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THE EU REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS AND THE COMMISSIONS PROPOSAL FOR A DECISION ON A REGULATORY FRAMEWORK FOR RADIO SPECTRUM POLICY IN THE COMMUNITY

CONCERNS OF AND CONSEQUENCES FOR PUBLIC BROADCASTERS IN THE EU

by

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A. The EU Regulatory Framework for Electronic Commications

I. Preliminary remarks

Fundamentally, even public broadcasters can share the Commission's horizontal approach to the regulation of communication infrastructures, on the one hand, and content-related electronic communication services, on the other. Moreover, they endorse the political objectives underlying the Commission's proposals, in particular the aim to safeguard competition, to secure open access to infrastructures on non-discriminatory terms and the prevention of a "digital divide" between users. Nevertheless, the proposals for the new regulatory framework fail to take sufficient account of the existing "links", in other words, the connections and interdependencies between the infrastructure and the content it transports. However, it is in the particular interest of the public to incorporate this interaction in the regulations.

In this respect, the proposal only draws one conclusion from the convergence phenomenon, and that is to cover all communication networks and associated services within a single framework. What it fails to see, however, is that a complete convergence of content and transport does not exist.

Above all, due consideration should be given to the fact that electronic communications addressed to the general public play a special role for a civic society and for democracy and a pluralism of opinions. Accordingly, the aim of a new regulation also of infrastructures must be to ensure that citizens have open and non-discriminatory access to the offerings of the information society. From this angle, regulating the infrastructure means more than creating a regulatory framework for the provision of technical services. The proposals rather pave the way for a future European policy to prevent a "digital divide" in this digital-age society. However, the proposals presented by the Commission fail to take account of the essential political goal which is to fundamentally acknowledge the fact that the regulatory framework must be open for specific

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public service offerings, which are crucially dependent on preferably unimpeded access of their content to communication infrastructure and corresponding access of their users to this content. This problem arises for all public service corporations in view of the increasing vertical integration of distribution and content and the associated tendency to treat the infrastructures and public goods such as the radio spectrum solely from an economic point of view.

The considerable concentration tendencies in the electronic media, especially increasing vertical integration of distribution and content services means that cable operators develop packages comprising television services, Internet and telephony and/or participate increasingly in such services, so that the question arises as to the access of competing television and other services. As regards the technical services associated with digital television including CI, API, and CA, the problem is not so much one of access to the individual levels from the aspect of vertical integration, but rather that the provision of these technical services is controlled by companies who simultaneously operate programme platforms and dispose over strategically important content. Other problematic aspects of vertical integration arise, if a dominant enterprise wants to develop software for access to broadband platforms together with the company dominating the television programme platform market.

The problem of vertical integration is also addressed in clause 6 of the European Parliament Resolution on the Commission Communication regarding the 1999 Communications review. The resolution points out the resulting disadvantages for consumers and competition in the field of digital television services and digital interactive services.

For these reasons a new regulation of communication infrastructure and associated services must also focus on keeping the markets open against such dominant powers. Only open market structures can ensure freedom of expression, pluralism and cultural diversity.

As the regulatory framework for electronic communications is an essential element of Europe's information society policy, it must be ensured that public interests and the interests of European citizens in this field are duly accounted for.

1. Proposal for a Directive on a Common Regulatory Framework for Electronic Communications Networks and Services

The Framework Directive stipulates the principle of separating the regulation of transmission from the regulation of content. In this respect, the new regulatory framework does not cover the content of services delivered over electronic communications networks and services. They include broadcasting content, financial services and certain information society services.

Recital 7 then states that the separation between transmission regulation and content regulation does not prejudice the consideration of links existing between them. However, this guideline, which is very important for the Member States' regulatory practice, is not to be found in the directive.

From this angle, the directive regulations with their one-sided focus on transport are inadequate. A regulatory approach like in the Framework Directive, which ignores the connection between infrastructure and the content it transports and only gives a general guideline in one of

its recitals , cannot solve the problems of competition and access that are crucial for the question of whether the transported content will actually "arrive" or not.

This also follows from the fact that the Commission's modified concept regarding the term "significant market power" in articles 13 ff. - incorporated in the ex ante regulations both of the Access Directive and of the Universal Service and Users' Rights Directive - still focuses on the classic instruments of telecommunications regulation. They were developed mainly in the context of regulating voice telephony - a field where content plays no role. Hence, both the instruments (accounting separation (Article 12), consultation (Article 6)) and the measures (harmonisation measures (Article 16)) of the proposed directive focus on technical services. They are suitable for undertakings that operate electronic services and networks regardless of their content and focus solely on their market position. These regulations do not cover the impacts on pluralism and cultural diversity, which take centre stage for the transmission of data and services with a public service function.

The communication from the Commission on "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age" of 14.12.1999 (COM (1999), 657) also acknowledges the necessity of adjusting infrastructure regulation to the nature of the service. It also considers such structural safeguards necessary, in particular for the public service broadcasting system to fulfil its public service function - already expressly confirmed in the Protocol to the Amsterdam Treaty - for the maintenance and promotion of democratic, social and cultural concerns and its contribution to integrating the Member States.

Hence, the text of the Framework Directive for infrastructure regulation should implement a complementary provision corresponding to the envisaged content regulation, which should safeguard this as a basic principle. This basic principle would have to be made concrete in other proposed directives such as the Access and Interconnection Directive or the Universal Service Directive.

The regulatory aim of an open and competitive market ensuring growth and benefits for European citizens can only be achieved, if the relevance of a communication infrastructure for content is not severed to such a far-reaching extent from transmission regulation as envisaged by the proposed directive. In this respect the proposed directive would have to be supplemented in a way enabling the Member States to deviate from general regulation guidelines by sector-specific regulations to serve public interests in the provision of specific audiovisual services or other public-sector services.

This is necessary above all in the following recitals and articles:

- ***Recital 7***

  Recital 7 only speaks of "broadcasting content". Hence, this term should be replaced by the more comprehensive term "audiovisual content" to cover new audiovisual services like electronic programme guides and interactive services.

