claim that the amount of the aid is so low that the effect on trade would be hardly appreciable. Moreover, they argue that in itself, the fact that the undertakings concerned are internationally active does not allow concluding that there is necessarily an effect on trade between Member States. In their view, it follows that there is no effect on trade as far as the situation of commercial broadcasters is concerned.

(127) In line with the case law of the European Courts, 'when (…) State financial aid or aid from State resources strengthens the position of an undertaking as compared with undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ([74]). Moreover, it was also held that even aid of a relatively small amount is liable to affect trade between Member States ([75]), in particular where there is a strong competition in the sector in which the recipient operates ([76]).

(128) Therefore, the Commission considers that the envisaged measure is liable to affect trade between Member States. As explained above, the measure favours directly the commercial broadcasters and may also entail an indirect advantage for the network operator T-Systems. Both the commercial broadcasters and the network operator are in international competition with other undertakings. All commercial broadcasters concerned by the present measure compete with other broadcasters and telecommunication companies in the markets for television advertising and film rights ([77]). Network operators like Deutsche Telekom's subsidiary T-Systems compete with cable operators and media corporations like UPC (Liberty Media), satellite operators like SES Astra, NSAB and Eutelsat, as well as other undertakings offering infrastructure services to broadcasters. At the same time, there is competition between terrestrial, cable and satellite operators for end-users in different Member States.

(129) The Commission is of the opinion that the overall amount of the aid in the present case, estimated at EUR 6,8 million cannot be considered as 'relatively small'. In any case, as indicated by the Community Courts, a small amount of aid is also liable to affect trade, in particular if there is strong competition.

1.5. CONCLUSION CONCERNING THE STATE AID CHARACTER OF THE MEASURE

(130) For the reasons set out above, the Commission considers that the subsidies envisaged by LfM fulfil all the conditions for constituting State aid within the meaning of Article 87(1) of the EC Treaty. The direct beneficiaries are the commercial broadcasters which receive the financial assistance. At the same time, T-Systems, the operator of the multiplexes used by the commercial broadcasters, would also be able to draw an indirect benefit from the measure.

([74]) T-55/99 Confederación Española de transporte de mercancías (CETM) v Commission of the European Communities [2000] II-3207.

([75]) C-172/03 Heiser v Finanzamt Innsbruck (OJ C 106, 30.4.2005, p. 5).

([76]) T-214/95 Vlaams Gewest v Commission [1998] II-717.

([77]) For instance, in June 2007, ProSiebenSat.1 took over the SBS Broadcasting group. The combined group will operate in more than 10 European countries.

2. *COMPATIBILITY OF THE AID MEASURE*

2.1. GENERAL CONSIDERATIONS

(131) The Commission actively supports the transition from analogue to digital broadcasting. The advantages of the digital switchover were underlined in the Action Plan eEurope 2005 and in the two Communications relating to the digital switchover ([78]). The digital switchover has great advantages in terms of more efficient spectrum usage and increased transmission possibilities. These will lead to new and better quality services and to wider consumer choice. As the Commission has also pointed out in its Communication i2010 — A European Information Society for growth and employment, the planned switch-off of analogue terrestrial television by 2012 will improve access to spectrum in Europe.

(132) The Commission also recognises that the digital switchover may be delayed if left entirely to market forces. Hence, it has no objection to the principle of public intervention in this field. Public authorities have different means of facilitating and encouraging the digital switchover, for example by coordination mechanisms, information campaigns, regulatory means and financial assistance. If public intervention takes the form of State aid, it must however comply with the relevant provisions of the EC Treaty.

(133) In line with the general approach of the Commission towards less and better targeted State aid, as a matter of principle, Member States may use aid to overcome a specific market failure or to ensure social or regional cohesion. However, it must be shown in each specific case that the aid is necessary to address the issue, it is an appropriate instrument, limited to the minimum necessary and does not unduly distort competition. Similarly, the Switchover communication provides that in the specific area of digitisation, public intervention would be justified under two premises: first, the presence of general interests which are at stake; secondly, the existence of a market failure, that is, market forces alone fail to deliver in terms of collective welfare. It also specifies that in any case, public intervention should be supported by a sound market analysis.

(134) The Switchover communication also indicates that the transition to digital broadcasting represents a big industrial challenge that must be led by the market. In principle, each network should compete on its own strengths. In order to safeguard this principle, any public intervention shall aim at being technology neutral. Exceptions from this principle can only be envisaged if, as explained above, the intervention targets a specific market failure or equity issue and is at the same time necessary, appropriate and proportionate to overcome these difficulties.

([78]) Cf. Footnote 9.

(135) It is generally recognised that the switchover may be hindered by certain market failures. Moreover, there is a risk that not all parts of the population can benefit from the advantages of digital television in view of their disadvantaged social situation (social cohesion problem). As the Commission also pointed out in the Berlin-Brandenburg case, a market failure might exist, for example, where market players are unwilling to agree on a common timetable to switch to digital TV waiting for others to make the first step (coordination problem) or where market players do not take into account the positive effects of switchover on society as a whole because they do not have the right incentives to do so (positive externalities).

