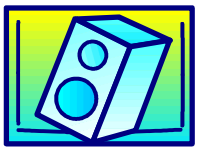

Institut für Rundfunkökonomie
an der Universität zu Köln

Michael Libertus

# Essential Aspects Concerning the Regulation of the German Broadcasting System.

## Historical, Constitutional and Legal Outlines

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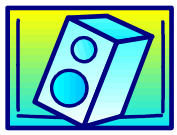

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# Essential Aspects Concerning the Regulation of the German Broadcasting System.

## Historical, Constitutional and Legal Outlines



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# A. Introduction

As a system of communication, broadcasting has always been a reflection of changing political and economic circumstances. Thus the medium of broadcasting offers a particularly good platform for observing the interaction of the various factors of technological, economic, and political development. Through its programming, broadcasting reflects those issues that society generates for mass communication or that are of greatest interest. It also reflects which issues are "socially acceptable" as a result of filtering either by state censorship or by the broadcasting company itself. As a conveyer of the communication requirements of others, broadcasting functions as a medium of communication; however it also actively influences the information supply of the respective society in which it operates and thus plays a proactive role - is in effect a key factor - in the communication supply itself. Consequently, in modern information societies, broadcasting plays a significant role in communication infrastructure.

# B. Historical Development

The constitutional and legal framework of broadcasting and the supervision of its rules in Germany are the subject of the following analyses. The questions are posed as to how and with what prospect of success the development of the broadcasting system and the conduct of those media companies within that system can be influenced by legal regulation.

## I. The Development Until World War II

In Germany broadcasting commenced in 1923 under the supremacy of the German Reichspost (Postal Authority). It was conceived of as entertainment broadcasting, which not only was to develop as free as possible from political conflicts but also was to avoid intervening in the political process - apart from the broadcasting of official government information.[1] In the beginning of the 1930's, however, it was given a growing role in the battle of political opinion as the government's mouthpiece. From 1933 onward its centralised form of organisation the "Reichsrundfunk" offered the National Socialists a good basis for political subjugation and for abuse for propaganda purposes.[2]

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1 Lerg, Rundfunkpolitik in der Weimarer Republik, in: Bausch (Hrsg.), Rundfunk in Deutschland, Band 1,1980, pp.146 et seq.

2 Diller, Rundfunkpolitik im Dritten Reich, in: Bausch (Hrsg.), Rundfunkpolitik in Deutschland Band 2, 1980, pp. 16 et seq.

## II. The Development in Western Germany After World War II

Therefore, following Germany's defeat in World War II, the tradition of state broadcasting was not only deemed inappropriate but also explicitly ruled out as a starting point for embedding broadcasting in a democratic framework in the Western zones of occupation. Instead, it was the British BBC that served as a role model, exemplifying impartial broadcasting committed to the common good. From the BBC Germany derived the requirement of independence and the concept of a broadcasting commitment to the public service idea.[3]

In light of the fresh memories of the abuse of broadcasting by the National Socialists, however, an effort was made to ensure even greater independence from the state with institutional and legal approaches than was in the case with BBC. Broadcasting was decentralized into various broadcasting authorities. In addition, an attempt was made to integrate the most important proponents of social interests as guardians of diversity and independence in programming[4] and thus to create a structure for broadcasting that exemplified the pluralism theory ("Binnenpluralismus").

Another reason for a solely public service broadcasting structure was the scarcity of frequency resources for broadcasting. Broadcasting was financed by license fees, at first solely and then later (beginning in the mid-1950s) joined by advertising revenues. Attempts by the federal government and newspaper publishers to gain access to broadcasting were thwarted by the Bundesverfassungsgericht (Federal Constitutional Court) in 1961.[5] In the late 1970s, publishers as well as other interested private parties began once again to call for the licensing of private broadcasting. Following stormy debates of media policy,[6] a compromise was reached in the 1980s with the launching of so-called pilot cable projects.[7] From an official standpoint, these served as a means of gaining experience with a broadcasting system of the future; in reality, however, they represented the first step toward a dual broadcasting system and thus the beginning of private broadcasting.[8]

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3 Hoffmann-Riem, Regulating Media, Germany 1996, pp. 114.

