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**Joint Statement by the Working Group of the Public Broadcasting Companies in the Federal Republic of Germany comprising the Regional Broadcasting Corporations (ARD) and the Second German Broadcasting Corporation (ZDF) on the Green Paper of the European Commission entitled "Public Sector Information - A Key Resource For Europe"**

ARD and ZDF have been interested to note that the Commission has dealt with the subject of access to "public sector information", and they are pleased to accept the invitation to make the following statement on the Green Paper.

ARD and ZDF basically support the Commission's goal of making it easier for citizens and enterprises within the European Union to gain access to public sector information. The Commission is right to single out the importance of public sector information as a key resource, and to stress the requirement for such information to be quickly available. In the view of ARD and ZDF, it is correct to say that inadequate or non-transparent information about circumstances in other Member States means that employees or small and medium-sized enterprises (SME) in particular will either make no use of the possibilities offered to them by the Community's regulatory legislation, or will only make slight use of such possibilities. A process initiated by the Green Paper will effectively be able to counter the (not always unjustified) reproach that information and transparency are lacking - a reproach which in some cases applies to EC institutions themselves. In this respect, it is also gratifying to note that the Green Paper does not exclude the EC as an institution, regarding it rather as one of the parties towards whom the initiative is directed.

In their statement which follows, ARD and ZDF restrict themselves to dealing with the questions which primarily relate to them as public service broadcasting corporations:

**Question 1:**

**Which definition of "public sector information" is most appropriate in your view?**

**What categories of public sector information should be used in the debate?**

With regard to the regulation of access to public sector information, ARD and ZDF consider it to be of elementary importance that access of this sort should be explicitly restricted to those data which are already accessible to the general public at present. The introduction to the Green Paper rightly points out that neither the Green Paper itself, nor any future action which it might lead to, "should be seen as an attempt to prejudice national rules governing the system of property ownership, nor the role of any public body in the Member States". ARD and ZDF therefore suggest that this clarification should also be incorporated into the definition of the term "public sector information" (Chapter III.1, rubrics 71 et seq.), in order to avoid misunderstandings.

In the view of ARD and ZDF, public service broadcasting does *not* form part of the "public sector" within the meaning of the Green Paper. At least in the Federal Republic of Germany, it is neither directly nor indirectly part of the State administration; in terms of finance and/or personnel, it is neither directly nor indirectly controlled by the State; and it provides no services within the scope of the so-called ("classical") *universal services*. On the contrary, it is specifically organised so as to be distanced from the State, and it is committed to fulfilling the *public service mission* of broadcasting.

To this extent, the suggested definitions which are formulated in the Green Paper (rubrics 71 et seq.) should be *made more specific*: at least, given that the Commission regards the organisation of public service programmes as "services of general economic interest" within the meaning of Article 90, Paragraph 2, ECT o.v. (= Article 86, Paragraph 2, ECT n.v.), and given also that it

considers fee financing in this connection to be "State funding" within the meaning of Article 92, Paragraph 1, ECT o.v. (= Article 87, Paragraph 1, ECT n.v.) (*State Aid No. NN 70/98 - Germany*, Decision of the European Commission dated 24 February 1999), public service broadcasting might otherwise in fact be subsumed as a part of the public sector, in line with the "functional" or "financial" approach developed in the Green Paper.

The broadcasting of news, reports, documentaries and fictional programmes - that is to say, the dissemination of information in the broadest sense - is also a part of the mission of public service broadcasting, as is expressly recognised by Community legislation, not least by Protocol No. 9 to the *Treaty of Amsterdam*. This means that there is another point on which public service broadcasting corporations - in this case, ARD and ZDF - differ substantially from the "public sector bodies" which are covered by the rules set forth in the Green Paper. Whereas in the case of the latter bodies, the provision of information represents a marginal activity which is frequently not regulated in detail, the provision of information to the general public is the principal mission of public service broadcasting corporations, and it is specifically regulated. This principal mission is regulated in detail by ZDF State Treaty, by the regulations which apply to ARD Regional Broadcasting Corporations, and by the broadcasting laws of the Federal Republic of Germany. These standards include detailed provisions concerning (for example) the circumstances under which citizens and enterprises have the right to demand sight of records of television broadcasts (cf. sec. 14, ZDF State Treaty, sec. 12, Paragraph 2, Act of the West German Broadcasting Corporation (WDR-Gesetz)).

In the view of ARD and ZDF, the *exceptions* to the definition of the public sector (rubric 72) should be extended. The Green Paper does not include State-owned enterprises in the public sector if they are active under normal market conditions and they are subject to private and commercial law. From the viewpoint of ARD and ZDF, these exceptions should be extended to include all public service enterprises which have to assert their positions in competition with private enterprises - but in any case, they should be extended to include the public service broadcasting corporations which are in competition with private broadcasters. Otherwise, public service enterprises would be unilaterally burdened by the imposition of conditions which are not applied to enterprises in private ownership. At present, the situation of public service broadcasting in Germany is already marked by a significantly higher regulatory burden than that which applies to private competitors. Further unilateral burdens would lead to a deepening of the competitive distortions which already exist.