- ***Recital 16***

Recital 16 of the proposed directive specifies that the allocation and assignment of radio spectrum is to be managed as efficiently as possible, balancing the requirements of commercial and non-commercial use of radio spectrum. In this context, the recital points out that secondary trading of radio spectrum can be an effective means of increasing efficient use of spectrum, as long as there are adequate safeguards to protect the public interest. Regarding the framework conditions, the recital then refers to the "Decision on a Regulatory Framework for Radio Spectrum Policy in the Community". The problem here is that the proposed decision contains no substantive law provisions for balancing public and private interests in spectrum use and assignment, but simply states that colliding interests should be clarified by institutional arrangements. In this respect, neither the proposed decision nor recital 16 define or specify the public interests that are to be safeguarded. In this context, one should single out that, in the conclusions on its communication on the "Community's Audiovisual Policy in the Digital Age" of 26 June 2000 (Official Journal C 196/1 of 12.07.2000), the Commission itself defined public interests that should play a role in the assignment of frequencies to broadcasting service operators:

> *„General interest objectives such as freedom of expression, pluralism, cultural diversity and consumer protection ... may be taken into account in the Member States' assignment of frequencies to the various broadcasting service operators".*

As a consequence there is a need for modifying recital 16 making clear the public interests that shall be duly accounted for by the Member States in spectrum usage include but are not limited to safeguarding freedom of expression, ensuring freedom of information, pluralism, linguistic and cultural diversity, social cohesion and consumer protection.

- ***Recital 20***

Recital 20 bears reference to the provisions of Article 13 ff. and the associated concept of "significant market power", claiming that ex-ante obligations to ensure effective competition are only justified for undertakings that have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry or which are vertically integrated entities owning or operating network infrastructures for delivery of services and also providing services over that infrastructure, to which their competitors necessarily require access.

This means that additional binding obligations can only be imposed on such enterprises in a very limited number of cases. In addition, it is not clear what "necessarily required access" is supposed to mean. Hence, there should be a clear definition of when this criterion is met. It should be out of the question that these conditions are not met, if, say, a cable network operator has a natural monopoly or dominant market position and refuses to grant access to his infrastructure, claiming that broadcasting services can also be transmitted terrestrially or by satellite.

- ***Recital 23***

  This recital specifies that standardisation should primarily be a market-driven process. For this reason the stipulation of specified standards at Community level should be possible only in certain situations. However, the recital cites no preconditions or criteria for this. Hence, the proposed directive should at least list all the criteria defining when and under what conditions standardisation can be made compulsory.

- ***Article 1 (2): Scope and aim***

  This article should grant Member States the possibility to impose measures securing access to contents beyond the regulations of the proposed directive. This is the only way to ensure that objectives like safeguarding the freedom of expression, pluralism, cultural diversity and consumer protection, which are public interest objectives and must be stipulated at Member State level, are duly accounted for.

- ***Article 6: Consultation and transparency mechanism for spectrum allocation***

  As a consequence of article 6 of the proposed Framework Directive the comprehensive consultation and transparency obligations of this article would apply whenever spectrum is allocated to public service or commercial broadcasting corporations. This regulation gives the Commission very far-reaching powers to monitor and, if necessary, prohibit such measures. This would subvert the existing spectrum management powers of the Member States in general and the federal state spectrum regime of German or Belgian broadcasting law in particular.

- ***Article 7: Policy objectives and regulatory principles***

  The basic principle of technological neutrality is definitely fundamental to the stipulation of policy objectives and regulatory principles. Still, there are certain infrastructures or technologies that are much better suited than others to transport audiovisual or other content services intended for the public. In the digital field, this goes for standards like DAB-T and DVB-T, for example. Therefore the Member States must have the opportunity to decide whether to provide certain spectrum areas exclusively to services that use specific standards or technologies.

  The article must also be modified due to the fact that, in the face of increasing vertically integrated structures, there is a danger that the diversity of offered contents, cultural and linguistic offerings for minorities and diversity of opinion will be reduced to the detriment of European citizens.

  Moreover, article 7 (2) (d) requires the regulatory authorities to ensure the "efficient allocation and assignment of radio spectrum". However the provision mentions no criterion for efficiency. In particular, it is unclear whether the Commission has really abandoned its purely economic concept of the term.

Only article 7 (4) (e) allows the regulatory authorities in the Member States to "address the needs of specific social groups, in particular disabled users", thus deviating from the criterion of efficiency.

In this respect, Article 7 of the proposed directive completely lacks any consideration of the legitimate and much further-reaching interests of the public and European citizens in the provision of broadcasting and other public services that not only address the needs of specific social groups but must be available to all citizens with a diversity of contents.

- ***Article 8: Management of radio spectrum***

The existing allocation and distribution system for spectrum management in the telecommunications sector, which provides, among other things, for payment of the economic value of a frequency, frequency auctions, or the introduction of a secondary market, cannot be transferred to the broadcasting sector. For it does not account for the fact that, especially in broadcasting, public interest objectives such as pluralism, cultural diversity and access to services orientated on public welfare must be considered. Nevertheless, the provisions on spectrum management in the proposed directive pick up this thread, although the Commission acknowledged in its conclusions on the communication on the "Principles and Guidelines for the Community's Audiovisual policy in the Digital Age" of 26 June 2000 (Official Journal C 196/1 of 12.7.2000) that it was necessary to account for the specific characteristics of audiovisual media and of content commitments in spectrum allocation and usage:

> *"General interest objectives such as freedom of expression, pluralism, cultural diversity and consumer protection ... may be taken into account in the Member States' assignment of frequencies to the various broadcasting service operators".*

The same aspects apply to the encouragement of a secondary radio spectrum market. In this respect, the question arises again how the objectives mentioned above can be safeguarded and achieved, once allocated frequencies are freely negotiable.

This concern is shared by the European Parliament in clause 11 of its Resolution on the Commission Communication regarding the 1999 Communications review:

> *"(...); is concerned to note that the Commission does not discourage spectrum auctions, since auctions tend to raise licence fees above their economic value, raise consumer tariffs and hamper the introduction of new services; (...)".*

For the above reasons the Member States must maintain the possibility to take public interest objectives into account for spectrum allocation and distribution. This is the case in many Member States, for example, in the form of the spectrum assignment regime for the public service broadcasting sector, which focuses on taking mostly statutory commitments to provide broadcasting services to the population nationwide duly into account. Hence, the tasks of a public service broadcasting operator often comprise the allocation of corresponding terrestrial frequencies.

