

TO PROTECT AND TO SERVE PLURALISM AND THE PUBLIC SERVICE MISSION
COMMENTS ON THE EUROPEAN COMMISSION'S COMMUNICATIONS REVIEW
1999 *

by

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A. Preliminary remarks

The Communications Review 1999 and the associated Communications from Commission on radio spectrum policy, the development of the market for digital television in the European Union and the implementation of the reform package for the telecommunications sector deal with subjects which are of prime importance to the digital future of Europe and thus also to the broadcasting companies as content providers and radio transmission network operators.

The European Commission accurately describes the dynamic development of markets in the communications sector. Driven to a large extent by technological convergence, this development is leading to the emergence not only of new sectors of commercial activity such as e-commerce and e-business but also new public interest services that will contribute to building an information society. This development poses a number of challenges to the regulatory regime. Growing technological convergence leads to new and novel digital gateways, which raises the issue of securing access to information and thus control over the "gatekeepers". This results in the need to concentrate and co-ordinate the previously rudimentary and selective regulatory approach on a European level.

B. ARD and ZDF react to the aspects addressed in the Communications Review as follows:

I. Objective, principles and form of the future statutory framework

ARD and ZDF agree in principle on the need seen in the Commission's Communications Review 1999 to have separate regulatory approaches to content services delivered via network infrastructures on the one hand, and the relevant communications infrastructures on the other. The regulatory regime must, however, also contain structural safeguards which take account of the fact that the issue of access to content is inextricably linked to that of access to technological platforms. In its Communication "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age" of 14 December 1999, [KOM (1999), 657], the Commission recog-

* Joint position of the Association of German State Broadcasting Corporations (ARD) and the Second German Television (ZDF) on the Commission Communication "Development of a New Framework for Electronic Communications Infrastructure and Associated Services – Communications Review 1999"

nised that this involves a relationship between content-specific and infrastructure-specific regulations which in certain sectors must address not only the means of delivery but also the character of the services delivered. Such structural safeguards are especially important from the point of view of the public service broadcasting system, which cannot perform its public service mission – now expressly recognised by the European Treaty through the Amsterdam protocol declaration – of upholding and advancing the democratic, social and cultural interests and contributing to integration in the Member States. The performance of these roles will be more important than ever in the digital age. However, the distribution channels must primarily be secured.

II. Permits for radio and television transmission networks

The Commission suggests that all transmission networks, including terrestrial broadcasting networks and telecommunications networks, should be included in the scope of the new statutory framework. The Commission presumes that the transmission means and routes for telecommunications services and broadcasting are to be evaluated equally without any discrimination between these services. This approach does not take adequate consideration of the fact that the networks have differing infrastructures and fulfil different service tasks. For example, the transmission of a radio programme aimed at the general public via mobile telephone networks is out of the question for profitability and capacity reasons. On the other hand, radio broadcasting networks transmit mainly radio signals and associated services, so that it is not always absolutely necessary to separate network operation and programme provider. It should also be taken into consideration that permission for running a radio station and for operating the station's own radio transmission networks is sometimes granted in a joint statutory authorisation. In such cases it is important for adequate account to be taken of the aspect of protecting the status quo, and to ensure that this decision remains the privilege of the corresponding legislative bodies of the Member States.

III. Access and interconnection

ARD and ZDF welcome in principle the Commission's intention to retain specific Community statutory directives controlling access and interconnection. In this context the principles stipulated in the Interconnection Directive and in the Television Standards Directive certainly provide a regulatory basis. But these principles need modifying and updating in view of new digital gateways. This applies particularly to digital radio in Europe. Although convergent technologies are present here, digital radio in Europe is still far from a state of interoperability with guaranteed open access. Here in particular and in the associated field of technical services and infrastructure, the situation is different than in the telecommunications or online sector, whose spectacular growth development is based primarily on a high degree of interoperability and open access.

