

**CONSULTATION DOCUMENT**  
**TRANSFORMING THE DIGITAL DIVIDEND OPPORTUNITY**  
**INTO SOCIAL BENEFITS AND ECONOMIC GROWTH IN**  
**EUROPE**

**OBSERVATIONS BY MEDIASET S.P.A.**

Mediaset welcomes the opportunity to contribute to the consultation launched by the European Commission's document on the digital dividend. Indeed, the benefits of new digital standards are to be sought for the progress of the knowledge economy as a whole. Hence, both industrial strategies and the individual welfare of all citizens ought to be analyzed in detail.

Accordingly, Mediaset submits to the European Commission's attention a two-fold set of considerations:

1. Legal analysis: legitimacy of Community intervention on spectrum allocation;
2. Political analysis: market and technological developments along with specific national issues in the Member States.

**Legal considerations: the document does not seem grounded on an adequate legal basis**

The legal basis of the Commission's initiative is to be assessed in the context of the EU policy on spectrum allocation to date and, in particular, in light of the revision of the framework directive, and in compliance with the principles of proportionality and subsidiarity.

Mediaset is in favour of all EU initiatives aimed at fostering greater efficiency in the regulatory framework applied to spectrum **management** in Europe. However, any initiative whose final goal is merely to shift the **power of allocating** frequencies from the Member States to the EU, well beyond the limits set by the Treaty, the current EU

regulatory framework as well as by the ongoing revisions, should be considered disproportionate and unjustified.

It is widely known that radiofrequencies are public goods owned by the Member States which have competence on an exclusive basis for any decision regarding spectrum allocation, with due compliance with rules, criteria and strategic indications proposed at EU level. There is no reference in EU law justifying a radio spectrum allocation decision at European level, rather than regulatory provisions to be implemented and administered by the Member States.

According to the observations indicated above, there seems to be no legal ground in the programmes indicated for the coming years by the new Framework directive, nor in the previously quoted Decision 676/02/CE<sup>1</sup>; moreover the European Parliament and the EU Council of Ministers will be called to express their views on this matter.

#### **“New” Framework Directive**

The text of the new Directive – due for adoption in the Fall – provides that (cf. art 8a, par. 1 and 2) Member States shall co-operate, amongst themselves and with the European Commission *"in the strategic planning, coordination and harmonisation in the use of radio spectrum in the EC"*, while considering a number of different factors, including non-economic ones, closely related to it.

More specifically, par. 2 provides for the co-ordination *"of radio spectrum policy approaches in the EC, and where appropriate, harmonised conditions with regard to the availability and efficient use of radio spectrum necessary for the establishment and functioning of the internal market"*.

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<sup>1</sup> DECISION No 676/2002/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).

As confirmed by the provisions reported above, Member States maintain exclusive competence to allocate radio spectrum, which they are expected to exercise in compliance with co-operation and co-ordination obligations, towards one another and vis-à-vis the Commission.

Par. 3, referred to in the document quoted above, confers to the Commission the power of initiative for any activities carried out in order to define "*policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum*". Thereby, neither the Commission nor the European Parliament have the power to propose, nor the Council to adopt any provisions aimed at allocating single portions of spectrum, but only "*policy orientations and objectives*", setting the terms within which Member States are expected to carry out their own decision on spectrum allocation.

This is neither a subtle nor a formal distinction: defining policy objectives at EU level – while leaving each Member State free to choose the best ways to implement them – is quite different from the adoption at EU level of decision concerning frequency allocation, precluding any discretionary power to the Member States.

The very last paragraph of art. 8a in the new *framework directive* is coherent with the system applied thus far whereby the Commission can, whenever necessary in order to facilitate the co-ordination of the Member States' interest at multilateral level, propose to the European Parliament and to the Council "*common policy objectives*". Also in this case, single decisions at multilateral level will continue to pertain to the Member States, within the framework of common policies defined by the EU.

### **Radio Spectrum Decision 676/2002/CE**

An adequate legal basis can not be found in the decision on radio spectrum which specifies clearly that radio frequencies continue to be owned exclusively by the Member States, which are entitled to all decisions on their allocation, with due respect of the technical harmonisation rules and of the common objectives defined at EU level.

The idea contained in the Commission's document suggesting that the intervention on the 800 Mhz band would be justified by the technical harmonisation rules in the Radio Spectrum Decision does not seem correct. Actually, it is clear that the choice to allocate such a band to mobile broadband communications networks is not a technical rule but a decision on allocation, assigning a portion of spectrum for a specific purpose rather than to other possible services, in a way which does not appear entirely coherent with the very decision on radio spectrum.

From a legal standpoint, it does not seem possible to suggest – as hinted by the Commission in its document – the introduction of a new Parliament and Council decision, targeting the 800 band Mhz specifically. In fact, such a decision, will have no legal basis in the Treaty – which allows to the EU to define rules and objectives pertaining to the administration of public resources in the Member States, when such resources are relevant to EU policies. That said, the EU is not entitled to adopt direct decisions, through its own provisions, pertaining to such resources.