Moreover, the problem of spectrum allocation will become even more pressing in view of the transition to digital broadcasting, particularly in the terrestrial field, where the broadcasting sector will need "more" spectrum to effect this transition.

As a matter-of-fact modifications are necessary to ensure that spectrum management considers the specific characteristics of the audiovisual sector.

According to this the EU-Member States shall ensure the effective management of radio spectrum for electronic communications services in their territory. They shall ensure that the allocation and assignment of radio spectrum by national regulatory authorities is based on objective, transparent, non-discriminatory and proportionate criteria, taking into account the democratic, social and cultural interests linked to the use of their frequencies.

The same reflections apply to other provisions of the regulatory package regarding spectrum management, in particular articles 5 to 8 of the Directive on the Authorisation of Electronic Communications Networks and Services.

- ***Article 12: Accounting and structural separation***

Article 12 specifies that the Member States must require undertakings providing electronic communications networks or public electronic communications networks or publicly available electronic communication services, which have special or exclusive rights for the provision of services in other sectors in the same or another Member State, to have a structural separation for the activities associated with the provision of electronic communications networks or services.

This requirement goes much too far. For the introduction of terrestrial digital television this would mean, for example, that public service broadcasting corporations who, after having met corresponding broadcasting law requirements, are granted multiplexing rights of their own but who - for technical reasons - must also perform multiplexing for third parties, would be forced to effect a structural separation of this activity. However, this would subvert the prerogative of the Member States under the Protocol to the Amsterdam Treaty, according to which they may define the mission and function of public service broadcasting.

- ***Article 21 (4): Creation of a High Level Communications Group***

According to Article 21 (4) of the proposed Framework Directive, a High Level Communications Group is to promote the "uniform application" of all national measures adopted under the Directive. However, this is no regulation on how this group is to be composed or who will decide on its composition. Neither does the article mention any term of office or procedure for adopting resolutions. As for the latter, the question arises whether decisions are to be made by a simple or qualified majority.

Moreover, it is not clear what the "codes of practice" under Article 21 clause 4 (f) mean, which may be drawn up by "interested parties" for the Member States on is-

sues regarding the application of Community legislation. This could lead to a future situation where manufacturers use codes of practice to commit the Member States to a certain application or interpretation of Community law.

In addition, under Article 21 clause 4 (g), the High Level Communications Group is also to monitor and publicise the activities of national regulatory authorities, "in particular national consultations" on specific regulatory issues and subsequent decisions. Again the question arises whether this would not open the door to a supervision of the Member States' broadcasting spectrum regimes and of the relevant authorities and institutions, in violation of the Amsterdam Protocol.

The interests of the Member States are only accounted for in that, under Article 20 (1) of the proposed Framework Directive, the Communications Committee comprising representatives of the Member States is informed by the Commission "where appropriate" on the outcome of regular consultations with the representatives of network operators, service providers, users, consumers, manufacturers and trade unions. In this respect, the Commission has no fundamental duty to inform the Committee; it can rather decide, at its discretion, whether to notify the Member States or not. Again, this shows that the implementation of the proposed directive and failure to account for these regulatory approaches in the Proposal for a Decision on Radio Spectrum Policy ought to change the balance of power between the Member States and the Commission regarding spectrum usage and management.

2. Proposal for a Directive on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services

- *Article 20: Interoperability of digital television equipment*

The provisions under Article 20, which contain interoperability specifications for digital television equipment according to annex VI, are important to protect consumers and their freedom of choice. However, they are neither far-reaching nor precise enough.

Accordingly, the specification in annex VI clause 1.2, according to which all consumer equipment intended for the reception of digital television must be capable of displaying signals transmitted in clear, is not unambiguous. Displaying signals alone is not a sufficient criterion, for digital television enables the transmission of interactive services, for example of EPGs or on-line channels. These services comprise functions that go beyond merely displaying screen contents. Hence, the regulation should provide that extra services transmitted in clear should be available to the consumer and fully functional on all terminals, if this equipment is able to display and perform interactive offerings. This equipment should meet the MHP standard.

Also, according to annex VI clause 2, any digital television set with an integrated screen of visible diagonal greater than 30 cm, which is put on the market for sale or rent in the Community, must be fitted with at least one open interface socket (either

standardised by a recognised European standardisation body or conforming to an industry-wide specification), permitting simple connection of peripherals and able to pass all the elements of a digital television signal.

This envisaged wording does not account for the fact that there is a difference in meaning between the terms "interface" and "interface socket". The requirement of an "open interface" implies the disclosure of software and data processing protocols. The term "interface socket", in its actual definition, only means the physical socket itself. Hence, the wording of the regulation should express the intended functionality.

Fundamentally, what the regulation prescribes here for the reception of analogue television is a so-called Scart socket. However prescribing an open interface socket for digital television sets with an integrated screen is problematic and hence inadequate. Hence, the provision ought to be modified, as well, to specify its functionality.

Neither does the screen size distinction make sense, specifying a visible diagonal of 30 cm for digital television sets. Hence, the provisions should also apply to television sets with a diagonal smaller than 30 cm, as the costs of an open interface are not related to screen size.

- ***Article 26: Must-carry obligations***

  - ***Article 26 (1)***

    Article 26 of the proposed directive provides that Member States may impose 'must carry' obligations, for the transmission of specified radio and television broadcasts, on undertakings under their jurisdiction providing electronic communications networks established for the distribution of radio or television broadcasts to the public. However, such obligations may only be imposed where they are necessary to meet clearly defined general interest objectives and must be proportionate, transparent and limited in time.

    This provision is incompatible with the regulatory framework of the Universal Service Directive, for the term "Universal Service" is specific to telecommunications law. However, in the case of must-carry obligations we are dealing with the consideration of specific services in the public interest that trigger sector-specific regulatory obligations due to their contents. Hence, the fundamental admissibility of must-carry obligations should be laid down in the Framework Directive, as these obligations constitute a case where there are interconnections and links between content and transmission structures.