Digital television on a European level is characterised above all by a large amount of incompatible proprietary standards. As a rule, the decoders, their operating and CA systems and functionality usually correspond to only one certain digital platform, thus restricting and impeding access of both providers and also consumers to the new services. *This* results in a distortion

of competition, impeding the consumers' right of choice and also preventing the development of the potential present in digital television of becoming a simple and broad access route to the Internet and to online services. In addition, this also restricts the breadth of the range of digital TV channels, particularly those with a general public service function and future public interest e-society services. In this context, the recent agreement which was explicitly supported by ARD and ZDF on the DVB Multimedia Home Platform constitutes a first major step to change this situation. However, this agreement requires further safeguards in the form of binding implementation at European or Member State level. Current developments in digital television in Germany are a notable example here.

In this context, ARD and ZDF are of the opinion that it is vital to safeguard and anchor the following basic principles by means of corresponding regulations:

- **Safeguarding the development of digital television throughout Europe by making it obligatory to ensure non-discriminatory licensing of "key tools" on reasonable terms and conditions; disclosing the technical parameters and interfaces needed to establish interoperability. In addition, setting standards on a voluntary basis or through regulatory instruments and binding stipulations of adjustment timetables.**

Here the central objective for every regulatory approach must be to anchor the obligation to disclose and license key tools and important interfaces at reasonable conditions. Technological development alone will not solve these problems in future. The need for obligatory regulatory regimes also exists for the migration of proprietary systems to European or International standards.

- **Ensuring free and open access to digital services and platforms on fair, reasonable and non-discriminatory terms.**

The current regulatory regime for safeguarding access to digital gateways and decoder systems goes back to the directive from 1995 on the application of standards for the transmission of television signals, which focused on safeguarding access to Conditional Access Systems. But as far as the control range is concerned, this directive has proven to be too restricted as regards the scope of licensing obligations, being both unpractical and ineffective. As ascertained by the Commission in the Communications Review 1999, the scope of this directive must be supplemented and extended with regard to the new digital gateways, such as navigators (ESGs), decoder operating systems or APIs. The same applies to communications, distributions and access coding services (e.g. CA systems, multiplexing), which should also be included in the scope of the access regulatory regime. In the interests of legal safety, here the digital gateways covered by the obligation must be given a binding definition which has to be continually updated.

The Communications Review 1999 does state some new bottle-necks resulting from digital technology. But in the opinion of ARD and ZDF, the Commission's attitude in the Communications Review, according to which a network operator should not be obliged to safeguard fair access to these "gateways" until he has acquired a dominant market position or at least 25 percent market share, is inadequate:

- Particularly in the rapidly changing, converging markets, providers can acquire a position which contradicts the interests of the consumers in free choice and the interests of the content providers in open, non-discriminatory access, long before they come to dominate the market.
- This is also associated with effects on the diversity of opinion, which is at risk from inappropriate developments which, once they have occurred, can scarcely be reversed if at all. This is why further preventive regulations are necessary.
- Furthermore, a regulatory regime which depends on actors acquiring a certain market share or market position or containing so-called "sunset clauses" will also give rise to additional problems. The automatic stipulation of indefinite legal definitions results in legal uncertainties, interpretation difficulties and the resulting long-winded disputes, for example regarding the question of distinguishing the relevant market. This alone is reason enough why this cannot be a suitable instrument for reacting to the challenges of rapidly converging markets. No effective regulation or even the exclusion of areas from a sector-specific regulatory regime can be based on this.

Instead, ARD and ZDF are of the opinion that a new regulatory regime should stipulate the obligation to guarantee free access to digital services and platforms at reasonable, non-discriminatory conditions, with access guarantee and corresponding fee in a reasonable relationship. Such obligations should be applied to all "gatekeepers", regardless of their position on the market; from a legislative point of view, these would be more direct, simpler and more transparent, and would make the regulatory regime more effective to the benefit of all concerned. Another advantage would be the increased security for investment as regards new networks and services which would otherwise not be made in view of the insecure legal and economic market parameters described above.

ARD and ZDF therefore clearly express their opinion to the Commission that the market share model which takes general competition law as the basis for regulating communications and access services and communication infrastructures, should only be seen as a supplement.

- **Unimpeded access to diversity-oriented channels and services by maintaining must-carry rules**

Europe's digital future will not solely depend on the interoperability of various technical standards for securing fair access to digital gateways, but on the quality and diversity of the digital services delivered to consumers and citizens.