4 Bausch, Rundfunkpolitik nach 1945, Erster Teil, in: Bausch (Hrsg.), Rundfunk in Deutschland, 1980, pp. 46 et seq;; Bierbach, Der neue WDR, 1978, pp. 126 et seq.

5 BVerfGE 12, 205 et seq; Zehner (Hrsg.), Der Fernsehstreit vor dem Bundesverfassungsgericht, Vol. I and II, 1964/65.

6 See Hesse, Rundfunkrecht, 2nd edition, 1999, pp. 24 et seq.

7 Hartstein/Ring/Kreile/Dörr/Stettner, Rundfunkstaatsvertrag, Kommentar, Status October 2003, Teil 1 Einleitung, No. 21 and 76 et seq.

8 Hoffmann-Riem, Regulating Media, Germany, p. 115.

### III. The Development in Eastern Germany After World War II

In the German Democratic Republic, however, formed from the Soviet zone of occupation, once state broadcasting was introduced it eventually became a tool in the realization of the socialist order and thereby a tool for political control of citizens.[9]

It was managed centrally and subjected in every aspect to the political imperatives of the East German Communist Party (Sozialistische Einheitspartei Deutschlands, or SED). Although citizens were prevented for decades from receiving Western programs, this began to be tolerated in the 1980s and to some degree even supported by the spread of cable networks in order to encourage citizens to remain in areas in which these programs could otherwise not be received. Following the political overthrow in 1990, decentralization was initiated and broadcasting freed from the system of state patronage. The accession of the German Democratic Republic to the Federal Republic of Germany on 3 October 1990 marked the beginning of the adoption of the East German broadcasting system to its counterpart in West Germany. Legal basis for the integration was Art. 36 Einigungsvertrag (Unification Treaty) of 6 September 1990, establishing a broadcasting cooperation named “Einrichtung” which was the legal successor of “Rundfunk der DDR” and “Deutscher Fernsehfunk” until its liquidation on 31 December 1991.[10]

## C. Essential Aspects Concerning the Regulation of the German Broadcasting-System

### I. Constitutional Basis

The development of today’s entire regulatory principles and structures for broadcasting in Germany must be seen in the constitutional context which is in its turn - above all - a reaction to the experience of abuse of media during the so called Third *Reich*: The media system in Germany has to ensure pluralistic structures. This constitutional predisposition lies at the heart of the legal regime for broadcasting.[11] So the German Constitutional Court, *Bundesverfassungsgericht*, sets the basic rules of how to safeguard these key principles. In a number of decisions, the Court interpreted the fundamental right of freedom to

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9 Riedel, Hörfunk und Fernsehen in der DDR, 1977.

10 See Hartstein/Ring/Kreile/Dörr/Stettner, Rundfunkstaatsvertrag, Kommentar, Status October 2003, Teil 1, Einleitung, No. 93 et seq.; Hoffmann-Riem, Die Entwicklung des Rundfunks und des Rundfunkrechts im Gebiet der ehemaligen DDR, AfP 1991, pp. 480.

11 A complete overview is given by Schuler-Harms, Rundfunkordnung Deutschland, in: Hans-Bredow-Institut (Hrsg.), Internationales Handbuch für Medien 2004/2005, 2004.

broadcast as set out in article 5, para. 1, sentence 2 of the German Constitution.[12] The article runs as follows:

*"The freedom of press and the freedom of reporting through broadcasting and film are guaranteed".*

The Court regards broadcasting as a medium and a factor in the formation of public opinion and democratic decision-making.[13] Therefore, the freedom to broadcast is primarily considered as a freedom serving the freedom of opinion and the public interest.[14] So the role of public broadcasting and its major mission to guarantee "a basic provision for all" in Germany's dual broadcasting system is not subsidiary or complementary to commercial broadcasting. On the contrary, the ability of fulfilling this mission is - according to the *Bundesverfassungsgericht* – a prerequisite for the constitutional admissibility of commercial broadcasting[15]. As a consequence public broadcasting must be able to meet the challenges of competition not only in economic but even more in journalistic respects. The Court always underlines that commercial broadcasting has to follow economic principles which unavoidably lead to a tendency of being mass attractive while neglecting the interests of minorities. Hence public broadcasting has to fulfil the – how the Court calls it – "classical broadcasting mission": That means its role in the formation of public opinion and political will, entertainment, information beyond reporting about current affairs and cultural responsibility[16]. Therefore public broadcasting has to offer programmes for the whole population meeting the demands of the "classical broadcasting mission" and which can stand the competition with programmes of commercial broadcasters.[17]