    Moreover, the obligation ought to be made concrete in the Access and Interconnection Directive, for must-carry obligations pertain to certain forms of privileged access to communication infrastructures due to public interest in these services. This public interest is not fully covered by consumer protection but also extends to safeguarding media pluralism and cultural diversity, and ensuring pub-

lic access to the programmes and services of public service broadcasting corporations.

In addition, the restriction of must-carry obligations to the transmission of specified radio and television broadcasts is too severe in several respects.

For one part, restricting such obligations only to the transmission of "specific radio and television broadcasts" is inadequate, as they ought to be extended to all services that lie in the public interest - such as e-government or e-society services - and/or have public service functions. Moreover, one must take account of the fact that, in the context of the development of digital television, on-demand and interactive offerings will be integral parts not only of digital bouquets offered by public service broadcasting. Such services ought to be eligible for must-carry status, as well.

For the other part, the envisaged must-carry obligations should not just pertain to "electronic communications networks" for the distribution of television and radio services to the public, but should also - to take account of future developments - be extended to other transmission structures and related services (such as multiplexes, decoders, navigators, EPGs). To ensure general access to reception and access to public service offerings on all distribution levels, must-carry obligations should also be extended beyond the cable sector to the field of satellite transmission and the use of terrestrial frequencies.

In clause 9 of its resolution on the documents presented so far by the Commission on the regulatory framework, the European Parliament has also voiced its support for the maintenance of must-carry obligations to secure open and general access to the content of services in the public interest. Moreover, it has welcomed an extension of must-carry regulations to key infrastructures and associated services (such as set top boxes). The same goes for the consideration of public service programme contents in navigators and electronic programme guides.

By including the additions suggested above, one could safeguard pluralism, diversity of content and quality of digital services, and the consideration of consumer and youth protection interests in all forms of dissemination. It would also be a major contribution to preventing a "digital divide" and subsequent social fragmentation.

Against this background, the general time limit of must-carry obligations specified in Article 26 of the proposed directive seems inappropriate, as it falls under the scope of the Member States' regulatory powers to impose a must-carry status for certain services and to abolish it where no longer appropriate. Hence, the time limit should be completely eliminated or replaced by a periodic review.

- ***Article 26 (2)***

  There is good reason to claim that the provision in Article 26 (2) on the compensation of network operators subject to must-carry obligations falls under the scope of the Member States' powers and not under those of the European Union. For the event of a Universal Service the EU has only specified an option but not a binding obligation for the Member States to introduce regulations on the compensation of network operators. The same regulatory approach ought to apply to the incorporation of must-carry obligations. Hence, the Member States ought to be free to decide whether they want to take measures to reimburse any costs of network operators for the transmission of must-carry services.

  By specifying a compensation obligation, the regulation assumes from the outset that must-carry obligations pose an unreasonable burden on network operators. The question whether this is really the case or not is especially justified in the digital sector, if cable network operators have special rights or where de-facto monopolistic structures exist. The same applies in cases where the operation of transmission infrastructures is part of vertically integrated structures, where audiovisual or other content services are additionally offered. In this context, one ought to take account of the fact that distribution costs in the digital field will continue to fall.

  However, if the compensation ruling in Article 26 (2) were to be maintained, it would definitely need to be limited to the net cost resulting from the must-carry obligation. Hence, one would not only have to take account of required capacities but also of the value of distributing certain programmes or services for the network operator.

3. Proposal for a Directive on the Authorisation of Electronic Communications Networks and Services

The fact that Article 3 of the Proposal for a Directive on Electronic Communication Networks and Services envisages a general authorisation can be fundamentally regarded as positive.

Nevertheless, the suggested measures do not take sufficient account of the specific characteristics and needs of the audiovisual sector, particularly in view of the allocation and distribution of radio spectrum for broadcasting services and the associated protection of certain general interest objectives such as media pluralism, cultural diversity and consumer protection. They do not appear in the regulatory framework of the annex. Moreover, the proposed directive lacks an adequate coordination of authorisations for the telecommunications sector and authorisations for broadcasting services.

- ***Article 5***

  As Article 5 of the proposed directive establishes regulations for the use of radio frequencies, the additional question arises why these substantive regulation contents

were not adopted (among others) in the "Proposal for a Decision on a Regulatory Framework for Radio Spectrum Policy in the Community".

- ***Article 6 (1)***

  Article 6 (1) fails to take sufficient account of the responsibilities of the Member States in the cultural sector and their role in regulating radio spectrum use for broadcasting services. Again there is good reason to point out the need for restraint in the regulation of obligations and measures with an impact on content. Hence, Member States must have the possibility to impose other content-related measures and specifications than only those mentioned in the annex. These include consumer protection or safeguarding the diversity of opinions.

- ***Article 8***

  Especially for the event that transferability and secondary trading of usage rights are to be granted, there is no evidence here of the restriction envisaged in Article 8 of the Framework Directive that the option of trading with frequency assignments under the supervision of the national regulatory authorities is only admissible, if corresponding frequencies are awarded by auction. Hence - if such an option is really to be granted - a corresponding addition would have to be made to the proposed directive.

- ***Annex part B***

  Moreover, one cannot see in the conditions that may be attached to authorisations for electronic communications networks and services, that connections exist between the communication infrastructure and the services delivered over it.

  Hence, the proposed directive provides a final ruling in Annex A, B and C on admissible conditions in this respect.

  Annex A clause 6 only lists mandatory transmission of specified radio and television broadcasts in conformity with the Universal Service and Users' Rights Directive as a possible condition, i.e. only services with a must-carry status. But this restriction is too limited.

  To account for the special role of broadcasting as a public service, the directive ought to generally grant the option to impose the transmission of broadcasting programmes and other services as a condition for authorisation of the infrastructure. In addition, consideration must be given to the fact that some Member States authorise broadcasting and the operation of own broadcasting transmitters by means of a coherent legal or state treaty-based authorisation.

