

Position paper Germany [plus other MS, who support the joint paper] on spectrum related provisions of the draft European Electronic Communications Code (EECC), [date]

[These comments are without prejudice to the individual comments of the signatories]

General Comments:

- The existing European regulatory framework on spectrum has delivered highly effective communications markets and ensured an effective and efficient management of spectrum, as a scarce resource. We therefore welcome that the EECC builds on the successful mechanisms and principles embedded in the existing framework, such as technology and service neutrality, which have worked well and continue to do so.
- We recognize the significance of 5G-technology for Europe and welcome the Commission's focus on bringing Europe to the forefront of 5G roll-out. However, we do not yet know what 5G will look like so we do not know what detailed regulatory support will ensure fast roll-out to all areas of the EU. We are, therefore, concerned that setting a regulatory framework for spectrum management as detailed as the Commission's proposal could put an early 5G deployment in the EU at risk and has the potential to create an obstacle to Europe becoming the most flourishing and successful 5G market.

Focus on the general principles of spectrum management

- Member States already successfully share the common principles of spectrum management laid down in the current framework. On this foundation, according to national market needs and characteristics Member States have different needs and different priorities for what they want to achieve and what they view as the best and most efficient use of spectrum. This flexibility is a strength and a source of good practices in order to react to a fast developing market and foster innovation, as such it must be preserved.
- The EECC now foresees very prescriptive criteria and exhaustive processes for spectrum management (e.g. in Articles 45, 46 and 47). We are concerned that the very detailed proposals on spectrum management will introduce ambiguity over the criteria that Member States need to consider and balance and thus increase legal uncertainty and instability of spectrum allocation decisions. The effect is likely to hamper the efficient management of spectrum.
- We do not share the Commission's pessimistic view on the current situation and propose to reintegrate the general principles of European spectrum management laid down in the existing framework. Therefore we propose to solely focus on implementation and enforcement of existing principles rather than introducing more detailed and complex provisions.

In addition to these detailed provisions the EECC-proposal contains new concepts for procedures and obligations that need to be revised. Those of particular concern include, inter alia:

Peer Review Process (Article 35 of the draft EECC)

- Spectrum management is a complex and detailed process. It has to be tailored to the specific national needs such as market structure, population density, involvement of other spectrum users etc. and thus differs considerably in circumstances and objectives between Member States.
- A peer review process as proposed in the EECC is based on the idea that any award decision can be checked against an ideal model. We don't believe that this is possible and refer to the outcome of the RSPG report on Efficient Awards and Efficient Use of Spectrum. Moreover, a mandatory peer review process would create an immense bureaucratic burden on national administrations and the Commission and is in contradiction with our shared aim of deregulation.
- The proposed approach which involves BEREC, the Commission and NRAs would increase legal uncertainty and inevitably introduce severe delays to awards, increase the possibility of litigation and risk stifling innovation in award design without achieving the intended benefits. Pioneer states could be hindered. It may also be that the most appropriate knowledge and experience is found elsewhere other than in BEREC or any other European institution (e.g. it may be more appropriate for a Member State to seek peer review on incentive auction proposals from the US FCC as they have the knowledge and experience). The proposed mandatory peer-review process is therefore neither adequate nor proportionate.
- Instead of a particular and burdensome process, the Commission and Member States should strengthen voluntary cooperation and sharing of good practice on technical and political level. A reinforced RSPG (not BEREC) composed of High Level Representatives of Member States and following a strategic approach concerned with all relevant aspects linked to spectrum would be a good vehicle for that.

Implementing Measures

- In numerous cases the Commission proposes the instrument of implementing acts in order to stipulate in a detailed manner how the Member States must interpret, balance and implement their responsibility for spectrum management. The proposed acts would extend Commission powers of oversight and intervention into areas such as assignments, award and spectrum utilization and also specific license conditions.
- Such a significant transfer of competence from Member States to the Commission could only be justified if there is a clear EU added value and the same or better results could not be achieved by Member States. However, we do not see any evidence that

centralised spectrum management would increase efficiency and be to the benefit of all Member States, or to Europe as a whole.

- The potential use of an implementing measure by the Commission for example to overrule existing license obligations or alter license duration (see Article 53) undermines the objective of legal certainty and predictability of regulation and could hold back investment in 5G networks. Furthermore, the likely length of comitology procedures to adopt implementing decisions could disturb a rapid allocation of spectrum of 5G. Pioneering countries would be hamstrung.
- Hence, there are more reasons to keep a flexible framework and to delete the implementing measures.

Fixed duration of spectrum rights and prolongation of spectrum rights (Article 49 paragraph 2 and Article 50 of the EECC)

- We share the Commission’s aim to create market certainty and security of investment for spectrum rights holders. An important factor in promoting a predictable legal and investment environment certainly is license duration and renewal.
- However, an excessively long license risks preventing innovations if relevant frequency bands are awarded for longer than the life cycle of a technology. Increased spectrum trading or the application of a “use it or lose it” clause are not suitable counterbalances to long licenses since they depend either on the good will of operators or require lengthy withdrawal of rights procedures with subsequent legal uncertainty due to cases of litigation. Member States must therefore retain the discretion to adapt the duration of rights to national market conditions. Mandatory fixed durations of spectrum rights, and particularly the proposed minimum license duration of 25 years for harmonized spectrum, are disproportionate and insufficiently flexible to be able to respond to market developments.

Sharing of passive or active mobile infrastructure (Article 59 paragraph 3 of the EECC)

- We question the need for regulatory measures imposing the sharing of passive or active infrastructure, obligations to include localized roaming access agreements or the joint roll-out of infrastructures. Mobile network operators throughout Europe successfully co-operate on purely commercial basis without the involvement of regulators and/or governments. Moreover, the risk of regulatory measures subsequently altering and amending the conditions laid down in a spectrum award decision would considerably increase legal uncertainty for operators and therefore have a negative impact on their upfront-investments.

Institutional arrangements

- The Commission’s proposals mandate an independent regulatory authority (NRA) to undertake a number of tasks including spectrum awards and spectrum authorisations.

However, the implementation of both European and national spectrum policy, taking into account national circumstances, interests and policy objectives, shall remain at the Member States discretion. Following the principle of subsidiarity it is the prerogative of Member States to decide upon the organisational and institutional arrangements for managing that scarce resource, whether through an independent regulatory body or via a government department.

Due to the time constraints that have been set, it has not been possible to work on possible joint alternatives for Commission' proposals

Conclusion:

Spectrum is a vital and scarce resource which supports a range of critically important services besides communications. The co-ordination of spectrum management is not an end, but rather a means to enable economies of scale and interoperability. Services will be better delivered for European consumers by competitive markets that are facilitated by agile, market-responsive regulation. The EECC should allow this flexibility by focusing on the general principles and leaving room for Member States to adapt the organisation and implementation of spectrum management to their national needs.

For further details we refer to the RSPG Opinion on Spectrum issues in the proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Framework.

For the better political co-operation between Member States, a reinforced RSPG composed of High Level Representatives of Member States and following a strategic approach concerned with all relevant aspects linked to spectrum would be the right platform.