In the view of ARD and ZDF, it is also necessary to restrict the term "types of information". Rubric 73 refers to all the information which the public sector has gathered in the execution of its duties. In the case of the public service broadcasting corporations, this would mean that *business secrets* are involved, just as much as *copyrights* and *performance rights*. On a regular basis, however, and particularly in the field of information obtained from news agencies, picture services, etc., ARD and ZDF are unable to grant third parties access to the information which they have obtained, due to legal and/or contractual reasons.

In connection with the specification of the relevant types of information, ARD and ZDF therefore recommend that it should again be made clear that the Green Paper only covers information in respect of which an entitlement to public access exists on the basis of laws and dissemination regulations which are already in existence today. Likewise, ARD and ZDF suggest that when the types of information are being defined, it should already be made clear that information which is subject to protection by intellectual property rights is *not* included in the area regulated by the Green Paper, rather than leaving this point until the document deals with the question of restrictions on access.

Moreover, ARD and ZDF would point out that the broadcasting corporations have (for example) accumulated their archives in the course of performing their mission (namely, the making of broadcasts). Due to its distance from the State, however, broadcasting does *not* form part of the administration (see above). Regardless of the criteria used to stipulate whether certain

information is relevant and included, these classifications should under no circumstances lead (for example) to a situation whereby the term "information" - on which the Green Paper and/or any subsequent actions are based - subsumes the archives of the broadcasting organisations, nor any other data and information obtained or gathered in connection with journalistic activity or other operational activities, such as in-house media research, or in conjunction with the collection of fees.

Otherwise, there would be fear of a substantial risk specifically affecting the main activity of broadcasting corporations, namely the performance of their journalistic mission. This is because broadcasting corporations - like press publishing enterprises - receive large amounts of information only because they guarantee absolute confidentiality and compliance with the provisions relating to data protection. This *protection of the informing parties* is also explicitly guaranteed by the provisions of German procedural law, according to which investigations and confiscations by the public prosecutor's office are impermissible if they relate to information which has been made available to the broadcaster, or the press enterprise, in connection with their journalistic activities. The same protection is also afforded to broadcasting and press employees who have to give evidence as witnesses in court proceedings. They may refuse to give testimony about the identity of the author, contributor or guarantor of articles and documents, or about statements made to them regarding their journalistic activities. This protection is indispensable for broadcasting corporations, and also for press enterprises, if they wish to fulfil their missions.

Any kind of further access by the public to the information available to ARD and ZDF, if such access were to be defined by means of legally stipulated tasks and duties, would not be appropriate to the function of ARD and ZDF in their capacity as disseminators of information. In the view of ARD and ZDF, public service broadcasters, whose mission (as recognised by Community law) specifically consists of the provision of information, should therefore be removed from the scope of application for the considerations set forth in Chapter III.1 (rubrics 71 et seq.).

#### **Question 7:**

**Do privacy considerations deserve specific attention in relation to the exploitation of public sector information? If so, in which form?**

Questions of data protection deserve specific attention in connection with the exploitation of the broadcasting corporations' information. Media law provides specific instruments for the legal protection of the individual's personal rights in relation to the press and broadcasting sectors, and many of the regulations which they contain vary from the data protection provisions. Although data protection and the legal protection of the individual's personal rights both serve the purpose of protecting the individual's right to privacy, they each have different ways of relaxing the tense relationship between the affected party and the body which processes his data. Whereas, in the conflict between the interests of information processing and the protection of the right to personal privacy, the legal provisions relating to data protection initially come down on the side of the right to personal privacy, media law is typified by the primacy of the basic rights of communication, which leads to a balancing of the conflicting interests. In recognition of this circumstance, the legislation has respected the special features of the protection of personal privacy from the press and broadcasting sectors, and in the case of press and broadcasting enterprises, it has drawn a distinction between processing data for journalistic purposes and other types of data processing, such as that undertaken for industrial/commercial and other business purposes. Whilst the general legislation on data protection is applicable to the latter activities, the processing of data for specifically journalistic purposes has been largely exempted from the application of the legislation on data protection ("media privilege"). The media privilege takes account of the sector-specific peculiarities of the protection of personal privacy.

This special position of the media in relation to the general law on data protection has now also been accorded recognition in terms of European law. Thus, Article 9 of the *Directive of the European Parliament and the Council on the Protection of Natural Persons with regard to the*

*Processing of Personal Data and on the Free Movement of Data* (Directive 95/46/EC) makes provision for a comparable privilege.

In every such case, it must be ensured that the regulations concerning access to public sector information do not bring about a situation whereby the media privilege, in conjunction with the envisaged access regulations, become (as it were) a gateway for circumventing the provisions of the body of law relating to data protection.

In the introduction to the Green Paper (rubrics 5, 11), the Commission has rightly made it clear that the paper only covers *available* public information. In connection with the provisions concerning data protection (III.7, rubrics 110 et seq.), ARD and ZDF therefore suggest that it should be made clear that the Green Paper only grants access to public sector information subject to the relevant provisions of data protection law, including Directive 95/46/EC.