(136) With respect to social cohesion, Member States will want to make sure that all citizens have access to digital television once analogue TV is switched off. Since the digital switchover entails costs for consumers and requires a change in habits, Member States may want to assist in particular the disadvantaged groups of society such as elderly people, low income households or people living in peripheral regions.

(137) Over the past three years, the Commission has assessed a number of State measures in different Member States aimed at promoting the switchover ([79]). In several State aid decisions, based on the Communications related to the digital switchover, the Commission has clarified the application of the State aid rules in this sector and provided guidance to both public and economic actors. Member States have several possibilities to grant public funding for the switchover, provided that the measures do not entail an unnecessary distortion between technologies or companies and are limited to the minimum necessary ([80]):

(a) pilot projects and research activities to test, for example, digital transmission technologies and interactive applications;

([79]) See, inter alia, N 622/03 Digitalisierungsfonds — Austria, 16 March 2005 (OJ C 228, 17.9.2005, p. 12) C 25/04 Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Berlin-Brandenburg — Germany, 9 November 2005 (OJ L 200, 22.7.2006, p. 14) NN 64/05 Digital Replacement Licences — United Kingdom, 25 January 2006 (OJ C 218, 9.9.2006, p. 10) N 111/06 Aide TNT pour les régions sans simulcast — France, 12 October 2006 (OJ C 293, 2.12.2006, p. 6) N 546/06 Fonds d'aide à des particuliers dans la perspective de la fin de la radiodiffusion analogique — France, 6 December 2006 (OJ C 23, 1.2.2006, p. 1) C 24/04 Digital terrestrial television in Sweden, 20 December 2006 (OJ L 112, 30.4.2007, p. 77) C 52/05 Contributi ai decoder digitali — Italy, 24 January 2007 (OJ L 147, 8.6.2007, p. 1) N 270/06 Subsidies to digital decoders with API — Italy, 24 January 2007 (OJ C 80, 13.4.2007, p. 3) N 107/07 Subsidies to IdTV — Italy, 28 February 2007, not yet published, N 103/07 Support for the acquisition of digital decoders and for the adaptation of antennas in Soria — Spain, 25 September 2007 (not yet published in the Official Journal).

([80]) Points (a) to (d) below are related to measures contained in case N 622/03 Digitalisierungsfonds — Austria and points (e) to (h) have been outlined in the final decision in Case C 25/04 DVB-T Berlin-Brandenburg.

(b) subsidies to individuals for the purchase of set-top boxes for any platform to prevent the exclusion of low income households from access to TV reception and to reach a critical mass of users, in particular in areas where due to the lack of frequency spectrum, the terrestrial transmission will have to be switched without simulcast period;

(c) grants to companies to develop innovative digital services such as electronic programme guides and mobile applications;

(d) subsidies to broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel (simulcast phase);

(e) subsidies to consumers for the purchase of digital decoders. Such subsidies should be technologically neutral. In granting subsidies, the authorities may encourage the use of open standards for interactivity. Open standards enable consumers to benefit from interactive services offered by different operators;

(f) funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage;

(g) 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;

(h) fair compensation to broadcasters which are required to give up the use of analogue spectrum before the expiration of their licences, if necessary and appropriate. The compensation should take into account the actual costs of the switchover to broadcasters including for instance adaptation costs to broadcast in another channel/multiplex where applicable.

2.2. LEGAL BASES FOR ASSESSING THE COMPATIBILITY OF THE ENVISAGED MEASURE

(138) The German authorities have invoked Articles 87(3)(c), 87(3)(b), 87(3)(d) and 86(2) of the EC Treaty to justify the measure if it was found to constitute State aid in accordance with Article 87(1) of the EC Treaty. In the following, the Commission assesses the compatibility of the measure in view of these provisions, taking into account the general considerations outlined above ([81]).

([81]) Given that the possible indirect advantage arising from the measure for the network operator T-Systems is inextricably linked to the funding provided to commercial broadcasters, the Commission is assessing the compatibility of the aid measure as a whole.

2.3. ARTICLE 87(3)(c) OF THE EC TREATY

(139) In the opening decision, the Commission stated that it was not convinced that the measure could be deemed compatible under Article 87(3)(c) EC Treaty. This remains the opinion of the Commission after having assessed the comments of interested parties and the observations provided by the German authorities.

(140) Article 87(3)(c) of the EC Treaty concerns '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'.

(141) In order to be compatible under Article 87(3)(c), an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed with respect to the following questions:

1. Is the aid measure aimed at a well defined objective of common interest?

2. Is the aid well designed to deliver the objective of common interest (i.e. does the proposed aid address a market failure or other valid objective)? In particular:

   (a) is the aid measure an appropriate instrument?

   (b) is there an incentive effect, i.e. does the aid change the behaviour of firms?

