

THE INTRODUCTION DIGITAL TELEVISION IN GERMANY

REGULATORY ISSUES – A COMPARATIVE ANALYSIS

by

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A. Introduction

The future of television broadcasting is digital. This applies to both the German as well as the British situation. Furthermore, both countries find themselves within the same legal framework when it comes to the question of open access to digital conditional access systems which have been set by the European Directive 95/47/EC.¹ However, not only market development, but also the creation of a suitable national legal framework for digital broadcasting has developed differently in both countries so far. The following analysis will examine this development, point out the relevant differences between the German and the British examples, and emphasise the transition of the European Directive into the laws of both nations.

While doing so, we will take a German point of view,² first providing an overview of the development of the digital television market in our country, which started in 1994 and which still has not reached any kind of settlement. Afterwards, we will describe the current legal framework that applies to digital television and which especially deals with conditional access systems under German law. Finally, we will move to the British situation and offer a comparative analysis of the development in both countries, trying to highlight their main differences, especially when dealing with the European Directive.

B. Market Development

I. Early Steps

The beginnings of digital television in Germany go back to 1994, when the Deutsche Telekom AG, the Bertelsmann AG and the KirchGroup founded a joint operating company for digital Pay TV services (*Media Service Gesellschaft*, MSG). Its purpose was to comprehensively supply technical and administrative services for digital television. In this context, the Deutsche

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¹ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, Official Journal L 281, 23/11/1995 p. 51 – 54.

² However, the authors already offered a detailed analysis of the British DTV regulation in an earlier paper as well. See Holznagel/Grünwald, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 1997, pp. 417-427.

Telekom AG was to develop a uniform Set-Top-Box, with the Bertelsmann AG providing the necessary subscriber management services and the KirchGroup producing the majority of the programming content.

However, the German public broadcasters, ARD and ZDF, were not involved in the MSG. Consequently, they were concerned about not being able to catch up with the digital television age after finding themselves locked out of the technical distribution platform of the MSG. From the beginning, the European Commission critically observed the establishment of the MSG, too. Having scrutinised the joint venture, the Commission found that regardless of future actual market development, each of the three enterprises taking part in the MSG was completely dominating the market with regard to its respective task (technical services, subscriber management and production of programming elements). The European Commission therefore held that this constituted a major threat for the freedom of competition in the Community and forbade the foundation of the MSG union with reference to the merger regulation.³

Shortly after the establishment of the MSG had failed, the enterprises involved made a new attempt at co-operation. This time, however, public broadcasters were also invited into the circle of the partners of the *Multimediatelebetriebsgesellschaft* (MMBG), which was now to be created. Its goal was to set up a competition-neutral platform, which other than the MSG would be limited to the supply of the technical infrastructure for the distribution of digital television, this time leaving out its content and subscription matters. Very soon however, the partners began struggling over numerous details of their arrangement, in particular with regard to the decoder technology which was to be used. Thereupon, the KirchGroup ceased all co-operation with the Bertelsmann AG. Thus, this initiative also failed.

II. The Premiere Case

After the failure of the different efforts at co-operation with other enterprises, the KirchGroup independently developed a digital television station as a 100 per cent subsidiary, called DF 1. The first DF 1 broadcasting took place on July 28th, 1996 via satellite. However, the Pay TV channel clearly proceeded more slowly in its development than expected. This soon caused serious economic difficulties within DF 1 as a company, as well as within the KirchGroup as a whole. Therefore, in 1997, KirchGroup and Bertelsmann AG decided to merge DF 1 with the analogue Pay TV channel, Premiere, which was at that time dominated by the Bertelsmann AG.

These merger plans were again examined critically by both the German and the European competition authorities and finally rejected by the European Commission in May 1998.⁴ This represented a further and more sensitive drawback for the development of digital television

³ 94/922/EC: Commission Decision of 9 November 1994 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.469 - MSG Media Service), Official Journal L 364, 31/12/1994 p. 1 – 21.