4. Proposal for a Directive on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities

a) Aim of the new regulatory framework for access to digital television

The audiovisual sector and public service broadcasting, in particular, will continue to be irreplaceable even in a digitalised environment as a guarantee of democracy, freedom of expression and pluralism, and for the protection and promotion of cultural and linguistic diversity in the European Union. Due to this fact and in view of the increasing interconnection of various information and communication technologies, access to audiovisual content is of great importance in the digital age. Hence, for the field of digital television, the new regulatory framework must, in addition to general competition regulations, provide sector-specific ex-ante rulings that must ensure free and open access both for content providers and end consumers. Apart from the special role of broadcasting for the public, it is insufficient in the digital television sector, also for consumer protection reasons, to rely solely on the provisions of general competition law and free market forces. In clause 2 of its resolution on the 1999 Communications review, the European Parliament shares the opinion that sector-specific regulation will continue to be necessary in addition to general competition law for the regulation of markets to achieve certain national policy objectives.

From this aspect, the existing regulatory framework of the so-called Television Standards Directive (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, OJ L 281 of 23.11.1995, p. 51), including first access regulations, should be adapted to the technological and economic developments in the digital television sector and worded accordingly.

b) Regulatory framework in detail

aa) Free and open access to digital television as a basic principle

According to the aims described in I, the future regulatory framework should incorporate free and open access to digital television services and digital platforms on fair, reasonable and non-discriminatory terms as a basic principle both for consumers and for providers of audiovisual contents. The European Parliament supports this approach in clause 5 of its Resolution on the Development of the Market for Digital Television.

For providers of audiovisual contents "access" means the (technical) possibility to use electronic communications networks, without hindrance or constraint, and the facilities and services delivered over them by corresponding operators as a means of transport and assistance for the transmission of their contents to the viewer. Alongside electronic communications networks, the "associated facilities" under Article 2 (d) of the Framework Directive - including digital decoders and television receivers and additional technical services associated with digital television such as conditional access systems or API - play a special role in the digital age. Hence, this approach corresponds to the definitions of the terms "access" in Article 2 (a) and "operator" in Article 2 (c) of the proposed Access Directive, which regulates relations between (network) operators and service providers (cf. Article 1).

The basic principle of free access for providers of audiovisual contents should be systematically incorporated in a further article in the Access Directive under chapter II ("General Framework for Regulating Access and Interconnection"), as article 4 in chapter II already expressly deals with the "rights and obligations of electronic communications network operators" and article 5 with the national regulatory authorities and their general powers and responsibilities with respect to access and interconnection.

For consumers, i.e. viewers, the right to open and unimpeded access primarily means the possibility to choose freely between the offered audiovisual contents. In this context, the focus is on those technical aspects that affect the viewer's access to such contents and serve as a filter between the operator and/or contents and the viewer, including but not limited to EPG and access control and any technical system switched between access to the communication medium and the selection of contents.

Regarding the access of viewers to digitally transmitted audiovisual contents, the question of functionality and interoperability of the receiver for digital television plays an important role. Only this can actually guarantee the viewer's comprehensive freedom of choice between audiovisual contents. However, this problem is not only addressed in the proposed Access Directive, as it only regulates relations between (network) operators and service providers, and access for end users expressly does not fall under the scope of the Access Directive (cf. Article 2 (2) (a)), but is regulated by Article 20 of the Universal Service and Users' Rights Directive.

Therefore, the right of the viewer to free and unimpeded access to digitally transmitted audiovisual contents should be systematically and expressly incorporated in chapter III of the proposed Universal Service and Users' Rights Directive, which lists the rights of users and consumers, in the form of a separate paragraph in article 20.

Along with the abstract incorporation of the basic principle of free access for content providers and consumers in the digital television sector, the wording of the future regulatory framework of the Access Directive and of the Universal Service Directive should include suitable regulations in this respect to guarantee pluralism and cultural and linguistic diversity and to protect the user's freedom of choice.

bb) Extension of the scope of the Access Directive to include new digital gateways, Article 6 and Annex I

Against the background of new digital technologies in the audiovisual sector it is necessary to continue to develop and swiftly update the existing regulatory framework as specified by the Television Standards Directive for this field. An adjustment and extension of the existing scope of the Television Standards Directive should be effected in a way to cover, in particular, the new bottlenecks or interfaces in the digital transmission of audiovisual contents, by means of which operators could block free and open access and interoperability for content providers and consumers. The European Parliament also rightly demands this in clauses 3 and 9 of its Resolution on the Development of the Market for Digital Television in the European Union.

In Article 6 (1) in conjunction with annex I part I, the draft Access Directive substantially adopts the obligation for operators of controlled access services, which ensures that content providers are granted access to conditional access systems on fair, reasonable and non-discriminatory terms, laid down in Article 4 (c) (1st indent) of the Television Standards Directive.

However, it fails to mention the new digital gateways, which, due to technological developments, now exist alongside conditional access systems, and fails to specify corresponding ex-ante obligations for this purpose so that the Access Directive only maintains the status quo of the Television Standards Directive in this respect.

In addition to conditional access systems, the new bottlenecks in the field of digital television comprise application program interfaces (APIs), navigators and electronic programme guides (EPGs), along with memory management, the necessary reverse channel for interactive use and the multiplexing function. All these new components of digital television systems developed in the course of convergence have a bottleneck function because those who operate or control these services or facilities can limit or block the access of content providers to end users and/or the choice of end users among services.

Annex I part II of the Access Directive at least lists access to APIs and EPGs as "other associated facilities" alongside conditional access systems. However, this list in annex I part II is incomplete and the already mentioned digital bottlenecks should definitely be added to it. In addition, the listed APIs and EPGs only need to be accounted for in the case of a possible review procedure of the Commission under Article 6 (2) of the Access Directive. In the context of such a procedure the Commission may, in concurrence with the Communications Committee (Article 19 of the Framework Directive), arrive at the conclusion that, due to technological and market developments, obligations to grant controlled access on fair, reasonable and non-discriminatory terms should be extended to new gateways such as EPGs and APIs to the benefit of European citizens in future (cf. recital (7) of the Access Directive).