   (c) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

(142) The German authorities maintain that the planned measure complies with Article 87(3)(c) EC Treaty. By reference to the Switchover communication, they claim that the promotion of the digital terrestrial platform is in the common interest as it contributes to the achievement of a number of general interest objectives. They argue that the measure is necessary to maintain the terrestrial platform and to address a number of specific market failures. Furthermore, they take the view that the measure is both appropriate and proportionate to the objectives pursued.

2.3.1. ***Objective of common interest***

(143) As explained in the general considerations above, the Commission agrees insofar as the transition from analogue to digital broadcasting is to be considered as an objective of common interest. However, as also highlighted in Switchover communication and subsequent Commission policy documents related to the switchover, this does not provide a universal justification why only the digitisation of the terrestrial platform should be supported. On the contrary, the starting point is, as referred to above, that the transition must be led by the market and that in principle, each network should compete on its own strengths. In order to safeguard this principle, any public intervention shall aim at being technology neutral. The requirement for technology neutrality is not met in the present case.

(144) In their submissions, the German authorities have called into question the appropriateness of the principle of technology neutrality for the purpose of the State aid assessment and claimed that technology neutrality cannot be achieved at the level of an individual State aid measure. They maintain that the overall policy of the German authorities is also technology-neutral and indicate that if it was necessary, they might also provide support to other platforms. However, they consider that the satellite technology does not need support for realising the switchover and the digitisation of cable is not sufficiently advanced to justify concrete support measures. At present, the Commission has not received any concrete information from the German authorities indicating that public funding would be foreseen for other means of transmission as well.

(145) The Commission considers that these general arguments concerning the non-applicability of the principle of technology neutrality cannot be accepted. There is a difference between, on the one hand, financial support for the switchover from analogue to digital transmission and, on the other hand, measures which are merely supporting the digital terrestrial platform as such. Subsidies provided selectively to one of the directly competing transmission technologies introduce a strong distortion of competition among these technologies.

(146) In accordance with Article 87(3)(c) and the applicable case law, such a distortion may only be accepted if it targets a specific market failure or equity problem and is at the same time necessary, appropriate and proportionate to the objectives pursued. In accordance with the State aid rules, this assessment has to be carried out individually for each measure.

(147) Besides the overall objective of promoting the switchover, the German authorities have put forward that the measure aims at maintaining the terrestrial platform by means of promoting the launch of DVB-T. They claim that this contributes to strengthen competition both among broadcasters and at the level of the infrastructure transmission, promoting the achievement of a number of objectives of general interest.

(148) In particular, they argue that the digitisation of terrestrial transmission contributes to media plurality, allowing commercial broadcasters to transmit their programmes in NRW over 12 channels instead of three in analogue mode. They claim that the terrestrial platform is better suited for the transmission of regional and local programmes than cable or satellite. Moreover, they argue that the measure contributes to ensuring universal coverage. The authorities also argue that the topology of the covered areas in North Rhine-Westphalia is such that the coverage of rural and remote areas is more costly and hence less attractive for the commercial roll-out of DVB-T than the territory of, for example, Berlin-Brandenburg. They argue that the measure would be a first step, acting as an incentive for the introduction of DVB-T in these zones at a later stage.

(149) In addition, they emphasise the innovation potential of digital terrestrial television, claiming that only DVB-T allows for the development of digital mobile reception.

(150) The Commission acknowledges the general interest objectives put forward by the German authorities. However, as demonstrated below, it considers that the aid is not specifically targeted to promote media plurality, regional and local content, universal coverage, to stimulate the provision of services in rural areas, or innovation and is not necessary, appropriate and proportionate to achieve the objectives pursued.

2.3.2. ***Necessity and appropriateness: well designed aid***

(151) The German authorities maintain that the envisaged measure is necessary to achieve the above mentioned objectives and to overcome specific market failures. Moreover, as a matter of principle, they claim that the Commission has no right to call into question the decision made by the Federal Government and the *Länder* to maintain the terrestrial platform and to carry out its digitisation. They also argue that the Commission is not entitled to consider whether other measures would have been more appropriate for achieving the same objective.

(152) Above all, the Commission wishes to clarify that the present decision concerns specifically the measure notified by the German authorities for the introduction of DVB-T in North Rhine-Westphalia, and not the political decision of the German authorities to maintain the terrestrial platform. In the framework of the present procedure, the Commission is bound to assess under the State aid rules whether the State aid supporting the operational costs of commercial broadcasters is both necessary and proportionate to achieve the general interest objectives pursued by the German authorities in the circumstances of the case.

(153) An analysis of the appropriateness of the State aid measure forms an inherent part of this assessment. The Commission considers that, apart from a proof of the necessity of a measure, the choice of State aid as a policy instrument should be motivated by the appropriateness of this particular instrument of State intervention to deliver the objective of common interest. In cases in which State aid is not an appropriate instrument to tackle a particular efficiency or equity concern, it might create unnecessary distortions to competition and trade that could be avoided by using another policy tool, such as regulatory instruments.

