

"Challenges and experiences"
Digital switchover and international rights management in Germany



Tihany, May 27th, 2008

The CISAC case



Digitisation
Two key issues

- Financing distribution;
- Content.

Supporting the Digital Switchover



Promoting DVB-T in Germany – how NOT to do it.

Seite 3

Supporting the Digital Switchover



Addressing transition problems

- If markets fail to drive digitisation ⇒ Call for Public Intervention:
 - Regulation (e.g. setting switchover dates, limiting life-time of licenses),
 - Financial support to consumers,
 - Information campaigns,
 - Subsidies to overcome a specific market failure or to ensure social or regional cohesion.
- Public Intervention = Potential conflict with the EC rules on State Aid
- Promotion of Digitisation ≠ Automatic justification for distortions of competition.

Seite 4

Supporting the Digital Switchover



Digitisation

Addressing transition problems in Germany

- Funding in Germany:
 - 3 x State support for Digital Switchover
 - 3 x Support was declared illegal.
- DVB-T funding in Berlin & Brandenburg
 - The “Leading Case” on how NOT to do it.

Seite 5

Supporting the Digital Switchover



The Berlin-Brandenburg case

What happened?

- Berlin & Brandenburg media agency support for DVB-T (only):
 - ProSiebenSat.1 and RTL to broadcast via DVB-T for 5 years, irrespective of coverage.
 - Contribution to transmission costs for five years (approx. EUR 4 million):
 - ProSiebenSat.1: EUR 330,000/a = EUR 82,500/channel;
 - RTL: EUR 265,000/a = EUR 66,250/channel;
 - Local TV FAB & BBC World: EUR 65,000/a each.
 - Eurosport, Viva Plus and DSF (not broadcasted terrestrially before): EUR 65,000 each (one year license only).

Seite 6

Supporting the Digital Switchover



The Berlin-Brandenburg case The Commission's assessment

- Economic Advantage [+] ⇒ Support for Operating Costs, not compensation for loss of analogue license:
 - Aid for broadcasters that did not even broadcast terrestrially before;
 - Aid even for broadcasters whose analogue license was due to expire anyway;
 - Aid even to broadcasters with new digital licenses (P7S1, RTL even got extra channels);
 - Payment exceeded switchover period.
- State Resources [+] ⇒ Grant by Regulator;
- Selective Aid [+] ⇒ Funding for DVB-T only;
- Grant without (!) prior notification to Commission ⇒ Automatic infringement.

Seite 7

Supporting the Digital Switchover



The Berlin-Brandenburg case The Commission's guidance

- Market Failure may be addressed by public intervention.
 - “**Coordination problem**”:
 - Market players must agree on timetable to ensure short switchover period;
 - “**Positive externalities**” (the “**Egoism Problem**”):
 - Social benefit > Private benefit of incumbents.
 - Extra channels/services = Extra competition = Extra business risk = No incentive for incumbents to switch.

Seite 8

Supporting the Digital Switchover



The Berlin-Brandenburg case The Commission's guidance

- Onus is on Member States to show:
 - financial aid is the most appropriate instrument to address such market failure (Incentive);
 - financial aid is limited to the minimum necessary;
 - Positive overall balance (Proportionality): No undue distortion of competition.

Seite 9

Supporting the Digital Switchover



DVB-T Funding in Berlin-Brandenburg = Not necessary to support the digital switchover

- Commission on the "Coordination Problem":
 - Public funding for DVB-T not necessary to overcome the "coordination problem";
 - Regulator can solve coordination problem by setting a common switchover date.
- Commission on the "Egoism Problem":
 - Cost Reduction: Digital transmission costs < Analogue transmission costs.
 - Incentive to switch: Extra channels/services = Extra business chances.
 - No "egoism problem".

Seite 10

Supporting the Digital Switchover



DVB-T Funding in Berlin Brandenburg

= Unjustified departure from the principle of technological neutrality

- Commission: "Digitisation will not be achieved by promoting a single transmission channel."
 - No structural problems ⇒ No need to promote inter-network competition.
 - DVB-T not clearly superior technological solution to other platforms;
 - Measure not focused on any innovative media or telecom services in particular;
 - Successful launch of DVB-T without public support in other German *Länder* (Hessia);
 - Roll-out of other platforms, e.g. DSL, at risk.

Seite 11

Supporting the Digital Switchover



Signal transmission via DVB-T

A cultural mission?

- Art. 87 (3) lit. d EC Treaty:
 - Justification for aid promoting culture and heritage conservation ...
- Art. 86 (2) EC Treaty:
 - Exemption from competition rules for „services of general economic interest“.
 - Service of general economic interest carried out by several private broadcasters?