The regulation in Article 6 (2) is - apart from the incomplete list in annex I part II – also inadequate because the Commission is neither obliged to perform the review procedure at certain intervals nor on a generally mandatory basis. Moreover, in view of the current pace of market and technological developments, it is rather questionable whether such a review procedure will enable the Commission to react fast enough to these developments, which often confront the market with a fait accompli. In this context, one should single out the late submission date of the Commission's report on the Development of the Market for Digital Television, which points to the obvious difficulties of implementing the Television Standards Directive.

However, the Commission's regulatory approach, as reflected in Article 6 (1) and (2) in conjunction with annex I, should not primarily be rejected because of the incomplete list of digital bottlenecks in annex I part II or because of the shortcomings of the review procedure, but due to fundamental considerations.

For the already quoted reasons of consumer protection and the important role of the audiovisual sector and public service broadcasting it is neither advisable nor appropriate to merely observe economic and technological developments and maintain the status quo of the Television Standards Directive to ensure open access to digital television both for content providers and viewers. Technological and economic progress has reached a stage where the new bottlenecks in the digital television sector can be clearly designated now, five years since the coming into force of the Television Standards Directive, which quotes controlled access as the

only bottleneck. The dangers of these new gateways are also well-known. They can only be prevented by an ex-ante regulation.

The Commission also lists new components such as API, EPG, memory management, reverse channel and multiplexing in its report on "The Development of the Market for Digital Television in the European Union" (COM (1999) 540) as further bottlenecks in the field of digital television.

In its communication on "Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age" (COM (1999), 657) the Commission additionally mentions that, in a digital environment access to audiovisual contents is not just a matter of access to certain contents but also one of problem-free access to contents. In this context, it quotes EPG and API, which play an important role especially with respect to pluralism, cultural diversity and other general interest objectives. The Commission is of the opinion that the design and use of EPGs, which the viewer needs for orientation, may influence the display and availability of audiovisual services, and that API, which determines which EPGs can be installed in decoders and digital television sets, is of similar importance. For the above reasons, it is inexplicable why the Commission sees no need for regulation in this field, despite the essential functions of API and navigation systems, but considers it sufficient that "at this early stage, where the development of the markets and technological progress are hardly predictable (...) this field" should remain "under careful observation (...)". As the danger of abuse in this field is also obvious to the Commission, a corresponding ex-ante ruling in the context of the Access Directive would already be necessary for reasons of consumer protection.

For the above reasons, it is necessary to extend the existing regulatory framework of the Access Directive to the new digital bottlenecks, the APIs, navigators and EPGs, along with memory management, reverse channel and the multiplexing function and to incorporate them directly in Article 6 (1) in conjunction with annex I part I of the Access Directive and not just in the framework of a review procedure under Article 6 (2) with an uncertain outcome. This would mean that access on fair, reasonable and non-discriminatory terms must be granted also to these associated facilities, in addition to conditional access systems. If this suggestion meets with approval, the regulation in Article 6 (2) would remain important as a monitoring regulation for new digital gateways not yet covered by the Access Directive. As the already known and listed digital gateways would be laid down in Article 6 (1) of the directive proper, they would not need to be listed in annex I.

cc) Ex-ante obligations to ensure interoperability

Alongside the fundamental obligation to grant access to digital bottlenecks under Article 6 (1) in conjunction with annex I part I on fair, reasonable and non-discriminatory terms the future regulatory framework of the Access Directive should also specify ex-ante obligations for operators, to ensure the interoperability of receivers and services. Increasing possibilities of interoperability between different platforms and services for digital television must take top priority, as stated in clause 7 of the European Parliament's Resolution on the Development of the Market for Digital Television.

To guarantee pluralism and cultural and linguistic diversity and to protect the user's freedom of choice, open access to digital television both for content providers and consumers is absolutely necessary and should be ensured by suitable regulations. But to make open access to digital television a reality, decoders and television receivers must be interoperable. The aim should be to duly account for the existing components of the new generation of decoders and television receivers created in the course of technical development, which generally feature both access control and software such as API and EPG.

Interoperability can be achieved either by developing open standards for key technologies, in particular for conditional access systems and APIs, and making them mandatory, or by prescribing a licensing procedure for the proprietary standards used or developed by respective operators.

With respect to the variety of conditional access systems of decoders, the open standard for a common interface is not mandatory so far under the Television Standards Directive but laid down as a facultative option alongside the possibility of awarding licences in the context of Simulcrypt technology. Regarding APIs, the DVB Group's specification for MHP is an example of an open standard, albeit not a mandatory one so far.

So it would be necessary to lay down existing open standards like MHP and CI as mandatory in the Access Directive and to specify binding terms of adjustment for proprietary systems.

Digital television will reach larger markets, once open standards become effective. And once open standards become effective, there will be less need for supervision by national regulatory and competition authorities. And finally, open standards can prevent enterprises from gaining a dominant market position or at least from abusing such a position, if they have already gained it, which is absolutely necessary for consumer protection reasons and due to the particular importance of the audiovisual sector. In clause 14 of its Resolution on the 1999 Communications review, the European Parliament rightly points out the danger that a lack of mandatory open standards or standardised interfaces for decoders could be used by vertically integrated operators to deprive consumers of the benefits of competition for the provision of digital television programmes and digital interactive television services, so that, as a result, rival content providers are granted only restricted or no access to consumers.

Only by making open standards mandatory, will it be possible to achieve the goal of the Access Directive, which is to create a regulatory framework between operators and content providers, ensuring sustainable competition and interoperability of services and thus favouring the interests of the consumer.