(154) In the following, the Commission assesses, one by one, whether the present measure can be considered necessary and appropriate to address the general interest objectives put forward by the German authorities to justify the present measure and to remedy possible market failures which may hinder the achievement of these objectives. Furthermore, it evaluates whether the present measure can be considered proportionate to overcome these difficulties.

Strengthening of competition between transmission platforms

(155) Regarding the strengthening of competition between transmission platforms, the German authorities have argued that the promotion of digital terrestrial television exercises a positive competitive pressure on the other transmission platforms and provides an incentive for the operators of the other platforms to improve and update their services and thereby would have the potential to accelerate digitisation on the other platforms too. Apart from being in contradiction to their claim that the measure does not distort competition, the German authorities have, however, not provided convincing evidence that broadcasting transmission in North Rhine-Westphalia is characterised by a structural competition problem. Even leaving aside terrestrial transmission, cable and satellite offer a large number of free-to-air television channels and are generally available. More competition is emerging from television via broadband (for example via xDSL technology) which is about to establish itself as an additional platform for broadcasting transmission. Consequently, and in accordance with the line taken in other Commission decisions on public support measures in favour of digital television ([82]), this justification cannot be accepted for granting aid.

Promotion of media plurality

(156) As regards media plurality and the variety of channels, the digital terrestrial channels have been allocated in such a way that incumbent broadcasters have received a priority treatment while market entry has been marginal ([83]). Therefore, the measure is not targeted to increase the plurality of programme channels. Furthermore, as outlined in the opening decision ([84]), while increasing capacity relative to analogue transmission, the DVB-T network still compares unfavourably with the number of channels available via cable or satellite. Even in analogue mode, both alternative platforms offer more channels than DVB-T and most, if not all, of the programmes available over the DVB-T platform can also be viewed over cable and satellite.

Promotion of regional or local programmes

(157) The measure is also not specifically targeted at supporting broadcasters or channels which would provide regional or local programmes. In fact, local TV channels are transmitted, for instance, via cable in numerous areas of North Rhine-Westphalia, while there are no local TV channels transmitted via the digital terrestrial platform in this *Land*. The tender for the broadcasting licences did not specifically address the dimension of regional or local programming. None of the beneficiaries is a regional or local broadcaster and the receipt of the funding is not conditional upon the broadcast of regional or local programmes by the commercial broadcasters.

Safeguarding universal coverage

(158) Furthermore, regarding the alleged safeguarding of universal coverage, the measure does not target areas where there could be a problem of coverage as a result of the switchover. The German authorities have admitted that from a technical point of view, practically every building may receive free-to-air television via satellite in North Rhine-Westphalia. This is currently not the case for DVB-T; the present measure is limited to urban areas with high population density where cable is also widely available.

([82]) Berlin-Brandenburg, recital 109 ff., Italian decoders, recital 153 ff. See Footnote 79.

([83]) The interest by new entrants for a channel on the DVB-T platform, without a guarantee for public funding, is evidenced by the fact that, following the departure of Terra Nova in 2007 there were seven applicants for Terra Nova's programme channel, which was awarded to Tele 5.

([84]) See recital 64 of the opening decision.

Introduction of DVB-T in rural and remote areas

(159) The argument concerning the promotion of the introduction of DVB-T in rural and remote areas at a later stage has not been substantiated by the German authorities and there is no indication that the measure would have an effect on the promotion of DVB-T in less densely populated areas as the measure only targets the most populated areas of NRW. Moreover, the measure does not contain any specific incentive for the broadcasters to move to remote areas. Indeed, already when using the analogue transmission platform, the commercial broadcasters were never transmitting their programmes in North-Rhine Westphalia outside the main population centres.

Promotion of innovation

(160) Concerning the alleged objective of promoting *innovation*, the Commission notes, first of all, that the envisaged public funding is not focused on innovative media or telecommunications services, but only serves to subsidise the operational costs of broadcasters to transmit television programmes.

(161) According to the information available to the Commission, the DVB-T network used in North Rhine-Westphalia uses the compression standard MPEG-2 whereas the more advanced MPEG-4 standard, which provides for a better use of frequency spectrum, will soon be available on the market (DVB-T 2). As regards mobile TV reception, the DVB-T platform used in North Rhine-Westphalia does not match the capabilities of advanced mobile TV technologies such as DVB-H (Digital Video Broadcast transmission to handheld terminals) ([85]) which offer a more stable signal reception and lower energy consumption. As regards potential innovation involving interactive services, DVB-T does not provide for a return channel and only carries the signal to the end user. Thus, interactivity is not an intrinsic feature of DVB-T.

(162) Accordingly, DVB-T does not represent a clearly superior technological solution in terms of innovation. Moreover, as outlined above, the envisaged public support for DVB-T may hamper innovation based on other transmission platforms and technologies.