In two specific decisions the Court stipulates that the public service broadcasting system must have the opportunity to adapt to a changing social, cultural and technical landscape to preserve its functions for democracy and the formation of public opinion. In this respect the Court acknowledges and stipulates that broadcasting is not a static but a *dynamic* process.[18] In these decisions dating from 1987 and 1991 the *Bundesverfassungsgericht* sanctions legislatory decisions of the competent federal states, the "*Länder"*, enabling public broadcast-

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12 The decisions can be found in the Official Collection of the Decisions and Rulings of the Bundesverfassungsgericht („BVerfGE"): BVerfGE 12, 205; 35, 202; 57, 295; 73, 118; 74, 297; 83, 238; 90, 60; 97, 228.

13 BVerfGE 12, 205 (260); 57, 295 (320); 74, 297 (323).

14 BVerfGE 57, 295 (320); 73, 118 (152); 74, 297 (323).

15 BVerfGE 57, 295 (320); 73, 118 (155); 83, 238 (296); 90, 60 (88).

16 BVerfGE 57, 295 (321 f.); 83, 238 (296).

17 See Sachs, Grundgesetz, Kommentar, 1999, Art. 20 No. 58.

18 See Schote, Die Rundfunkkompetenz des Bundes am Beispiel bundesstaatlicher Kulturkompetenz der Bundesrepublik Deutschland, 1999; Pieper, Der deutsche Auslandsrundfunk, 2000.

ing corporations to offer "new electronic communication services similar to broadcasting" and "new services on the basis of new technologies" respectively.[19] The admissibility of such an entitlement was justified by the fact that in the face of rapid technological development it can not be excluded that these new electronic communication services closely associated with broadcasting will fulfil functions of traditional broadcasting in future. Therefore public service broadcasters must have the ability to adapt to these developments because otherwise they would be in danger of no longer fulfilling their public service mission in an appropriate way.[20] It is evident that the interpretation of the *Bundesverfassungsgericht* of the fundamental right of the freedom to broadcast is closely related to its function in a democratic state. So the dynamic dimension of broadcasting is not reduced to technological developments, it also includes changes of reception and changes in the presentation of formats and contents.

## II. Competence to Regulate Broadcasting, New Media and Telecommunications

The competence for regulating and organising broadcasting rests with the *Länder*, as each state is responsible for educational and cultural matters according to the regime of federal state competences of the German Constitution. In order to harmonise broadcasting regulation on a national level, the *Länder* have entered into an Interstate Treaty on Broadcasting ("*Rundfunkstaatsvertrag*") which can be seen as an example of so-called "cooperative federalism".[21]

This Treaty is the legal basis for *ARD* and *ZDF* and their financing system, and it contains the main principles applying to the provision of private broadcasting in Germany.

Apart from the area of foreign broadcasting – operated by the broadcasting cooperation "*Deutsche Welle*" as a consequence of the federal competences for foreign affairs - the Federation (*Bund*) itself has no jurisdiction in the broadcasting sector.[22] Each state has enacted its own broadcasting laws, and since these often deviate from one another, the state of the law is not uniform.

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19 BVerfGE 74, 297 (350) 83, 238 (302).

20 BVerfGE 74, 297 (354).

21 BVerfGE 7, 377 (443); 33, 303 (357), 56, 298 (322). Concerning the question whether this also implies a uniform broadcasting licence fee in all federal states see Libertus, in: Hahn/Vesting (Hrsg.), Beck'scher Kommentar zum Rundfunkrecht, 2003, § 8 RfStV, Rn. 9.

22 See Schote, Die Rundfunkkompetenz des Bundes am Beispiel bundesstaatlicher Kulturkompetenz der Bundesrepublik Deutschland, 1999; Pieper, Der deutsche Auslandsrundfunk, 2000.