In this context, the regulation in Article 20 in conjunction with annex VI part 2 of the Universal Service Directive, which specifies interoperability obligations for digital television equipment, needs to be modified and supplemented accordingly. Alongside the binding specification on the use of a common interface, Article 20 and annex VI part 2 should also be extended to television decoder boxes and other receivers, so that they can also benefit from a standardised CI. It is incomprehensible why only consumers, who own television equipment, should enjoy better protection in this respect than owners of decoders, as - due to the regulation

in Article 20 (1) in conjunction with annex I part 2 - they are not dependent on a Simulcrypt agreement of their operator to receive other pay TV bouquets. As long as no open and binding standards exist (yet), which are necessary for the interoperability of receivers and services, one should at least impose obligations on the operators to disclose the technical parameters and relevant interfaces needed to generate interoperability along with obligations to licence these key technologies on reasonable and non-discriminatory terms.

dd) Ex-ante obligations imposed by the national regulatory authority under Article 8 and Article 9 to 13 of the Access Directive

It is primarily necessary, for the reasons listed in (2), to lay down the new digital gateways and corresponding ex-ante obligations regarding interoperability in the Access Directive itself, which is not the case in the existing draft Access Directive – except for the obligation to grant access to conditional access systems on fair, reasonable and non-discriminatory terms (Article 6 (1) in conjunction with annex I part I).

As no comprehensive ex-ante specifications have been laid down at the European level, it is therefore basically to be welcomed that Article 8 (1) and 2 (b) of the Access Directive grants national regulatory authorities, at least at Member State level, the opportunity to impose ex ante obligations set out in Article 9 to 13 on operators - and, subject to certain conditions, even obligations that go beyond the former (cf. Article 8 (2) (b)). However, such ex-ante obligations exclusively at Member State level cannot ensure a uniform regulatory framework in the European Union for access-related issues in the digital television sector and, in connection with this, legal certainty.

Article 12 (1) (d) lists, as one of the obligations imposed on operators to grant access to certain network facilities and their use, the obligation to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services. Hence, the national regulatory authority would in any case generally be able, according to Article 8 in conjunction with art 12 (1) (d), to extend the obligation to grant open access on fair, reasonable and non-discriminatory terms also to the new digital bottlenecks.

- *Ex-ante obligations not just for operators with "significant market power"*

  However, it is to be rejected that, under Article 8 (1) in conjunction with Article 12, the national regulatory authority may only impose such a preventive obligation on an operator who has "significant market power“ on the market in question according to the Commission's "market analysis" under Article 14 of the Framework Directive.

  The adoption of such a market share model (with possible ex-ante regulations) is to be rejected for the audiovisual sector in general and the field of access regulation for digital television in particular.

  In principle, it is to be welcomed that, regarding the requirement for ex-ante obligations, the focus is no longer - as envisaged by the 1999 Communications review - additionally on an operator's "dominant position in the market" alongside the model of "significant market power". Compared with a "dominant position in the market" the

term of "significant market power" implies correspondingly lower requirements for such a position on a specific market. This shows that the Commission is aware of the particular dynamics of this sector. However, as long as the national regulatory authority may only impose obligations on an operator with "significant market power", these are de facto no longer ex-ante obligations, but ex-post regulations. But this does not take account of the nature of the audiovisual sector and the dynamics of technological development in this field.

Hence, as a rule, it must be possible to impose obligations on all operators concerned to grant access both to content providers and consumers. To safeguard pluralism in the audiovisual sector it must also be ensured that the establishment and not just the maintenance of dominant positions is prevented. This cannot be achieved by imposing obligations only on operators with "significant market power".

Regarding the "market analysis procedure" under Article 14 of the Framework Directive, one should point out that this is not a suitable instrument to ensure adequate and swift reaction to fast-changing, converging markets, either. It will take some time until markets that are not identified in the first "Decision" of the Commission on product and service markets, but which emerge in the meantime or have to be accounted for contrary to the market analysis, are included in the "Decision" by means of a further procedure. Any unfavourable developments that occur in these areas will then be hardly reversible or completely irreversible.

The general unsuitability of a market share model for regulation of the audiovisual sector applies likewise to the regulation of Article 8 (2) (b), according to which the national regulatory authority may impose access-related obligations on operators that go beyond those under Article 9 to 13. Again in this constellation, the restriction solely to operators with "significant market power" is not justified.*Relationship between Article 6 and Article 8 (in conjunction with Article 9 to 13)*

It is necessary to clarify the scope of applicability for an intervention of the national regulatory authority under Article 8, making a distinction from the Commission's powers under Article 6.

As Article 8 (2) expressly grants the national regulatory authorities powers "without prejudice to the provisions of Article 6", the question arises as to the relationship between Article 8 (1) and Article 6. Hence, a corresponding reference in a further paragraph under Article 6 ought to clarify that the regulations of Article 6 and Article 8 in conjunction with Article 9 to 13 are not mutually exclusive but can apply simultaneously. This would ensure that the Commission cannot block possible measures or an intervention of the national regulatory authorities under Article 8 - in particular in conjunction with Article 12 regarding the new digital bottlenecks - due to its powers under Article 6 (2).

B. Proposal for a European Parliament and Council Decision on a Regulatory Framework for Radio Spectrum Policy in the Community

I. Preliminary remarks

The aim of the Commission's proposal is to extend radio spectrum harmonisation in the Community for a better implementation of Community policies in the fields of communication, transport, broadcasting, research and development. It also aims for an improvement of the institutional basis of radio spectrum co-ordination.

In its current version, the Commission's proposed decision on a regulatory framework for radio spectrum policy in the Community almost reverses the results of the public consultation on the Green Paper on Radio Spectrum Policy and on the working documents. For example, page 1 of the proposal claims that the consultation showed "support for [establishing] a framework to ensure the harmonised use of radio spectrum to implement Community policies." However, the result of the consultation was that a stronger co-ordination of certain fields such as satellite communication was supported but not a general harmonisation. The majority of consulted representatives clearly rejected such an approach for use of the entire radio spectrum.

The general tenor of the Commission's proposals on spectrum management shows that the Commission largely wants to decide itself how radio spectrum should be distributed among user circles. At all events, an implementation would mean very extensive changes for the Member State system of spectrum allocation and distribution but would also shift established and proven spectrum coordination at the European level towards an extensive increase of the Commission's powers. For the broadcasting sector in Germany this would call the federal state spectrum regime of German broadcasting law into question.