Seite 12

Supporting the Digital Switchover



Dont's

- Discrimination: DVB-T is NOT “more equal” than other transmission channels.
- Operating Costs: Do not relieve companies from their operating costs, i.e. from their transmission costs.
- Do not “forget” to notify.

Seite 13

Supporting the Digital Switchover



Do's

Transparency, Necessity, Proportionality and Technological Neutrality.

- Technology Neutrality:
- Support pilot projects, R&D, roll-out of network in areas with insufficient coverage, development of new digital services (e.g. EPG, mobile applications);
- Grants to consumers, e.g. to buy Set-Top-Boxes/decoders;
- Compensate private broadcasters for additional transmission costs during simulcast or early expiry of their analogue licenses;
- Grants to public broadcasters to promote universal coverage on all transmission platforms.

Seite 14

Supporting the Digital Switchover



Criticism I

Commission's approach was too formal

- Small funds – Limited distortion of competition; cable and sat. already highly developed, no need for funding.
- Benefits were passed on to network operator, no economic advantage.
- Set-Top-Box Funding is more expensive (especially if technologically neutral):
 - Germany (Berlin-Brandenburg + NRW + Bavaria):
 - Approx. EUR 13.2 million over 5 years:
 - Italian funding for STB via tax deduction:
 - Total: EUR 40 million in 2007;
 - EUR 200 / STP (max.).
 - Digitisation Fund Austria:
 - Aid STB (DVB-T / Cable): EUR 4.39 million in 2007.
- STB Funding much more distortive as consumers may indeed switch.

Seite 15

Supporting the Digital Switchover



Criticism II

Commission not competent to rule on local cases

- Proposed Aid was regional (Berlin-Brandenburg; Köln/Bonn; Düsseldorf/Ruhr).
- Effect on trade between Member State?
 - The Commission: "Yes!"
 - Private broadcasters and the network operator are in international competition with other undertakings.
 - There is competition between terrestrial, cable and satellite operators for end-users in different Member States.
- DVB-T Funding justified as promotion of an "important project of common European interest" (Article 87(3) lit. b EC Treaty)?
 - The Commission: "No!"
 - "The promotion of digital terrestrial TV specifically in two urban areas of North Rhine-Westphalia cannot be considered as 'an important project of common European interest'." [sic!]

Seite 16

Supporting the Digital Switchover



The case of Hungary

- The 2007 Hungarian Switchover Act provides for different frequency fees for digital and analogue broadcasters:
 - Digital broadcasters gets a discount;
 - Analogue broadcasters pay more (or at least do not get a discount).
- In addition, it is also provided that expenses of digital switchover would be in part covered from frequency fees collected from analogue broadcasters.
- Reduced regulatory fees for digital licenses replacing analogue licenses (UK case) = No Aid?
 - Digitisation ⇒ More capacity ⇒ Less scarcity ⇒ Reduced market “value” of license.
 - No “benefit” (i.e. no extra) for recipient.

Seite 17

Regulatory Affairs & Distribution



The CISAC case

Seite 18

The CISAC case



Digitisation Content is king

- Digitalisation = More space = More demand for content.
- Getting content in the digital world: Clearing copyright.

Seite 19

The CISAC case



Collective Rights Enforcement in the EEA CISAC

- CISAC = Worldwide Association of collecting societies ("CS") representing right-holders (authors and composer).
 - Representing authors vis-à-vis users = Providing clearance of rights for users
- Performing right includes:
 - Right to primary broadcasting; and
 - Right to re-transmit the work of the author / composer.
- Mechanical right = Right to make a copy.

Seite 20

The CISAC case



Dreams of a broadcasting right user Choosing the one-stop-shop

- One-stop-shop for everything:
 - ☐ Performing rights & Mechanical rights;
 - ☐ Multi-repertoire (no withdrawals);
 - ☐ For all countries;
 - ☐ For all uses (Internet, cable and satellite);
 - ☐ For all user.
- Being represented by the Collecting Society of choice, i.e.
 - ☐ Competition between CS on price and quality;
 - ☐ Lower costs.

Seite 21

The CISAC case



The reality No choice – no competition

- Each EEA CS holds global portfolio of musical works („multi-repertoire“):
 - ☐ National one-stop-shop.
- But - Each EEA CS grants multi-repertoire licence for domestic market only:
 - ☐ *De facto* monopoly of national CS – No competition between CS;
 - ☐ No choice for right users and right owner.
 - ☐ No international one-stop-shop for copyrights clearance;
- Multi-national broadcasting group must acquire rights country-by-country;
- Extra costs – extra effort.

Seite 22

The CISAC case



Well – isn't that a cartel?

