



Kai Struckmann

Brussels

62 rue de la Loi

1040 Brussels

T: +32 2 219 16 20

F: + 32 2 219 16 26

Digital Switchover in the EU - A Legal Perspective

Monday 4th December 2006

SAS Radisson Hotel

Riga, Latvia

Key Principles

Communications Commission of the European Commission

- 2002: eEurope2005 - An information society for all
- 2003: Transition from analogue to digital broadcasting ("switchover communication")
- 2005: Accelerating the transition from analogue to digital broadcasting (2nd "switchover communication")

The key principle is: technological neutrality.

'In principle, each network should compete on its own strengths. Any public support for one particular option cannot be excluded but should be justified by (1) well-defined general interests and (2) implemented in a proportionate way. Otherwise it would appear discriminatory and could jeopardize investments in other networks.'

EU Law

Sector specific rules

- **Regulatory Framework for Telecommunications**
 - Framework Directive (2002/21/EC)
 - 4 Specific Directives (Access, Authorisation, Universal Service, Data Protection)
 - MS must ensure effective competition and make regulation technologically neutral
- **Other specific Directives**
 - Competition Directive (2002/77/EC)
 - MS must remove exclusive rights and ensure that operators can provide services based on non-discriminatory, transparent procedures

Cases: Sector specific rules

Infringement procedure

- **Sweden: broadcasting services monopoly (SE 2004/2197)**
 - The European Commission referred Sweden to the ECJ for failure to change rules giving state-owned company Boxer TV-Access a monopoly to provide access control services in Sweden's digital terrestrial broadcasting network
 - Swedish broadcasters using digital terrestrial broadcasting and transmission technology remain obliged to acquire access control services exclusively from Boxer, giving this company a monopoly for these services

The 'Competition Directive' required that all monopoly rights be abolished for broadcasting transmission services by July 2003

EU Law

Competition rules

- Antitrust rules / abuse of dominant position (Art. 81/82 EC)
 - Less likely to apply

- State aid rules (Art. 87 EC)
 - In principle grant of State aid is prohibited; there may be exemptions if aid serves certain common objectives

Non-technologically neutral government support for one form of transmission may constitute State aid and in principle is incompatible with EU law

Cases: State aid – a key decision on digital switchover

DVB-T in Berlin Brandenburg (C 25/2004)

- The Commission declared that:
 - Non-technologically neutral State support for DVB-T is incompatible with the Common Market
 - Under certain circumstances limited State interventions may be acceptable to overcome specific market failures related to the switchover
 - But:
 - This did not apply in the Berlin-Brandenburg case. Thus, the Commission ordered the recovery of the aid from the beneficiaries

Cases: State aid

Guidance in the Berlin Brandenburg decision

- Acceptable forms of public support:
 - Funding for the roll-out of a transmission network in areas where otherwise there would be *insufficient TV coverage*
 - Financial compensation to public service broadcasters for the *cost of broadcasting via all transmission platforms in order to reach the entire population*, provided this forms part of the public service mandate
 - *Subsidies to consumers* for the purchase of digital decoders as long as they are *technologically neutral*, especially if they encourage the use of open standards for interactivity
 - Financial compensation to broadcasters which are required to *discontinue analogue transmission before the expiry of their licenses*, provided this takes account of granted digital transmission capacity

Cases: State aid

Other decisions

- Austria: fund for digitalisation (N 622 / 2003)

Pending investigations

- Sweden: introduction of DVB-T (C 24/2004)
- Italy: digital decoders (C 52/2005)
- Bavaria: introduction of DVB-T (C 33/2006)
- North-Rhine Westphalia: introduction of DVB-T (C 34/2006)

Conclusions

- State interventions should in principle be *technologically neutral*
- State aid is *only permissible in specific circumstances* and for a number of limited objectives
- Member States *must demonstrate that State aid is the appropriate instrument* to address the issue