The states have established regional public broadcasters (*Landesrundfunkanstalten*), some of which are responsible for several states[23]. They are independent of the government and financed by broadcasting fees as well as advertising revenues. Together they form a network called the Working Group of Public Broadcasting Organizations of the Federal Republic of Germany (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland*: (ARD)), which was set in 1950. The regional public broadcasting organisations broadcast both radio and television.[24]

In the television sector, they are responsible for the nationwide broadcast of the "1. *Fernsehprogramm*", the first channel (ARD) and for the "*Dritte Programme*", so-called "third channels" which are the regional public broadcasting channels and which are varying from state to state and tending to offer programming that is culturally more challenging. Due to their satellite provision on ASTRA and their availability in the regional cable networks their reception nowadays is nationwide, too. Finally, there is the "*Zweites Deutsches Fernsehen*" (ZDF), the so-called Second German Television, a public body and television institution established by the states jointly in 1961. It provides television programming to all of Germany as well[25]. The public broadcasting organizations ARD and ZDF cooperate with foreign German-language broadcasters SRG (Switzerland) and ORF (Austria) in the thematic television channel 3Sat. A German-French culture orientated thematic channel, ARTE, has also been established by ARD, ZDF and ARTE France.[26] Together, ARD and ZDF operate two nationwide thematic television channels, KiKa *Kinderkanal* (children television programme) and Phoenix (News and Documentary Channel). Moreover they offer digital bouquets (ARD Digital and ZDF vision) transmitted by cable and satellite, which are consisting of different television and radio channels under a specific Electronic Programme Guide (EPG).[27]

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23 Northrhine-Westphalia: Westdeutscher Rundfunk; Hessen: Hessischer Rundfunk; Hamburg, Schleswig-Holstein, Mecklenburg-Western Pomerania; Lower Saxony: Norddeutscher Rundfunk; Bremen: Radio Bremen; Rhineland-Palatinate, Baden-Württemberg: Südwestrundfunk; Saxony, Saxony-Anhalt, Thuringia: Mitteldeutscher Rundfunk; Saarland: Saarländischer Rundfunk; Bavaria: Bayerischer Rundfunk; Berlin/Brandenburg: Rundfunk Berlin Brandenburg.

24 See Steinwärder, Die Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, 1998.

25 See Holznagel, Der spezifische Funktionsauftrag des Zweiten Deutschen Fernsehens, 1999.

26 See Schmid, Der Europäische Fernsehkulturkanal ARTE, 1997.

27 See Breunig, Programmbouquets im digitalen Fernsehen, Media Perspektiven 2000, pp. 378.

As far as nationwide public radio is concerned, ARD and ZDF are members of the public body *Deuschlandradio* which offers two different nationwide radio channels.[28]

In the area of private broadcasting, radio and television programming are offered by a number of separate, though often economically linked broadcasters. There are several television broadcasters that provide nationwide transmission of "full programming" namely the particularly successful broadcaster RTL Group (Bertelsmann-Group/WAZ-Group) and its channels RTL, VOX, RTL 2, n-tv and the Pro Sieben SAT 1 Media AG and its channels Pro Sieben, SAT 1, Kabel 1 and N 24, as well as some smaller operators. Regional TV broadcasters, as in Berlin/Brandenburg, Bavaria, Baden-Württemberg, Northrhine-Westfalia and Hamburg, are an exception.

Radio is more strongly regionalized and local, however, the provision of ready-made programming by regionally or nationally operating suppliers is on the rise.

Separate broadcasting acts on the *Länder* level regulate commercial broadcasting on the one hand, and public service broadcasting on the other hand. If an ARD regional broadcaster provides programming for only one state, its legal basis is an act (e.g., the Act governing the *Westdeutscher Rundfunk* (WDR) for Northrhine-Westphalia). If the remit of an ARD-broadcaster covers the territory of more than one state, its legal basis is a broadcasting treaty between the *Länder* involved (e.g. the Interstate Treaty governing *Norddeutscher Rundfunk* and covering the territories of the four federal states Hamburg, Schleswig-Holstein, Western-Pomerania and Lower Saxony).