**Analysis of market, technologies and national specificities: the Commission's document is based on a value judgement which is neither neutral nor in line with national specificities**

Further to the considerations exposed thus far on the legitimacy of the Commission's initiative, it is worth considering now in further detail market and technological aspects which are closely interwoven with specific national characteristics underlying the necessity to maintain the current level of subsidiarity for all decisions on radio spectrum allocation.

To begin with, the document promotes the thesis advocating that an efficient exploitation of the digital dividend can only be pursued through an action at EU level, since it would be employed for services that require economies of scale.

After several years of discussions and consultations with the main stakeholders, the geographical dimensions of the relevant markets are not clear yet. Moreover, market

access conditions on the supply-side and consumption trends on the demand-side have not been analyzed in detail. Such an analysis is likely to prove that pan-european communication services are, as of today, a mere whim and that the markets are still characterized by national dimensions, both in terms of offer and, even more so, in terms of consumer choice.

Several times, Mediaset has voiced its concern over the fact that, hypothetical services - for which there is no concrete demand yet - could obtain an unjustified political favour and preclude the growth prospect of digital terrestrial television - an existing service, by no means obsolete and still extremely valuable for general interest purposes (as the Commission itself maintains in the Communication on the financing of Public service broadcasting).<sup>2</sup>

As for the Commission's intention to bridge the digital divide by making available, through wireless infrastructure, broadband connections in remote rural areas, please note that, currently, wireless broadband does not meet that specific goal: rather, it is wholly dedicated to business users. It is thus consequential to expect that wireless broadband in the UHF band will follow the same trend.

At present, wireless broadband hinges on a business model that can only be viable thanks to public subsidies. The alleged willingness to reach rural areas through improved coverage allowed by the UHF band will end up favouring only the users of mobile business and elite services. On the contrary, digital terrestrial television will become the main platform for the provision of free audio-visual content and, by definition, serving the general public as a whole. Therefore, it is not coherent with elementary notions of allocation efficiency to penalize from the start the broadcasters' capacity to enhance their content offer (both in terms of quality and quantity) on the basis of vague auspices. Such an approach is even more unjustified if one considers that the digital dividend itself

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<sup>2</sup> Communication from the Commission on the application of State aid rules to public service broadcasting as adopted by the Commission on 2 July 2009 - IP/09/1072, 02.07.2009.

results from the financial investments borne by the broadcasters to ensure the network digitisation and, where necessary – as it is the case in Italy – new frequency planning.

### **800 Mhz band**

As for the Commission's intention to allocate the 790-862 Mhz band to communication services different from broadcasting services, it is worth considering, besides legal obligations, that in some Member States the 800 Mhz band is absolutely necessary to ensure the entire television's system transition to DTT. In the specific case of Italy, in order to cater for 21 national DVB-T frequencies (covering approximately 80% of the entire national territory), 4 national networks for DVB-H and 11 national frequencies allocated to local broadcasters, at least 36 national networks will be needed.

Consequently, an hypothetical intervention on the 800Mhz band would entail an immediate reduction of the entire television offer, in a way which appears in contrast with the very goal of the digitisation process, thus precluding a return on the investments undertaken so far by television operators.

### **MPEG-4**

In its document, the European Commission suggests also to expand the transmission capacity of digital terrestrial television and to ensure, by the year 2012, the making available of set-top-boxes suitable for signals compressed with standards as complex as MPEG4. By the year 2012, million of set-top-boxes with compression capacity MPEG2 will be marketed; thereby, the Commission's suggestion may inadvertently transfer the cost of technological upgrade to the users. Moreover, even the use on a large scale of MPEG4-like set-top-boxes will not be enough to meet the need for growth of digital terrestrial television. That said on the merit of frequencies, Mediaset appreciates the Commission invitation to promote the MPEG4 standard.

### **“Single Frequency Network” development**

In Italy, SFN technology has already been adopted both for national and local networks. The current radio-spectrum allowance granted to television services has been calculated

net of the frequencies saved through SFN deployment: any further band savings can no longer be pursued.

## **Conclusion**

Any mandatory provision by the EU on radio spectrum allocation is not only a worrying legal precedent but also a major threat to industrial, social and cultural heritage build over several decades, and especially discriminatory vis-à-vis specific national situations.

As for Italy, besides the well renowned case over 600 local networks – a unique resource in terms of pluralism and cultural diversity – one should not refrain from considering the very special urbanisation and orography of the Italian peninsula that did not allow vast and meaningful cable coverage. The digital terrestrial platform is nowadays the only alternative platform to the satellite platform, whose services are delivered in a monopoly regime. Internet Protocol Television (IPTV), even after hypothetical public investment plans, will complement, rather than being an alternative to, existing platforms.

Accordingly, the Commission's proposals, if implemented in Italy, will curb the DTT's potential for growth as an alternative platform to satellite delivery, and will thus restrain the Italian users' access to a single, monopolistic platform.

Mediaset S.p.A., September 2009