⁴ 99/153/EC: Commission Decision of 27 May 1998 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.993 - Bertelsmann/Kirch/Premiere), Official Journal L 53, 27/02/1999 p. 1-30.

in Germany. Bertelsmann AG and KirchGroup, however, first tried to evade the decision of the Commission by reorganising the ratio of their interests in Premiere. Thus the channel should be built up to the most important provider of digital television services in Germany by internal growth. However, this plan was again turned down by the German Cartel Office in October 1998.⁵

Much to the surprise of the public, however, in the spring of 1999, the Bertelsmann AG announced the immediate termination of all of its Pay TV activities. Among others and above all, this effected the company's participation in Premiere, which was lowered to an interest of 5 %. The remaining shares were entirely taken over by the KirchGroup, including the Premiere interests of the former French partner Canal+. Despite this emergence of a KirchGroup quasi-monopoly in the field of digital television, the antitrust bodies this time agreed to the transaction, stating that it would help to terminate the transverse intertwining between Bertelsmann AG and KirchGroup, whereby at the end of the day, the competitive conditions within the German television market would be improved by balance.

At first, the KirchGroup continued offering DF 1 and Premiere as separate brands, the latter's analogue programme having previously been supplemented by additional digital offers. By October 1999, however, the DF 1 programme, as such, ceased. After a necessary restructuring, the contents of both services were united under the common brand name, "Premiere World". Regarding decoder technology, Premiere World still relies on the d-box or set-top box which was previously used by DF 1.

Currently offering approximately 30 Pay TV channels, Premiere World is at present the only digital television broadcaster in Germany. It distributes its programme over both cable and satellite, reaching a technical range of approximately 80 % of the population. In the meantime, however, other broadcasters have announced the start of digital programmes, among them RTL, the largest commercial Free TV channel in Germany, which foresees four digital programmes. Meanwhile even public broadcasters eventually transmitted their main programme digitally, using the so-called Simulcast procedure, while offering additional special interest channels.

III. Field Testings of Digital Terrestrial Television

With regard to cable and satellite broadcasting, Germany therefore is catching up with the age of digital television, even if the audience in this field is small in comparison with other countries. Terrestrial commercial digital television, however, is not yet available in Germany. In this field, only some model tests are being exercised thus far (e.g. one in the Berlin area and another in Northern Germany). In addition to Deutsche Telekom AG, commercial as well as public broadcasters are involved in the latter project. Both this and the Berlin project place special emphasis on mobile applications of digital television.⁶

⁵ Bundeskartellamt, Decision of 6 October 1998, at <http://www.bundeskartellamt.de/6101998.html>.

⁶ For more details see Ladeur, MMR 1999, p. 266-72.

IV. Analogue Switch-Off

In December 1997, the German Federal Government had assigned the Federal Ministry for Economics to prepare a suggestion to arrange the transition from analogue to digital television broadcasting. In lines with this effort, a working group named "Digital Broadcasting" was set up, which submitted its final report in the autumn of 1998.⁷

In its report, the working group assumed that apart from cable and satellite, terrestrial and digital television will also play a special role in the future media landscape. This consideration is justified by the achievements of the terrestrial approach with regard to mobile and portable reception, in addition to its advantages in terms of range and cost. The report demands an immediate stop to further investment into the development of analogue transmission networks. Instead, it recommends that an analogue switch-off by 2010 be aimed for. This end-date will, however, be re-examined in 2003 and the final execution will depend on whether the general population can be provided with a sufficient penetration of terrestrial digital television at this time.

Thus, the report of the working group "Digital Broadcasting" does not contain any specific suggestions for regulatory arrangements in the transition scenario. It only determines that "major challenges" are involved in the analogue switch-off for everyone involved. The report remains especially obscure when it comes to questions of how changed conditions for the need of terrestrial frequencies are to be handled. Nevertheless, the working group plans to continue their activities in the future.

C. Regulatory Framework

I. Constitutional Background

The Constitutional framework of the German communications and media sector is primarily determined by Art. 5 I 2 GG.⁸ This provides for the freedom of broadcasting, whereby the freedom of the press and freedom of reporting by means of broadcast and film are guaranteed. Since the foundation of the Federal Republic of Germany, this fundamental right has been subject to the jurisdiction of the Federal Constitutional Court at various times.⁹ These trials shaped the Article's current range. One of the key elements of this range is that Art. 5 GG demands a "positive order" of the broadcasting system. This implies that the legislator is not allowed to let the radio and television markets develop absolutely freely on the basis of purely market forces. On the contrary, German legislators have a duty to act in order to guarantee the free development of the freedom of broadcasting. In addition, the Constitution requires that the legislator set down all decisions which affect fundamental rights in the form of written statutes.

⁷ See http://www.bmwi.de/infomaterial/dr_bericht.html.

⁸ See Hoffmann-Riem, *Regulating Media*, New York 1996, p. 119-123; Michalowski/Woods, *German Constitutional Law*, Oxford 1999, p. 212-214.