The state laws regulating private broadcasting complement the Interstate Broadcasting Treaty and contain further details on licensing and supervisory procedures for private broadcasters.[29] The state law comes into play, e.g. whenever a commercial broadcaster applies for a broadcasting license in a given state. However, a broadcaster only needs one licence for the nationwide distribution of its programmes via cable or satellite. Nevertheless, the decision about cable retransmission in situations of scarcity is made by the relevant state Media Authority ("*Landesmedienanstalt*") on a case by case basis according to the legal framework.[30]

The Media Authorities administer the broadcasting or media laws. They do not have regulatory powers over public service broadcasters, however.

Beyond traditional radio and television broadcasting services, subtile distinctions must be made, under German law, between "media services" and "tele-

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28 See Kaufmann, Der nationale Hörfunk im vereinten Deutschland, 1997.

29 See Vahrenhold, Die Stellung der Privatfunkaufsicht im System staatlicher Aufsicht, 1992.

30 See Wille/Schulz/Fach-Petersen, in: Hahn/Vesting (Hrsg.), Beck'scher Kommentar zum Rundfunkrecht, 2003, § 52 RStV Rn. 1 et seq.

services". Media services can be described as communications services that are aimed at providing information and communication content via distribution or on demand, provided that they are characterized by an editorial arrangement that is aimed at influencing public opinion. Media services include, in particular: distribution services in the form of a direct offer to the public, in connection with the sale, purchase, rent or lease of products or the provision of services ("teleshopping"); distribution services in connection with the transmission of measuring results and data transmission in the form of text or images with or without supporting sounds (burglar alarm systems, online supervision systems); ondemand services whereby sounds or images are transmitted form electronic storage media unless such services are predominantly limited to the individual exchange of goods and services; and the mere transmission of data, or on-line games. These and other "media services" are governed – as a transformation of the e-Commerce Directive – by the 2002 Interstate Treaty on Media Services ("*Mediendienste-Staatsvertrag*") which essentially treats media services as similar to press publications for legal purposes and establishes rules governing, inter alia, advertising, the protection of minors and journalistic fairness.[31]

Teleservices, however, can be described as electronic information and communication services, which are designed for the individual use of combinable data (such as characters, images or sounds) and are based on transmission by means of telecommunication. They include, in particular, services offered in the field of individual communication (e.g. telebanking, data exchange); services offered for information or communication unless the emphasis is on editorial arrangement to form public opinion (e.g. data services providing traffic, weather, environmental and stock exchange data); services providing access to the Internet or other networks; services offering access to online games; and goods and services offered and listed in electronically accessible data bases with interactive access and the possibility for direct order ("electronic department store"). These and other "teleservices" are governed in line with the e-Commerce Directive by the (federal) Teleservices Act of 22 July 1997 in its revised version of 14 December 2001, which is complemented by specific data protection legislation, and by the Digital Signature Act, which is aimed at establishing a secure system for digital signatures.[32]

The Teleservices Act requires any teleservices provider to block the use of illegal content of which it becomes aware. In addition, whereas both the Teleservices Act and the Interstate Treaty on Media Services establish the basic principle that providers are responsible for contents over which they have editorial control, the Teleservices Act additionally provides for a differentiated system of liability for third party content: Under the Act, providers - i.e. natural or legal persons who make available either their own or third party teleservices or who pro-

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31 See Lent, Rundfunk-, Medien-, Teledienste, 2001, pp. 135 et seq.

32 See Lent, Rundfunk- Medien-, Teledienste, pp. 166 et seq.

vide access to the use, provided that the provider has knowledge of such content and is technically able and can reasonably be expected to block the use of such content - are liable for the respective content. In the case of mere "access" providers, liability is considerably reduced. Providers are not responsible for any third party content to which they only provide access. The automatic and temporary storage of third party content due to user request is considered as the provision of access and, therefore, exempt from liability.