II. Complete lack of substantive regulations for radio spectrum policy in the proposed decision

The most important question which arises is why the proposed decision should be limited to institutional and procedural specifications, while important substantive statements on the design of spectrum management and use, such as the permission of trading with frequency assignments are to be found in article 8 of the Proposal for a Directive on a Common Framework for Electronic Communications Networks and Services, or the option of transferability and secondary trading of usage rights appears in the Proposal for a Directive on the Authorisation of Electronic Communications Networks and Services. The same goes for the rules and conditions attached to the limitation of rights to use radio spectrum.

By permitting trading with frequency assignments or secondary trading of usage rights, the Commission still holds on to the concept of so-called "spectrum pricing" and of creating a secondary radio spectrum market, although it saw a further need for examination in the 1999 Communications Review and in its Communication on next steps in radio spectrum policy. Hence, the Commission still ignores the fact that the outcome of the public consultations on the 1999 Communications review and the communication both reject a purely economic defini-

tion of efficiency in spectrum usage and show no general support for frequency sales, leasing or auctions. The same goes for the issue of creating a secondary radio spectrum market with impacts and implications - especially on consumer tariffs - that are hardly predictable.

The European Parliament shares this concern in clause 11 of its Resolution on the Commission's Communication on the 1999 Communications Review, where it also points out that spectrum auctions tend to raise consumer tariffs and hamper the introduction of new services.

III. No provision on the consideration of public interests for access to or assignment of frequencies

The proposed decision contains no regulations on the consideration of public interests for access to or the assignment of frequencies. These policy objectives and regulatory principles only appear in article 7 of the proposed Framework Directive. It defines the sole policy objectives and regulatory principles that are to apply to the regulation of infrastructures in future. However, no criterion can be found stating that public interests are worthy of consideration, although they play an important role in the question of broadcasting regulation and hence define the service character of telecommunications law for the broadcasting sector. Moreover, article 7 (2) (b) requires the national regulatory authorities to ensure "that there is no distortion or restriction of competition in the electronic communications sector.“ In view of this dogmatic and unexceptional legal principle, the question arises whether, for example, the spectrum management regulations in many federal state broadcasting and media laws, according to which basic supply programmes are to receive priority treatment in frequency assignment, would still be tenable.

Moreover, article 7 (2) (d) requires the regulatory authorities to ensure the "efficient allocation and assignment of radio spectrum". However the provision mentions no criterion for efficiency. In particular, it is unclear whether the Commission has really abandoned its purely economic concept of the term.

Only article 7 (4) (e) allows the regulatory authorities in the Member States to "address the needs of specific social groups, in particular disabled users", thus deviating from the criterion of efficiency. In this respect, this provision completely lacks any consideration of the legitimate and much further-reaching interests of the public and European citizens in the provision of broadcasting and other public services that not only address the needs of specific social groups but must be available to all citizens with a diversity of contents.

IV. Shift of decision-making powers to the Community also for broadcasting frequencies

Moreover, it is the Commission's declared aim to address radio spectrum requirements also of terrestrial and satellite television and radio broadcasting in Community legislation with the new regulatory framework, "to ensure that radio spectrum is and will remain available to implement Community policies in all these areas" (cf. p. 2). But this is already the case with existing radio spectrum policies and co-ordination, so that the question arises what other impacts the proposed new regulatory framework will have on radio spectrum. Hence, there are many

indications that, with this regulatory framework, the Commission intends to decide itself how radio spectrum should be distributed among user circles.

V. Inappropriate policy principles on the use of radio spectrum at Community level

In this respect, recital 2 of the proposal is also problematic, according to which policy principles on the use of radio spectrum are to be defined at Community level in view of meeting Community policy objectives, in particular in the areas of broadcasting and communications. This is to "maintain a high standard of citizens' health." It is remarkable that health protection is quoted as the top-priority goal for the definition of policy principles here. Moreover, in recital 3, the Commission wants to take account of economic, political, cultural, health and social considerations in spectrum policy. The Member States would only retain the right to make necessary restrictions "for public order and public security purposes". In contrast, the Commission claims the right to balance the respective needs of the different sectors. Hence, the Member States would be more or less deprived of the right to make independent broadcasting policy deliberations of its own in spectrum assignment and usage, for there is every indication that these would hardly fall under the term of "public order and public security". This means that, in future, the right or decision to reconcile the interests of competing needs - including but not limited to economic interests and public interests in pluralism and cultural diversity - would probably pass to the Community or the Commission, if the proposed decision were implemented.

VI. Necessity of a body to define policy objectives regarding the use of radio spectrum

Recital 4 of the proposed decision also gives rise to fears that the Commission wants to install a further body to define corresponding general policy objectives regarding the use of radio spectrum. The fact that each national delegation should already have a co-ordinated view of all policy aspects affecting spectrum use in its Member State, is a good indication of this. The proposed composition of the body is also remarkable, as it could mean that representatives of industries aiming for a specific or modified use of radio spectrum for broadcasting services, could directly enforce the definition of corresponding policy objectives, which would then be binding for the Member States.

VII. Relation of envisaged new bodies to existing spectrum co-ordination institutions at the European level

Also, regarding institutional aspects, the proposed decision does not make it sufficiently clear to what extent, in which cases, and on what basis the Commission may give mandates to the CEPT under article 6 and make the results of this harmonisation mandatory for the Member States. Nor is it plain which other measures the Commission may adopt, if the CEPT is unable or unwilling to ensure this harmonisation. Moreover, according to article 6 (1), the advice of the Senior Official Spectrum Policy Group is by no means binding for the Commission, which only has to take such advice into account "where possible". Hence, the question arises as to the scope of responsibilities and powers of the consultative and decision-making committees, i.e. the envisaged Senior Official Spectrum Policy Group under article 3 and the Radio Spectrum

Committee under article 5. The proposal does not specify the powers of these bodies, nor does it demarcate their respective powers, nor indicate the representatitveness of its members or the rights and obligations of the Commission towards these bodies.

Also, questions arise as to the co-ordination of activities of these bodies with the activities of the CEPT and the ERC. Particularly with regard to the creation of new institutions the consultations on radio spectrum policy have highlighted the efficiency and benefits of existing international spectrum management and co-ordination and that there is no need to accord the Commission greater powers in this field.