Thousands of new (mostly fee-funded) commercial channels and services, which only offer "more of the same", provide only a slight added value when it comes to spreading digital television. Studies of television markets, for example in the United Kingdom with its "progress" on the pay-TV front, show that an offer merely of digital (commercial) pay-TV services would just result in a market penetration of only somewhat more than half of the population. Accordingly, it is precisely the public-service channels providing corresponding content and digital free-

TV channels that will play the key role in making it possible for digital television to become available to every citizen, with free access to high-quality content.

Must-carry rules are an important means of establishing equal communication opportunities and guaranteeing universal availability of and access to the public service contents. They also act as publicistic counterweight and important instrument for curbing the opinion-making power acquired by "global players" through horizontal and vertical integration. As a rule their contents are scarcely attuned to national circumstances if at all; similarly, they scarcely originate from European production, if at all.

Must-carry rules also ensure that digital networks and platforms cannot be monopolised by pay-TV services alone.

Against this background, must-carry rules are necessary and indispensable in a digital world. On this point, it should be noted that compliance by network operators will become less of a problem as digital capacities become increasingly available.

IV. Frequency spectrum policy

With the stipulations on frequency policy within the Communications Review 1999 and in the Communication "Next Steps in Radio Spectrum Policy", the Commission has summarised the results of the public hearing into a Green Paper on frequency policy, and presented conclusions for subsequent measures, which are to be put into effect during 2000 in the form of a Draft Directive.

In its Communication, the Commission ascertains a need for frequency policy standardisation measures on a European level, referring to the strategic planning of frequency use, harmonisation of frequency allocation, uniform granting and approval procedures and market-oriented procedures for standardising radio appliances.

ARD and ZDF believe that greater transparency of frequency co-ordination can be adequately ensured by making more information available on frequency distribution and establishing common procedures under the relevant Community legislation. This also basically corresponds to the results of the hearing on the frequency policy Green Paper, where no serious need for change was seen apart from a few exceptions, usually companies in the telecommunications sector. Extensive transfer of frequency co-ordination from the Member States to the Commission therefore would not appear necessary.

According to ARD and ZDF, it is furthermore not clear which laws are relevant in the European Treaty when it comes to competence for harmonising frequency policy. Responsibility for frequency policy is fundamentally a matter for the Member States. A possible link for harmonisation of the frequency policy can only be seen in the general authorisation of Article 308 (formerly Article 235) of the European Treaty. Both ARD and ZDF believe that this legal basis is inadequate.

Furthermore, Article 308 of the European Treaty presumes that the Council will be unanimous in following the Commission's proposal after the hearing in parliament.

But even when in favour of fundamental EU competence, it must be remembered that with reference to the basic idea of subsidiarity which pervades European law (Article 3 lit. b Para. 2 European Treaty old version = Article 5 Para. 2 European Treaty new version) any need for control on the European Community level only exists in the event that the corresponding regulatory regimes on the Member State level have proven to be inadequate. Here the question arises whether in future there are going to be so many potential European services that strategic frequency planning on the European level will be vitally necessary at all. Instead of Community stipulation of the principles for frequency planning, one alternative geared more to the subsidiarity principle could consist of more effective co-ordination of national frequency planning in the Member States while taking greater account of the need for European standardisation, which the Commission could provide as part of the CEPT. It is remarkable that the Commission considers the principle of self regulation or self co-ordination on an international level to be a suitable instrument in many areas, including large areas of the communications sector, but takes a different point of view when it comes to allocation and distribution of the frequency spectrum.

But it is here in the area of frequency co-ordination and standardisation where a functioning system based on the accepted interaction of corresponding international organisations does actually exist. World-wide stipulation of frequency ranges, the planning of frequency distribution to the individual countries and the stipulation of international frequency co-ordination procedures are settled at world radio conferences and through frequency agreements as part of the International Telecommunications Union (ITU). The national governments accede to these international frequency agreements, giving them national legal status. On a European level, the CEPT is responsible for frequency planning. This body co-ordinates its position for frequency use in the form of ECPs (European Common Proposals) particularly for world radio conferences, and the European Radio Office (ERO) standardises frequency use in Europe. Just at the moment the CEPT is involved in extensive activities for standardising future frequency use in Europe in the three phase "Detailed Spectrum Investigation (DSI)". Therefore there can only be a need for Community frequency planning in those cases which are not covered by co-ordination through these two institutions. In this context it would be useful for the Commission as member of the CEPT to introduce the existing interests in Community co-ordination of certain frequencies for corresponding trans-frontier radio services into the CEPT co-ordination process. What must be avoided is that the Commission "instrumentalises" the CEPT and simply issues it with instructions for frequency standardisation and co-ordination. This would also ignore the fact that the CEPT not only consists of the Community Member States but altogether 43 European countries, so that frequency co-ordination on a European level not only considers the Member State interests but also superior pan-European frequency co-ordination interests.