Besides the regulation of Teleservices, digital signature and specific data protection legislation the regulatory competence of the federal government is restricted to telecommunications networks and services, i.e. the technical infrastructure required for broadcasting. Under German constitutional law, telecommunications networks do have – when used for broadcasting transmissions – a so-called *serving* function for broadcasting and thus take second place in balancing the public interest objectives involved in the regulation of electronic media.[33] The operation of telecommunications networks, such as broadcast transmitters or broadband cable networks, as well as the allocation of frequencies, is subject to federal legislation laid down in the 2004 Telecommunications Act ("*Telekommunikationsgesetz*").[34]

## III. The Dual System of Broadcasting

The broadcasting model chosen by the *Länder* is based on a dual structure. It can be characterized by the coexistence of non-profit orientated public broadcasting and private broadcasting, which is nearly entirely dependent on advertising revenues. All public service broadcasters are independent of the national or regional governments and subject only to a very limited legal supervision. To ensure independence of financial control by the state, they are financed through television and radio licence fees paid by viewers and listeners. Where content is concerned, ARD and ZDF are bound to a programme policy of comprehensiveness, balance, mutual respect and quality programming.

Public broadcasting is under an obligation to offer so-called internally pluralistic "integrated programming". In other words, the programs it broadcasts must present all social and societal interest in a balanced manner and, in particular, are forbidden from pursuing any one-sided interest or viewpoint ("*Ausgewogenheit*"). A given palette of programming must be diverse. For the purpose of monitoring the legal requirements, the broadcasting laws have provided two special organs of the broadcasters, namely, the Broadcasting Council ("*Rundfunkrat*"). The pluralistically composed Broadcasting Council's main tasks are to ensure monitoring independence and diversity in programming; that of the Administrative Council ("*Verwaltungsrat*") is to ensure that the broadcaster's ad-

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33 BVerfGE 12, 205, 227; see also Hesse, Rundfunkrecht, pp. 49.

34 See Baker & McKenzie, Telecomunication Laws in Europe, 4th edition, 1998, p. 136.

ministration and financial management comply with the regulations. Since supervision is thus accomplished internally, that is, by an organ of the broadcasting authority itself, there is no need for an additional, external supervisory body. Nevertheless, each state government makes sure that its broadcasters observe the relevant laws, even though its supervisory powers are somewhat restricted ("limited legal supervision"). State governments are prohibited from intervening in the creation of programming itself.[35]

To receive a licence, a private broadcaster must have sufficient financial funds, and it must fulfil certain standards regarding the provision of content. While it must be ensured that private broadcasting does not become the tool of individual social groups and that all relevant forces of society must have a say in their overall content, it is understood that private broadcasters cannot be subject to the same strict programming standards as public broadcasters. Commercial programmes have to appeal to broad sections of society, thus making it possible to maximise the return on investment. Given these economic constraints, private broadcasters are not in a position to provide comprehensive and balanced programming in the same way as pubic broadcasters. This is not to say that private broadcasters do not contribute to public interest objectives. However, the extent of their contribution is necessarily limited, and there is no guarantee that this contribution is sustainable under varying market conditions. This is why the Constitutional Court has held that as long as and to the extent that public broadcasters secure the public interest and the public service remit, legislators may place reduced legal requirements on private broadcasters. Their relatively light regulation is, therefore, inextricably linked to the fulfilment of the public interest by public service broadcasters and their ability also to fulfil this function in the future (the so-called "development guarantee" of public service broadcasting).[36]

Against this background, the public service mission of public service broadcasters is necessarily a comprehensive one. The remit includes making a significant contribution to public opinion forming and diversity of opinion by providing the largest possible range of quality information, cultural and educational programmes, as well as entertainment and sports programming. The obligation to provide "basic services" ("*Grundversorgung*")[37] includes supplying such content to the entire population. Compliance is monitored by the above mentioned "Broadcasting Councils" made up of representatives of organisations representing the general public.

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35 Hesse, Rundfunkrecht, pp 64; Herrmann, Rundfunkrecht, 2004, pp. 161.

36 BVerfGE 83, 238 (326); Selmer, Bestands- und Entwicklungsgarantien für den öffentlich-rechtlichen Rundfunk in einer dualen Rundfunkverordnung, 1988.

37 Libertus, Grundversorgungsauftrag und Funktionsgarantie, 1990, pp. 28.

## IV. The Legal Framework for Public Broadcasting

Due to the described constitutional conditions the *Lände*r are required to create a so-called "positive legal regime" with substantive organisational and procedural safeguards. Part of this legal regime is the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*) which can be seen as an example of so called "co-operative federalism" and the legal framework for our dual broadcasting system. Its seventh – and for the time being – last revision came into effect on April 1st 2004.