⁹ BVerfGE 12, 205; 57, 295; 73, 118; 83, 238; 90, 60; 92, 203; BVerfG NJW 1998, 1627.

The legislator is prohibited from delegating these important decisions to lower bodies, since decisions that affect fundamental rights must necessarily be made in Parliament. This implies that the fundamental decisions about the positive broadcasting order have to be made by legislators themselves in the form of regular written statutes. Thus, a broadcasting regulatory framework consisting of administrative guidelines would violate Art. 5 GG.

Additionally, German Constitutional law prescribes a separation of the regulatory powers in the fields of media and communications.¹⁰ Thus, pursuant to Art. 73 no. 7 GG, the legal regulation of telecommunications is incumbent on the Federation. Telecommunications, in this sense, is understood as purely technical procedure of the transmissions of signals. In addition to individual communications such as voice telephony, for example, this also encompasses broadcasting, but only in its technical rather than its editorial features. In contrast to this, the states are – pursuant to Art. 30, 70 GG – responsible for the legal arrangements of the broadcast. This separation of powers does not only apply to the legislation, but also to the level of the regulation of the services concerned. Accordingly, the supervision of the telecommunications sector is incumbent on a Federal authority, the *Regulierungsbehörde für Telekommunikation und Post* (RegTP), while the state authorities for the media (*Landesmedienanstalten*) are responsible for the broadcasting sector.

II. Current Legal Framework

As a consequence of this multi-layered system of authorities, the existing legal framework for digital television in Germany is obscure. In particular a uniform set of rules is missing that would regulate the substantial areas of digital television in a truly comprehensive way. There is, however, a joint comprehensive treaty, in which the states agreed on uniform regulations for broadcasting, the so-called Broadcasting State Treaty (*Rundfunkstaatsvertrag*).¹¹ Further details finally can be found in the rules of the states that refer to the broadcast contract between the states, and in the informal agreements in which the *Landesmedienanstalten* themselves decided over several aspects of digital television. Finally, there exists a revised version of the Broadcasting State Treaty. Together, all these documents form the current legal framework for digital television in Germany, which will now be discussed in more detail.

1. Broadcasting State Treaty of 1996

§ 53 of the 1996 Broadcasting State Treaty demands that any owner of digital conditional access facilities offer his services to others with fair, reasonable and non-discriminatory conditions. Thus, § 53 of the Broadcasting State Treaty practically transposes the European Directive on a word-for-word basis into German law. § 53 also rules that any conditional access provider has to announce his presence in the business to the respective *Landesmedienanstalt* that is in charge of his matters. However, German law does not demand conditional access providers to

¹⁰ See König/Röder, *Converging Communications, Diverging Regulators?*, IJCLP Web-Doc 1-1-1998, http://www.ijclp.org/1_1998/ijclp_webdoc_1_1_1998.html.

¹¹ To be found at <http://www.alm.de/rfstvert.htm>.

be licensed under media law. But most of all, § 53 of the current Broadcasting State Treaty does not provide any specifics about what exactly is meant by the terms "fair, reasonable and non-discriminatory conditions of access." Therefore, the Treaty only regulates the "if" of an open access, leaving out "how" it will be implemented and enforced.

2. Television Signal Transmission Law

Besides, not only the German States, but also the federal government has dealt with the question of providing open access to conditional access services in its legislation. This happened in 1997 when the so-called Television Signal Transmission Law (*Fernsehsignalübertragungsgesetz, FÜG*)¹² came into force. This law covers mainly technical standardisation issues for television sets and conditional access systems. Nonetheless, § 7 of this law includes identical provisions to the ones that can be found in § 53 of the Broadcasting State Treaty, demanding fair, reasonable and non-discriminatory access to conditional access systems. This doubling of the relevant open access rule raises the question of how exactly both provisions can be separated from each other, both in terms of enforcement competence and interpretation.

3. Regulations in the Broadcasting Acts of the States

Currently, the media laws of the states contain no independent regulations for digital television. They restrict themselves rather to so-called test clauses, which grant the state media authorities a right to permit model tests and pilot projects regarding digital television. In contrast to conventional licensing in the field of media law, these permissions are more open to innovations, since – due to their temporal restriction – the regulatory authority can adjust more quickly to changes of the actual conditions of digital television. On the other hand they often appear to be too indistinct and extensive, which also raises constitutional issues. This form of legislation is constitutionally problematic because of the provision embodied in the German constitution which means that the legislator must regulate any substantial legal question himself and may not leave it to the administration.