Furthermore, the Commission sees the objective of its policy in promoting the efficiency of frequency use. To achieve this, an economic usage value is to be allocated to the frequencies. On the one hand, this should consist in principle in objective balancing of commercial forms of use. But the Commission sees problems arising here in the fact that non-commercial forms of use, i.e. services mostly in the "public interest", are not adequately defined. The Commission also persists in seeing usage fees as a solution for access problems to the frequency spectrum. In

doing so, the Commission is not rejecting the concept of "spectrum pricing", on the contrary, it indicates that only those operators who purchased frequencies at normal market conditions can operate them with the greatest economic efficiency. The Commission also considers the concept of a market for secondary trading in frequencies to be worth considering, but accepts that this needs further verification.

By adhering to this approach, both the Communications Review 1999 and the corresponding Communication herald a renunciation of the proven practice of sector- or service-specific frequency allocation, which up to now also guaranteed radio programmes preferential access to the terrestrial frequency spectrum.

But here the Commission ignores the fact that in addition to rejecting a purely economical definition of efficiency, the result of the public consultations did not produce general support for the sale, renting or general auctioning of frequencies. The same applies to the creation of a market for secondary trading, whose effects and implications are very hard to estimate so that this is viewed with great scepticism by ARD and ZDF.

Other European institutions such as the European Council clearly differ in their view of the importance of broadcasting in frequency distribution and allocation, particularly in view of the expanding sector of telecommunications services, than is the case in the Commission Communications Review.

For example, the European Council issued the following *Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism dated 19.01.1999* :

„In view of the expansion of the telecommunications sector, member states should take sufficient account of the interests of the broadcasting sector, given its contribution to political and cultural pluralism, when redistributing the frequency spectrum or allocating other communication resources as a result of digitisation.“

When it comes to weighing up between the prevailing scarcity situation on the one hand and the strong demand for use of the frequency spectrum on the other, the European Council takes up the following position in figure 26 in the Explanatory Memorandum to Recommendation No. R (99) 1:

“In this respect, the Recommendation underlines that governments should take into consideration the needs of the broadcasting sector when allocating spectrum. It is in particular stressed that, because of the rapidly expanding mobile-communications industry, adequate space should be saved for the television industry given its contribution to political and cultural pluralism.”

It is the opinion of ARD and ZDF that the Commission should adopt this Recommendation addressed to the Member States of the European Council as part of its frequency policy, because it reveals aspects which contradict the move to purely economic efficiency parameters.

It can also be seen that as regards use of the frequency spectrum, there is not necessarily a need to make a decision along the lines of exclusive preference for a certain radio service. On the contrary, it should also be taken into consideration that frequency ranges have already been allocated for UMTS services for example, so that the introduction of UMTS is not dependent

on the allocation of frequency ranges intended for new use. In addition, the conversion of the previously analog mobile telephone networks to digital distribution and the associated licensing of UMTS services opens up new possibilities within the already allocated frequency spectrum with scope for substitutions here.

But even if purely economic considerations are used, it is important to draw attention to the economic effects involved in the introduction of digital television or radio services on the level of terrestrial distribution. These too produce important impulses for technological development in Europe and thus for creating qualified jobs. Here European standards have been created in both the DVB and DAB range, some of which are already being used world-wide. But the emerging commercial prospects for companies in the Community can only be maintained if services with these standards are still available in Europe, which presumes that adequate frequencies are available here.

