

**Amsterdam Protocol (1977) and Amsterdam Conference (2004):
Advancing the Cause of Public Service Broadcasting in Europe!
Taking the Guarantee to Develop Seriously and Keeping the Promise!**

Public Service Broadcasting – today more than ever – is essential for social coherence, education, culture and democracy. This applies not only on a national level but also on a European and International scale. However, not a day goes by without the agitated opposition of lobbyists of the commercial media who persistently try to influence political actors and government officials in order to restrict the remit of Public Service Broadcasting. Occasionally, they do find a sympathetic ear. The public sector of broadcasting is increasingly coming under pressure. Particularly in view of technical developments (digitalization, convergence, internationalization), it must be prepared to face new challenges. This requires the support of all of those who still appreciate its integrative force. We belong to those and in this statement we oppose current restrictive attempts and undesirable trends on a European level.

Forces seem to advance within the European Commission who wishes to restrict Public Service Broadcasting in a functionally adequate development. These forces endeavor to make the entrance of Public Service Broadcasting into the realm of digital possibilities more difficult and particularly wish to restrict it in the online area to a meager, if not peripheral position. The temptation in Brussels Offices to give in to the jostling of the lobby and, in the long run, to pursue a change of paradigm, seems indeed great: away from the reasonably balanced dual broadcasting system towards a more general market economy media structure, approximately to the model of traditional print media.

It is particularly the Directorate for Competition which is making an effort by putting its shoulder to the wheel. As critical analyses prove (Verena Wiedemann, epd medien no. 68/04, p. 3 ff.; Christina Weiss, epd medien Nr. 78/04, p. 18 ff.), an increasingly clear neo-liberal and economizing trend is emerging. As a result of this trend, Public Service Broadcasting may not be in a position to sufficiently engage itself in the new media. It is only meant to play a subsidiary role and step in to act as sweeper in the event of an obvious market failure. In the meantime, it is even harried and troubled in its traditional classical areas, particularly by means of the law on state aids. Its inherent democratically important communicative mediation function and its comprehensive cultural mission seem to become gradually alienated from this simple market doctrine, they are hardly still taken into account or fully understood. Whether the Directorate-General, primarily responsible for media (so far “Education and Culture”, in future “Information Society and Media”) is willing and able to energetically steer against this situation, remains to be seen.

In contrast, the well-understood social and constitutional tasks of the public sectors constituted the focal point of a special EU-Conference in September 02-03 2004 on “The key role of public service broadcasting in European society in the 21st century”, arranged by the Dutch Council Presidency in Amsterdam (www.omroep.nl/eu2004). To that conference, the EBU submitted a substantial and in-depth contribution paper (www.ebu.ch/CMSimages/en/___amsterdam_e_04_v7_tcm6-15077.pdf), which – well suited to the location – recalled the Amsterdam Protocol on the System of Public Broadcasting in the Member States from 1997. In this Protocol the Member States have stated a factually limited authentic interpretation of the Competition and State Aid Provisions of the European Commission Treaty. For this, they have offered a reason for consideration, according to which “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”. The new EBU paper deals with the question of how such values and tasks will be considered in future.

The EBU deems it necessary to take decisive action in this matter. At the conclusion of the Amsterdam Conference, the EBU appealed to the 25 European Union’s Member States to ensure “that public broadcasters have a clear remit and sufficient funding to offer a full and evolving range of services in

the new media” (www.ebu.ch/en/union/news/2004/tcm_6-15078.php). This is in accordance with the demands put forth by numerous speakers, e.g. the German EP-MP Ruth Hieronymi, and it is to be hoped from the results of this remarkable conference – sadly insufficiently recognized in Germany – that the necessary conclusions will be drawn by the official authorities. In a nutshell, it is about acting in the spirit of the Amsterdam Protocol and ensuring that Public Service Broadcasting participates to the best of its abilities in the presently beginning decisive phase of European Integration while continuing to flourish in the future.

The Amsterdam Protocol focuses on certain integrative functions of Public Service Broadcasting mentioned in the above reason for consideration and subsequently adopts a functional concept of broadcasting. It envisages modern and liberal national constitutional cultures such as those developed in Germany under the influence of the Constitutional Court. Accordingly, the broadcasting concept and broadcasting mandate have to be formed by each Member State, namely in the light of broadcasting freedom as a so-called “*servicing*” freedom (comp. BVerfGE 57, p. 295, 319 ff.). They have to be understood as technology-neutral, open to development and dynamic. They should be adjusted to the changing circumstances in finalizing constitutional procedures in which the broadcasting stations should be accorded a substantial say based on their expertise and experience. Specialists in this country call it “regulated self-regulation”. The central point here is a continual quality safeguard by means of declarations of commitment issued by the broadcasters (comp. epd medien no. 79/04) in the framework of normative governmental preconditions according to § 11 Interstate Treaty on Broadcasting. In this context, Public Service Broadcasting enjoys a guarantee to function, i. e. to exist and to develop; that includes the financial precondition of a functionally adequate development.