Based on these test clauses, the states passed further regulations for digital television, that are not embodied in an act of parliament. In this area, however, there are substantial differences between the individual States every now and then. These differences become especially obvious with regard to the respective approaches the States chose to apply in their regulations. For example, following the experimental clause in its Broadcasting Act, Northrhine-Westfalia passed a separate ruling that authorised the *Landesmedienanstalt* to give out special licences to digital television broadcasters, the so-called *Medienversuchsverordnung*. On the other hand, Bavaria did not adopt the licensing scheme but decided in favour of a contractual solution. Doing so, the Bavarian *Landesmedienanstalt* negotiated a contract based on public law with DF 1 in 1996, at that time Bavaria's only operating digital television broadcaster, which included several provisions DF 1 had to fulfil while operating its services. However, being an experimental agreement as well, this contract was only valid for a certain amount of time. It has now become irrelevant

¹² To be found at <http://www.artikel5.de/gesetze/fueg.html>.

anyway as DF 1 went out of business by feeding its programming activities into Premiere World, as we mentioned earlier. But still, both examples may demonstrate once again the variety of different regulatory approaches within German digital television which arise due to the federal structure of the country.

4. DLM Agreements

Apart from these regulations, which are specific for each individual state, the Conference of Directors of the regulatory bodies of the states (*Direktorenkonferenz der Landesmedienanstalten* – DLM) issued statements concerning the legal questions of digital broadcasting, especially conditional access systems. The DLM is a general body consisting of the Directors of all individual *Landesmedienanstalten*. The agreements and decisions made by this body are only of an informal character, they do not oblige the individual state regulatory authorities to act. Nevertheless, in reality the *Landesmedienanstalten* generally follow the agreements of the DLM in their regulatory decisions.

The DLM issued its agreement concerning conditional access systems in June 1997 and published a revised version in December 1997.¹³ The first edition contained only general provisions to put "Freedom of Access," which is laid down in § 53 RStV, into more concrete forms. In contrast, the second edition of December 1997 alluded plainly to the then planned co-operation between Bertelsmann and the Kirch-group in digital TV. Although the European Commission prohibited this co-operation in the end, the relevant rules and regulations are basically still applicable.

With its agreement, the DLM tries to add more details to the Freedom of Access provision laid down in the Broadcasting State Treaty. It demands that conditional access providers shall keep their conditions of co-operation with others transparent. The DLM also requires them to unbundle their services as much as possible, especially in terms of a separation of subscriber management and technical conditional access services, including separate billings for each of the relevant services. And finally, the conditional access providers shall be obliged to actively support the development of technical solutions that would help keep conditional access systems open.

III. Future Perspective

The core element of the future development of the German regulatory framework for digital broadcasting is the revision of the Broadcasting State Treaty. It is meanwhile available in a draft version that will come into force in March 2000.¹⁴ The revised Treaty also effects the open access provision for conditional access services included that laid down in § 53 of the current version. However, the open access provision itself remains unchanged, still demanding from conditional access providers the offer of access to third parties at fair, reasonable and non-

¹³ To be found at <http://www.alm.de/aktuelles/position.htm>.

¹⁴ To be found at <http://www.artikel5.de/gesetze/rstv.html>.

discriminatory conditions. But in addition to this, the new Treaty now requires that providers keep their conditions of co-operation transparent, as well as explicitly not allowing any discrimination by means of pricing methods. Therefore, the new Treaty not only fully complies with the requirements of the European Directive 95/47/EC, but it also is an effort to transfer the Directive into German law in further details.

The revised Treaty also covers the procedural matter of guaranteeing open access to conditional access services. Although it does not rely on a licensing scheme for conditional access systems, in favour of simply requiring providers to announce their going into business to the *Landesmedienanstalt*, the *Landesmedienanstalten* will themselves now be required to pass a joint statute that clearly indicated the terms of a fair, reasonable and non-discriminatory access. This promises a higher amount of clarification in the enforcement of the open access provision. Additionally, the revised Treaty gives a special right to the public service broadcasters to comment on that statute before it actually comes into force.

Although it still remains to be seen what exactly the joint statute of the *Landesmedienanstalten* on the open access provision will look like, the revised version of § 53 of the Broadcasting State Treaty seems to be a clear move towards more clarification and probably efficiency in the enforcement of that provision.