Maintaining the terrestrial platform

(163) The German authorities have also asserted that the funding is necessary to maintain the terrestrial platform as such. They argue that the presence of commercial broadcasters and in particular of the big broadcasting groups RTL and ProSiebenSat.1 is necessary to maintain the attractiveness of the platform from the viewers' point of view. According to the information provided by the German authorities, these broadcasting groups were only willing to participate on the condition that the digital terrestrial transmission does not involve additional costs for them compared to the analogue mode. Furthermore, the German authorities maintain that although the RTL group did not ask for funding, it made its participation conditional upon the presence of ProSiebenSat.1 on the platform.

(164) In this respect, the German authorities have also invoked the examples of the other areas in North Rhine-Westphalia (Wuppertal, Ostwestfalen-Lippe, Münsterland, Aachen and South Westphalia), where the DVB-T platform has been or is being launched without the participation of the commercial broadcasters. In their view, this demonstrates that without funding, commercial broadcasters are unwilling to participate on the DVB-T platform.

(165) The Commission considers that the information submitted by the German authorities does not demonstrate that the funding is necessary for securing the existence of the terrestrial platform. In the Commission's view, the German authorities have not demonstrated the incentive effect between the envisaged funding and the presence of the private broadcasters on the terrestrial platform. It has not been proven that the envisaged aid measure really changes the behaviour of the recipients.

(166) The general agreement on the introduction of DVB-T in North-Rhine Westphalia contained a binding timetable for the switchover without providing any clear indication about the envisaged funding measure. As highlighted under recital 19 above, the agreement only contained vague references to funding 'for the technical infrastructure for DVB-T transmission' and 'for citizens on social grounds'. The announcement for the attribution of broadcasting licences did not contain any reference to the funding. The terms of the financial assistance were only laid down by means of the directive on financial support of 19 November 2004 after the attribution of the broadcasting licences and several months after the launch of DVB-T.

(167) It follows from the above that commercial broadcasters were willing to engage in DVB-T without any concrete details regarding the financial assistance. Those broadcasters present on the analogue platform agreed to the binding timetable for the switchover without any clear indication about the funding measure. Moreover, as regards those commercial broadcasters which have previously not been present on the analogue platform, the submitted information indicates that LfM has received

([85]) See for instance COM(2007) 409, Commission Communication on Strengthening the Internal Market for Mobile TV of 18 July 2007.

considerably more applications for digital licences than the number of channels available. In this respect, the German authorities maintain that on the basis of the general agreement concluded on 20 October 2003, all broadcasters knew about the possibility of funding. However, even if all applicants were aware of the general agreement to which they were not parties, this did not provide them with any clear indication about the funding measure.

(168) In addition, the Commission notes that private broadcasters have already been present on the digital terrestrial platform for more than three years without public funding. Although more recently, TerraNova has left the platform, it has been replaced by another broadcaster, Tele5, following seven applications from commercial broadcasters. In the case of these broadcasters, there was clearly no guarantee for funding in light of the decision of the Commission in the Berlin-Brandenburg case and of the present procedure. In other *Länder*, for example in the Rhein-Main area and in the North of Germany, the commercial broadcasters are transmitting over the DVB-T platform without State aid ([86]).

(169) Regarding those broadcasters already present on the analogue platform, the German authorities maintain that the measure was necessary to cover their 'additional costs' arising from digital transmission.

(170) However, as assessed in recitals 74 and 123 above, the alleged 'additional costs' incurred by ProSiebenSat.1 and the RTL group are merely due to the increase in the number of channels, given that the digital transmission costs per channel are lower than the costs for analogue transmission. The German authorities have not substantiated why it was necessary for these broadcasters to be present with more channels in digital mode and why the commercial revenues from these channels were not taken into account in the calculation of the envisaged aid.

(171) As regards the argument concerning the other areas of North Rhine-Westphalia where DVB-T is being launched without the participation of commercial broadcasters, the Commission considers that these areas are not comparable to the urban areas targeted by the present measure in terms of population density and attractiveness for commercial broadcasters. At the same time, these examples also indicate that it is possible to launch the digital terrestrial platform without the participation of commercial broadcasters, by means of a participation of the public service broadcasters.

([86]) The Commission also notes that in the case of Berlin-Brandenburg, despite the negative decision and the recovery of the aid granted, all commercial broadcasters concerned by the decision in this case are still transmitting their programmes over DVB-T in Berlin-Brandenburg (see http://www.garv.de/).

Remedying market failures with regard to the switchovers

(172) The German authorities maintain that the measure addresses specific market failures which hinder the switchover to digital terrestrial television. By reference to the Switchover communication, they invoke the coordination problem among market players, risk, positive externalities and short-term cost increases associated with the switchover. They claim that in view of the decreasing share of terrestrial television and the high transmission costs, there was a risk that commercial broadcasters would switch-off analogue transmission abandoning the terrestrial platform. In their view, this would lead to losing the advantages of the terrestrial platform outlined above in terms of media plurality, universal coverage, broadcast of regional and local programmes, innovation potential, and infrastructure competition.