It is also worth noting that both terrestrial DVB and terrestrial DAB open up a completely different usage spectrum than UMTS services. Even the expansion of these possibilities by increasing the used data rates will not result in them being capable of mobile transmission of moving pictures, like DVB for example. Moreover, any clearance of the frequency spectrum used up to now for analog terrestrial broadcasting services would mean that only cable and satellite would be available as alternative forms of distribution. But in inadequately cabled countries, this would make consumers dependent on satellite systems. As a result, there would no longer be competition between various forms of distribution. This would give satellite providers a dominant position on the market, with scarcely any alternatives for the consumer. Moreover this form of radio use would also be more costly than previous terrestrial reception. The terrestrial distribution route is also ideally suited to the regional or federal structures of the Member States, as in contrast to the satellite it also allows for regional and local services. And in contrast to cable and satellite, it also caters to portable or mobile reception.

Even when the matter is considered from a purely economic point of view, the question arises whether usage of the public asset "frequencies" by European services really has the greatest economic value, or whether so-called *intangible* effects have to be considered here resulting in new forms of broadcasting services. If other services, UMTS for example, are substituted on these frequencies used by the broadcasting services, or if these frequencies are relocated to other problematical frequency ranges, then certainly the so-called "*lost opportunity costs*" have to be taken into account caused by relocation of substitution of public service or private broadcasting services. In addition, this would pose an unacceptable restriction on the eminent public interest in the distribution of these broadcasting services in the interests of maintaining a wide variety of opinion and pluralism. Furthermore, this would infringe the trust placed in these frequencies by the user, i.e. the private and public service broadcasting companies, as well as the radio user or consumer, who have become accustomed to using this form of distribution or means of reception.

As far as ARD and ZDF are concerned, the only justification for compulsory payments of usage fees is for commercial use of frequencies, i.e. when the public asset "frequency spectrum" is used to satisfy individual commercial objectives. The provision of so-called public services,

such as public service broadcasting programmes on the allocated frequencies must be considered from another point of view. Particularly when it comes to radio, the charging of usage fees would make services provided for information, entertainment, education and culture more expensive which would in turn influence the radio licence fees. Usage fees are therefore possibly justified for commercial radio companies. But non-commercial public service radio financed through the licence fees paid by the general public may not be evaluated from these economic points of view. Far more, its democratic, cultural and social functions which lie in the public interest must be taken into consideration. This is why the introduction of usage fees for the use of radio frequencies by public service broadcasting companies is a mistake, because the objective of eliminating competitive advantages when using different frequency ranges by raising corresponding fees cannot be reached in this way. On the contrary, frequency usage fees in this case constitute an unfair hurdle which contradicts the citizens' right to free, comprehensive information. The commercial value for frequency usage can also not be taken as a criterion here.

ARD and ZDF share the EU views on licensing fees and administration costs. The charges for licensing and frequency allocations should only reflect the administrative costs actually incurred. The suggestion is put forward to check the possibility of uniform licensing and allocation procedures on a EU level.

If frequency usage fees are charged in addition to licensing and allocation fees, these should not impede the development of new and innovative services, let alone be used as a source of general revenue for national budgets.

V. Institutional matters

The Communications Review 1999 and the Communication "Next Steps in Radio Spectrum Policy" proposes the creation of a Spectrum Policy Expert Group (SPEG) to deal with frequency policy matters on a Community level. This body should support the Commission in stipulating Community priorities in the context of harmonisation of frequency use.

ARD and ZDF are of the opinion that international frequency co-ordination on the basis of the wavelength plans and the on-going activities within the ITU and CEPT basically ensures that the procedural and general conditions are stipulated for frequency allocation and frequency usage in an open and transparent manner and with sufficient legal security. Although mechanisms for harmonising and allocating frequencies across the spectrum already exist (UIT, CEPT), ARD and ZDF welcome the Commission's proposal to create a Spectrum Policy Expert Group (SPEG). This group should include representatives of the broadcasting sector as a major user of the radio spectrum to ensure that its frequency requirements for performing its remit continue to be met. The expert group proposed by the Commission should also assist existing bodies such as the UIT and CEPT and advise the Commission on defining Community interests.

It cannot however be regarded as a body that will replace the CEPT's role as the framework for intergovernmental co-ordination between Member States.