D. Comparative Analysis

There is a fundamental difference in the development of digital broadcasting in Germany and Great Britain. This difference relates to market development as well as to the regulatory framework. The regulations guaranteeing a reasonable, equal and non-discriminatory access to the gatekeeper-positions of digital broadcasting are very different in both countries.

While Great Britain has been broadcasting by terrestrial and digital means since the fall of 1998 via six national multiplexes, in Germany so far there do not exist any other digital programs except for the pilot- and test projects mentioned above. Premiere World, still being Germany's only country-wide-operating digital broadcaster, is only distributed via cable and satellite. The reason for this difference in market development is evidently the different market penetration of cable- and satellite connections in both countries. In Germany, about 51 % of households are connected to the cable network, with an additional 37 % receiving satellite television.¹⁵ This means that hardly more than 10% of German households are in need of regular terrestrial broadcasting with its four to five different analogue stations and programs.¹⁶

By contrast, cable and satellite broadcasting in Great Britain only reaches a market share of about 25%. Thus, terrestrial broadcasting plays a completely different and much more important role in the future development of broadcasting in the UK than it does in Germany. However, as the current pilot-projects show, broadcasters in Germany are also well aware of the still

¹⁵ See http://www.bmwi.de/infomaterial/dr_bericht.html.

¹⁶ *Zimmer*, Media Perspektiven 1998, 352 (352).

existing significance of terrestrial broadcasting, especially with regard to portable and mobile television sets. In the medium range there will also be an analogue switch-off of terrestrial broadcasting in Germany, but the time frame for this will necessarily be longer than in Great Britain, where the analogue Switch-Off is already planned for the year 2006.

The situation in both countries is different not only regarding the market situation, but also regarding the legal aspects of the development of German and British digital broadcasting. The most fundamental difference lies in the regulatory approach taken in each country. By enacting the Broadcasting Act 1996, Great Britain decided on a comprehensive and extensive legal solution, which is amended by guidelines and codes of conduct issued by OFTEL and the ITC.¹⁷ In doing so, the UK established a regulatory framework that contains the most detailed and complex legal provisions regarding digital broadcasting in Europe.

By contrast, in Germany there are hardly any comparable legal regulations. The written statute only contains some basic rules and tries to codify the above mentioned experimental clauses. Additionally, some rules exist that deal with particular isolated problems of digital broadcasting. However, in contrast to the British situation, these rules do not exist on the basis of a formal statute issued by Parliament, but only as rules and regulations issued by the relevant supervisory body.

The advantage of the German regulatory approach is definitely a high amount of flexibility and openness to innovations regarding the existing regulatory framework. This openness results from the use of experimental clauses and has been explicitly the reason such clauses are chosen. On the other hand, the German approach lacks judicial security and transparency. The importance of a reliable regulatory framework should not be underestimated especially for a market like that of digital broadcasting which is still in the process of developing. In Great Britain, judicial security is guaranteed on a much higher level than in Germany by laying down the structural principles of digital broadcasting regulation on a statutory basis.

Additionally, the absence of judicial security in Germany also creates constitutional problems, since Art. 5 GG demands a „positive order“ for broadcasting. This positive order can only be created by formal statutes, not merely by administrative regulations. The constitutional requirement that statutes have to contain a certain degree of certainty also has to be taken into account in this context.

To conclude, let us compare how both countries transformed the directive 47/95/EC into national law.¹⁸ With the broadcasting act of 1996, Great Britain created a complex regulatory system to fulfil the requirements of the directive by guaranteeing reasonable, equal and non-discriminatory access to Conditional-Access-Systems. Again, these regulations are amended by guidelines of OFTEL, which is also obliged to control the British Conditional-Access-Providers. This regulatory scheme results in a tight framework for those providers, which is in

¹⁷ See <http://www.oftel.gov.uk/broadcast/conacc.htm> and <http://www.itc.org.uk/digital/index.asp>.

¹⁸ See also Communication COM(1999)540 from the Commission: Report on the development of the market for Digital Television in the EU, in the context of the TV Standards Directive 95/47/EC.

accordance with the directive 95/47/EC. In Germany, however, the directive has been transformed into national law both by the Television Signal Transmission Law on the one hand and by § 53 of the current Broadcasting State Treaty of 1996 on the other. Both regulations only repeat the provisions of the directive, without containing any rules that try to reach the goals of equal and non-discriminatory access. Such rules can only be found in the stipulations of the DLM, with the consequence that, due to their juridical quality, the rules are not binding.