(173) On these points, it should be analysed first whether these are genuine market failures which prevent the market to deliver the maximum outcome in terms of societal welfare. Second, it has to be assessed whether State aid is necessary and appropriate to remedy such market failures, and whether the present measure is proportionate to achieve this objective. It is only if the measure is both necessary and proportionate that the measure can be considered compatible under Article 87(3)(c) EC Treaty.

(174) Regarding the coordination problem invoked by the German authorities, the Commission recognises that this may, in principle, represent a market failure hindering the transition from analogue to digital broadcasting. The problem arises because broadcasters need to agree on common dates for switching off analogue transmission and for switching on digital transmission so as to overcome the lack of frequency spectrum and to minimise the costs of parallel transmission. Consumers might not be willing to shift to digital transmission until the digital platform carries a large number of programmes. At the same time, broadcasters might wish to await the arrival of other broadcasters on the digital platform before they switch over themselves. In the absence of coordination, these issues might delay the switchover.

(175) The Commission also acknowledges that accelerating the switch-off of analogue transmission is, in principle, a valid objective for public intervention in order to reap the benefits of the better use of the freed-up spectrum.

(176) Regarding the coordination problem indicated above and in line with the approach taken in the Berlin-Brandenburg decision ([87]), the Commission considers that State aid is neither necessary, not an appropriate instrument to address this issue. The need for coordination arising in the context of the digital switchover can be, and indeed was in the present case, resolved by other means which are more suitable for this purpose and at the same time involve less distortion on the market.

(177) In the present case, LfM has agreed on a timetable in the general agreement concluded with the broadcasters present on the analogue platform on 20 October 2003. Moreover, it has managed to fix a common date for the return of the analogue broadcasting licences. Furthermore, it has coordinated the switchover process with the *Länder* of Northern Germany. These measures have allowed launching the digital terrestrial platform in line with a common timetable and without any simulcast period for commercial broadcasters at the same time in several *Länder*. Thus, in addition, the funding of the broadcasters' transmission costs does not appear necessary for this specific purpose.

(178) The German authorities have declared that the envisaged payments are not only made to alleviate the commercial broadcasters from the 'additional costs' of broadcasting over the terrestrial platform but also claim that they are a compensation for the specific commercial *risks* (for instance through reduced commercial revenues) for the commercial broadcasters. Indeed, the 2003 Switchover communication mentions: 'the likelihood of market failure is linked to the complexity of the environment where switchover takes place, and the interactions between the main parties involved ([88]).' However, in the case at hand, this complexity was considerably reduced by the preparatory action of the LfM and every broadcaster knew about the estimated transmission costs and could make its own revenue forecasts.

(179) Indeed, the authorities never substantiated or quantified these claims or the magnitude of the alleged risks. The Commission doubts that, in view of the successful switchover carried out without funding so far, there are such specific risks for the commercial broadcasters ([89]) in the case at hand apart from the general commercial risks associated to their activity which are independent from the platform over which they transmit broadcasting signals. The fact that there were more applicants for a licence to broadcast over digital terrestrial in North-Rhine Westphalia than licences available shows that commercial broadcasters are ready to participate in DVB-T, to pay the necessary transmission costs and take the commercial risk, even without guaranteed public funding.

([87]) See paragraph 95 ff. of the Berlin-Brandenburg decision of 9 November 2005.

([88]) COM(2003) 541 final, cf. Footnote 9.

([89]) There may be a commercial risk for the network operator but there are no indications that the market cannot cope with this kind of risk cf. recital 114 of the Berlin-Brandenburg decision.

(180) Regarding the positive externalities related to the freeing-up of the frequency spectrum, these advantages arise mainly from the switch-off of the analogue terrestrial platform. This fact has not been put in question in the case of North Rhine-Westphalia. Given that the measure intends to subsidise the transmission costs of commercial broadcasters which are lower per channel for digital transmission than in analogue mode, the measure cannot be considered necessary to cover any possible short-term cost increases associated with the digital switchover either.

Compensation for the return of analogue licences

(181) The German authorities have also argued that the funding was necessary to compensate commercial broadcasters for the return of their analogue licences before their expiry date. At the same time, the submissions also state that in order to compensate the broadcasters previously present in the analogue platform for giving up their analogue licences, these broadcasters have received a priority treatment in the procedure for the allocation of the broadcasting licences, which enabled RTL and ProSiebenSat.1 to apply with a set of programmes for entire multiplexes.

(182) In this respect, the Commission notes in the first place that this argument is only relevant from the point of view of the financing granted to broadcasters which were previously present on the analogue platform and cannot be invoked to justify the necessity of the funding for the new broadcasters on the DVB-T platform. Regarding the broadcasters previously present on the analogue platform, however, this argument is not valid either. Among those broadcasters which have returned their analogue licences, only ProSiebenSat.1 is receiving a subsidy under the present measure and the calculation of the subsidy submitted by the German authorities does not take into account a possible value of the outstanding duration of the licences. In these circumstances, the funding of the transmission costs cannot be considered to be linked to the return of the analogue licences and to be necessary and appropriate for this purpose.