This is exactly what the Amsterdam Protocol denotes in the statements concerning the public service mandate and financing of broadcasters. How broadly the concept of broadcasting should be specified in the era of new technology, to which extent the broadcasting remit should be reformed and differentiated within the changing framework, and the amount of financial allocation Public Service Broadcasting might subsequently require – all these are questions which, as explained, must be addressed by the Member States according to the Protocol. It would be completely beyond the point for the Commission to attempt to achieve a stronger hold on the steering competence by means of limited interpretation of this precondition and expansive usage of the European Competition Law. The Commission is not authorized to carry out restrictive reinterpretation regarding the range and content of the Amsterdam Protocol and it may not conduct e.g. a rolling back of Public Service Broadcasting in favor of commercial broadcasting. On the contrary, the Commission must refrain from such unqualified interventions and join forces with the national regulating authorities.

This becomes evident against the backdrop of the constitutional process which has fortunately now been put in motion in the EU. The European Constitutional Convention has formulated a Treaty establishing a Constitution for Europe (EUConst.) which has already met with the approval of the heads of governments (doc. CIG 87/2/04 REV 2 of the Conference of the Representatives of the Governments of the Member States 2003/04, ue.eu.int/igcpdf/en/04/cg00/cg00087-re02.en04.pdf). It has been signed by the Member States at October 29th 2004 in Rome and will hopefully now be unanimously ratified and implemented. The Charter of Fundamental Rights of the Union which was previously created by the European Fundamental Rights Convention has been accepted as Part II into the draft of the EUConst. This also includes the following new European Basic Media Law: “The freedom and pluralism of the media shall be respected” (art. II-71 ?? par.2) This condition shall be equally valid for public and commercial media.

Regarding public media, it is furthermore important that the Amsterdam Protocol to the EC Treaty, resulting from the Final Act of the Intergovernmental Conference, is endorsed and taken over to the Constitutional Treaty. (doc. CIG 87/04 ADD 1 REV 1, ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01re01.en04.pdf, Protocol 27, in an editorial adaptation). According to a statement given on this subject, the Conference has taken note of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and

updated under the responsibility of the Praesidium of the European Convention. On the subject of guaranteeing freedom of the media, it is stated in those semi-official explanations that this freedom is based, among other things, on the Amsterdam Protocol (doc. CIG 87/04 ADD 2 REV 2, ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02re02.en04.pdf, declaration 12, explanation to art. 11 para. 2). It follows that the Amsterdam Protocol must remain prominent in its previously indicated denotation for the interpretation and the application of the future art. II-71 par. 2 EUConst. (see Norbert Bernsdorff, in: Jürgen Meyer [publisher], *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2003, art. 11 speaker 16 et seq.).

Accordingly, EU authorities are not allowed to censure and harass Public Service Broadcasting in member states by applying dysfunctional economic legal measures. They are not allowed to disadvantage and depress Public Service Broadcasting in favor of market broadcasting. On the contrary, EU authorities must respect the freedom of broadcasting in its respective national character, in particular the functional freedom of Public Service Broadcasting which must include a guarantee for future development. A value particularly worthy of protection in this context is stipulated according to art. II-71 ?? par. 2, media pluralism, which must also be regarded as a specific manifestation of “the diversity of the cultures and traditions of the peoples of Europe” (Preamble to Part II EUConst., par. 3). This corresponds, by the way, with on-going global efforts at UNESCO level to bring about a convention on the protection of cultural diversity (www.unesco.de/c_arbeitsgebiete/kulturelle_vielfalt.htm; see also Fritz Pleitgen, in: *ARD-Jahrbuch 2003*, p. 17 ff.; Verena Metze-Mangoldt, www.uni-koeln.de/wiso-fak/rundfunk/pdfs/19204.pdf).

The EU Commission must also honor the European dimensions of this media-specific cultural diversity. Public Service Broadcasting must be allowed to develop in such a way that out of manifold national program offers, a lively discursive, forward-thrusting public opinion may constitute itself – just the ingredient that is often claimed to be missing! Last but not least, it is imperative to the success and further development of the EU-Constitution that broadcasting acts and strongly engages – to express it in the terms of the German Constitutional Court – as a “medium and factor” of European self-assurance and further integration. The Commission must not be permitted to ignore or even obstruct this development, it must not simply indulge in general commercialization. In the framework of its competence it should rather contribute to achieving the great constitutional goals outlined in this paper. At the same time the doors should be kept open for genuine European programs which may sooner or later develop out of the public sector.

To safeguard this and foster the requirements of Public Service Broadcasting at a EU level, the *Initiativkreis* has addressed the Fundamental Rights Convention and the Constitutional Convention in several petitions (documented www.ioer.org, under *Stellungnahmen*). We have made an effort to explicitly anchor a European public-service-idea in the Communication Article of the Fundamental Rights Charter (former art. 11). Whether this might be useful at all and to which extent this might prove to be the case, was explained at length by our member Martin Stock (last in: Lutz M. Hagen [publisher], *Europäische Union und mediale Öffentlichkeit*, 2004, p. 77 et seq.). However there was no majority for this idea in the political arena. Faced with the present hardening of media policy in Brussels, now there may be some who regret this. Nevertheless, Public Service Broadcasting could live with art. II-71 EUConst. in its final version providing the Amsterdam Protocol is accorded constitutional status, is defended against neo-liberal reinterpretation and may be interpreted offensively. The recent quote from the Amsterdam Conference is in this spirit: Public Service Broadcasting must be advanced in Europe, the guarantee to develop must be taken seriously and the promise must be kept!