Allocation of markets and customers between national collecting society

- Reciprocal representation contracts between all CS in the EEA (and the rest of the world) based on CISAC model agreement:
 - Membership restrictions (Authors can't chose):
 - Authors must transfer their rights to „their“ national CS.
 - Territorial restrictions (User can't chose):
 - Right user can only purchase rights from “his” local CS;
 - CS only grant licenses for “its” territory.
- *De facto* monopoly for local CS (sometimes *de jure*) .
- **Allocation of customers and territories = “Hardcore” antitrust infringement ?!?**

Seite 23

The CISAC case



Is there somebody doing something about it?

Law Enforcement in Slow Motion

- First complaint in 2000 [!] by RTL Group, against GEMA.
- Early 2006 [!], Commission issues Statement of Objection (“SO”).
- Possible restriction of competition:
 - Membership restrictions (monopoly in the upstream market):
 - Territorial restrictions (monopoly in the downstream market):
 - Network effects of the agreements (completion between CS, barriers to entry):
- However, the Commission's criticism is limited:
 - Online, satellite and cable usage only.

Seite 24

The CISAC case



How did the Collecting Societies react?

To remove antitrust concerns, CS offered modifications of agreements (commitments)

■ Good:

- ☐ Lifting the membership restrictions – Authors can choose;
- ☐ Lifting the exclusive territorial restriction – Users can choose;
- ☐ EEA-wide multi-territorial licences grant possible covering portfolio of a CS!

■ Bad:

- ☐ Commitments limited to performing rights!
- ☐ Caveats to prevent “powerful music users” from provoking a “race to the bottom” on royalties (CISAC).

Seite 25

The CISAC case



Extensive caveats destroy pro-competitive effects

“Deny, delay, degrade.”

- Tariffs for multi-territorial licenses agreed between CS = Price fixing.
- Country of destination principle for royalties
- Multi-territory license only by CS fulfilling extensive catalogue of requirements
 - ⇒ Existing structures cemented, excluding efficient administration as driver for competition.
- Online: Multi-territory license only for
 - ☐ Offering with multi-territorial target group ⇒ National websites excluded;
 - ☐ For consumers ⇒ B2B rights users excluded.
- Satellite: Multi-territory license only for broadcasters with multi-territory target group (≥ 6% outside domestic area)
 - ⇒ Multi-territory License only for CNN & Co., P7S1 channels would not qualify.

Seite 26

The CISAC case



Even worse ...

The end of the "One-Stop-Shop"

■ Limitation to performing rights renders changes useless:

- Broadcasters need Performance & Mechanical rights – e.g. for broadcasting concerts (archiving not covered by performance right);
- Two-stop-shop: Broadcasters must still shop for mechanical licenses;
- New System more complex than old system.

■ Right to exclude specific repertoire from reciprocal representation network:

- ⇒ Direct licensing for attractive repertoire (e.g. CELAS).
 - ⇒ End of even the national "One-Stop-Shop",
 - ⇒ End of the World (Repertoire),
- ⇒ The end of the only advantages of the old system.

Seite 27

The CISAC case



The EU Commission's Investigation

A lesson in effective lobbying

- One year ago – on June 14, 2007 – the Commission published the proposed commitments of CISAC and its member societies and called for comments.
- Broad resistance prevented Commission from declaring the commitments binding.
- The case is still pending...

Seite 28

The CISAC case



EU Legislative Efforts

A sophisticated international affair? A total mess? Or what?

- EU Commission first brought up the case for EU-wide licensing in April 2004.
- Mid-2005, Commission paper on collective cross border rights management:
 - Do nothing (Option 1);
 - Suggest improvements of cross-border cooperation btw. national CS in the EU (Option 2);
 - Let right-holders chose the CS to manage their works across the EU (Option 3).
- Commission proposes Option 3.

Seite 29

The CISAC case



EU Legislative Efforts

It ain't over yet...

- March 2007: EP criticised Commission's recommendation ("**Lévai Report**"):
 - "Option 3' to marginalise small country CS";
 - "Maintain international reciprocal agreements providing one-stop-shops for users";
 - "Apply country of destination principle to determine applicable tariffs."

Seite 30

The CISAC case



Side effects in Hungary?

Statutory Monopoly for Collecting Societies

- EU Commission called Hungary to terminate this statutory monopoly.
 - Infringement of Article 43 EC Treaty: Right of Establishment;
 - Infringement of Article 49 EC Treaty: Free movement of services.
- Measures taken by Hungary: Draft amendment of the Hungarian Copyright Act:
 - Several CS may exist with respect to a particular right of a particular group of right-holders;
 - However, right-holders may not be members of more than one CS at the same time;
 - Foreign entities may register as CS in Hungary with respect to collective management of online rights ;
 - However, foreign CS might not be able to clear online rights for Hungary, unless registered in Hungary;
 - CS must be representative (CS must represent a significant part of the right-holders in the given area).

Seite 31



Köszönöm a figyelmet !

Seite 32