(183) This is in particular the case in view of the compensation these broadcasters have already received in the context of the attribution of the digital terrestrial broadcasting licences. This priority treatment was not limited to guaranteeing a continued availability of their analogue programmes in digital mode, but enabled RTL and ProSiebenSat.1 to increase the number of their channels in the digital mode (two additional channels for the RTL Group and three additional channels for ProSiebenSat.1). At the same time, several other broadcasters had requested such a licence, without success, due to the limited amount of transmission channels available.

Proportionality

(184) The German authorities have maintained that the present measure is proportionate to the objectives pursued. In their view, the funding represents the minimum necessary to provide an incentive for commercial broadcasters to be present on the DVB-T platform and thereby to secure the existence of the terrestrial platform. In their view, proportionality is ensured by means of only financing the 'additional costs' arising from digital transmission for those broadcasters previously present on the analogue platform and by providing for a decreasing funding for the new broadcasters on DVB-T. Concerning the amount of financing provided to the broadcasters previously not present on the analogue platform, the German authorities have not submitted any information justifying the share of transmission costs covered by the public support.

(185) Moreover, as outlined, the Commission has several doubts related to the considerations and calculations related to the alleged 'additional costs' submitted by the German authorities. The Commission notes that the present measure subsidises the transmission costs for broadcasters which are actually lower per channel in digital terrestrial than in analogue terrestrial mode. The alleged 'additional costs' only arise in the case of RTL and ProSiebenSat.1 due to the increase in the number of channels in North Rhine-Westphalia as compared to the analogue mode. Broadcasters previously not present on the terrestrial platform do not have 'additional costs'.

(186) As regards the broadcasters previously present on the analogue platform, as indicated above, the measure cannot be considered as covering any 'additional costs' of digital transmission. There were no simulcast costs as a simulcast period has not taken place in relation to the commercial broadcasters. The German authorities have also not claimed that there were additional costs due to the switchover linked to investments in new technical equipment or similar. Under these circumstances, the Commission considers that the funding (even if it was considered necessary and appropriate, *quod non*) cannot be considered as limited to the minimum necessary.

2.3.3. *Overall balance and conclusion regarding Article 87(3)(c) of the EC Treaty*

(187) In light of the above considerations, the Commission considers that the general interest objectives put forward by the German authorities and the market failures identified in relation to the digital switchover cannot serve as a justification for the aid granted in the present case. Accordingly, the Commission is not convinced that the aid is a necessary, appropriate and proportionate instrument to remedy those market failures and to achieve the general interest objectives pointed out by the German authorities. In particular, the Commission considers that in the context where, as at present, the market is capable of supporting different technologies ([90]) and various competing market-based solutions can be developed, the public support to the operational costs of commercial broadcasters on the DVB-T platform represents an unjustified departure from the principle of technology neutrality and introduces unnecessary distortions of competition.

(188) Therefore, the Commission considers that the measure cannot be considered compatible with the common market on the basis of Article 87(3)(c) of the EC Treaty.

2.4. ARTICLE 87(3)(b) OF THE EC TREATY

(189) According to Article 87(3)(b) of the EC Treaty 'aid to promote the execution of an important project of common European interest' may be considered to be compatible with the common market.

(190) The German authorities maintain that the measure falls under Article 87(3)(b). They claim that in line with the Switchover communication, the digital switchover constitutes an important project of common European interest which also has economic, social and political effects. In their view, the measure addresses the significant short-term costs and the lack of coordination mechanisms in relation to the switchover, also referred to in the Switchover communication.

(191) The Commission considers that in order to fall under Article 87(3)(b) of the EC Treaty, it is not sufficient that the overall objective is in the common European interest. It is the specific project implemented by the measure which has to be in the common European interest and be of European scale, forming part of a transnational European programme supported jointly by a number of Governments of the Member States, or arising from concerted action by a number of new Member States. As the ECJ stated 'the mere fact that the investments envisaged enabled a new technology to be used does not make the project one of common European interest' ([91]).

(192) Based on the above, the Commission considers that the promotion of digital terrestrial television specifically in two urban areas of North Rhine-Westphalia cannot be considered as 'an important project of common European interest'.

([90]) The support to DVB-T may hamper the roll-out of other platforms, for example IPTV over broadband, which might have other advantages and are capable of developing autonomously.

([91]) C-62/87 and 72/87 Exécutif régional wallon and Glaverbel v Commission [1998] I-1573.

2.5. ARTICLE 87(3)(d) OF THE EC TREATY

(193) Article 87(3)(d) of the EC Treaty concerns 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'. Furthermore, Article 151(4) of the EC Treaty provides that 'the Community shall take cultural aspects into account in its actions under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures'.

(194) The German authorities maintain that the measure falls under Article 87(3)(d) of the EC Treaty because it contributes to ensuring a balanced broadcasting system and thereby promotes culture in the meaning of Article 151 of the EC Treaty.

(195) As stipulated by Article 151(4), cultural aspects shall be taken into account in the Community's action. At the same time, the Commission considers that the cultural derogation enshrined in Article 87(3)(d) of the EC Treaty, as any exception of the general rules of the Treaty, must be interpreted restrictively. Accordingly, the Commission considers that the cultural derogation can only be applied in cases where the cultural product is clearly identified or identifiable ([92]). Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se ([93]).

(196) In the present case, the financial support concerns the transmission of broadcasting signals over the digital terrestrial platform and it is not related to any particular cultural content that would otherwise not be broadcast. Therefore, the Commission considers that the conditions for the application of Article 87(3)(d) of the EC Treaty are not met.

2.6. ARTICLE 86(2) OF THE EC TREATY

(197) Article 86(2) of the EC Treaty provides that 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

([92]) For example, Commission decisions NN 88/98 BBC 24 hours (OJ C 78, 18.3.2000, p. 6), NN 70/98 'Kinderkanal and Phoenix' (OJ C 238, 21.8.1999, p. 3).

([93]) For example, Commission Decision N 458/04 State aid to Espacio Editorial Andaluza Holding sl. (OJ C 131, 28.5.2005, p. 12).

(198) As already outlined in recitals 91 and 92 above, the German authorities maintain that the measure represents a compensation for a service of general economic interest, i.e. the transmission of broadcasting programmes over the DVB-T platform. They claim that the commercial broadcasters have been entrusted with the service of general economic interest by means of the attribution of the digital terrestrial broadcasting licences, and accordingly they are obliged to broadcast their programmes to the public. They argue that the lack of funding would obstruct the provision of this service. In their view, commercial broadcasters would have been reluctant to participate in the DVB-T launch without the envisaged measure, which would have put the existence of the terrestrial platform at risk. Furthermore, they consider that the funding does not affect the development of trade to an extent as would be contrary to the interests of the Community.

(199) According to the case law on the interpretation of Article 86(2) of the EC Treaty, in order for Article 86(2) of the EC Treaty to apply, the undertaking beneficiary of the aid must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest. Such act or acts of entrustment must specify, at least, the precise nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned.

(200) As already outlined in recital 93 above, the Commission does not call into question that digitisation of broadcasting is in the public interest. However, on the basis of the findings stated in recitals 92 to 96, the Commission considers that the present measure envisaging to grant support to normal commercial activities of commercial undertakings cannot be considered as compensation payment for the delivery of a service of general economic interest in accordance with Article 86(2) of the EC Treaty.

(201) Moreover, even if the commercial broadcasters had been charged with the delivery of a service of general economic interest (*quod non*), Article 86(2) of the EC Treaty requires that the compensation does not exceed what is necessary to cover the costs incurred by the undertaking in discharging the public service obligations, account being taken of the relevant receipts and a reasonable profit.

(202) As demonstrated in recitals 97 to 99 above, the envisaged public funding is not determined on objectively established criteria as foreseen under Article 86(2) of the Treaty. Moreover, the measure only takes into account the transmission *costs* of the commercial broadcasters transmitting over the digital terrestrial platform but not their receipts (for instance from advertising revenues).

(203) Furthermore, in order to ensure compliance with the necessity requirement set out in Article 86(2) the granting authorities need to lay down provisions relating to the calculation and monitoring of the amount of compensation granted. Member States should check regularly that the compensation granted does not lead to overcompensation. The measure at hand does not foresee any such provisions or checks by the public authorities involved.

(204) In view of the aforementioned, the Commission finds that the aid cannot be declared compatible under Article 86(2) of the EC Treaty.

VII. **CONCLUSION**

(205) For these reasons, the Commission concludes that the funding envisaged by LfM to the commercial broadcasters constitutes State aid within the meaning of Article 87(1) of the EC Treaty and cannot be considered compatible with the common market in accordance with Article 87(3)(c), 87(3)(b), 87(3)(d) and 86(2) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Federal Republic of Germany is planning to implement for the introduction of digital terrestrial television in North Rhine-Westphalia to commercial broadcasters on the DVB-T platform based on the directive on the financial support for DVB-T (*Richtlinie der Landesanstalt für Medien Nordrhein-Westfalen über die Gewährung von Zuwendungen zur Förderung von digitalem terrestrischem Fernsehen als Maßnahme und Projekt für neuartige Rundfunksübertragungstechniken gem. § 88 Abs. 3 S. 5 und 6 LMG NRW*) of 19 November 2004, notified to the Commission by letter of 13 January 2005 is incompatible with the common market.

The aid may accordingly not be implemented.

Article 2

The Federal Republic of Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 October 2007.

For the Commission

Neelie KROES

Member of the Commission