In the Interstate Treaty of Broadcasting the public service mission is laid down in accordance to the rulings of *Bundesverfassungsgericht*.

Here again the role of public service broadcasting is described as medium and factor in the process of the formation of free individual and public opinion by producing and broadcasting radio and tv programmes.

Moreover public service broadcasting has to provide a complete overall view of international, European, national and regional events in all essential areas of life. In doing so, public service broadcasting should contribute to international understanding, to European integration and social coherence on the level of the federal state and the *Länder* level. Further on it is laid down that the programmes have to provide information, education, advice and entertainment, and that public service broadcasting also has to offer programmes dealing with cultural contents. In fulfilling the public service mission public broadcasting has to honour the principles of objectivity and impartiality of reporting, pluralism of opinions as well as a balance of offerings and programmes respectively. On a second level the regional public service broadcasters forming the ARD – as well as ZDF and DeutschlandRadio – have to pass guidelines or statutes to make the public service mission more precise. These statutes and guidelines shall be published in the Official Journals of the *Länder*. Influenced by the BBC role model these statutes and guidelines stipulate binding principles and content-requirements for programmes and online services on a general basis.[38] For example public broadcasters commit themselves that external links in online services shall be justified by journalistic standards and chosen carefully. Moreover every two years ARD, ZDF and DeutschlandRadio have to publish a report concerning the fulfilment of the public service mission regarding quality and quantity of the offerings and programmes as well as the main topics of programming within the next two years. So there will be an instrument to proof they will have fulfilled their self-commitments or not.[39] The first report was published on 1th of October 2004. The new version of the Interstate Treaty implementing a three level sys-

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38 See Libertus, Programmbeschwerdeverfahren und Selbstverpflichtungserklärungen bei der BBC - ein „role model" für Deutschland? TKMR 2003, pp 400.

39 Schwarzkopf, Bindungsmuster und Selbstverpflichtungserklärungen: Erwartungen und Perspektiven, epd medien Nr. 58 vom 28.7.2004, pp. 3.

tem of defining and precising public service remit ensures that the public service remit will be clearly defined for both traditional as well as new media content.

The Interstate Treaty also is the legal basis for ARD and ZDF online activities. According to the wording of art. 11 para. 1 of the Treaty public service broadcasting system may offer electronic communication services (*Mediendienste*) with programme-related content.

In the official reasons concerning the regulatory intent of article 11 para. 1 it is made clear that the offering of such electronic communication services by public broadcasting lies at the heart of his public service mission and that this regulation reflects the prerogative of the member states for broadcasting regulation according to the *Amsterdam Protocols* enshrined in the EC-Treaty as well as in the recently adopted European Constitution.

This entitlement to offer electronic communication services with programme-related contents is part of the definition of the public service mission laid down in art. 11 Interstate Treaty.

As far as ARD-Online services are concerned, their legal basis can be found in article 4 of *ARD-Staatsvertrag*, which is a part of the Interstate Treaty. According to the wording the regional public service broadcasting corporations building the ARD are entitled to offer electronic communication services (*Mediendienste*) with programme-related content as a part of their public service mission. Advertising and sponsoring are not allowed in these electronic communication services. There are parallel wordings for ZDF and DeutschlandRadio.

On the level of the Regional Public Service Broadcasters (*Landesrundfunkanstalten*) the regulations for electronic communications services differ in the separate broadcasting acts of the *Länder*.

## V. Financing

Private broadcasting is funded by advertising, sponsorship, pay tv, and teleshopping.

Public service broadcasters receive their revenues by licence fees and only to a small extent from advertising and other sources.[40] The basic monthly fee at present only for radio is 5,32 €, for television 10,83 €, so the total amount is 16,15 € per month.

The amount of the licence fee is defined in several stages. Firstly, each public broadcasting organisation submits its requirements. These are subsequently analysed and assessed by the Commission for the Assessment of Financial Requirement ("*Kommission zur Ermittlung des Finanzbedarfs*", KEF), independent from the state and made up of independent experts which are appointed

[40] Hesse, Rundfunkrecht, pp. 174.

by the *Länder*. The state legislators, which eventually decide upon the amount of the licence fee, are basically committed accepting the proposal of the KEF: They are only allowed to deviate from the proposal of the KEF by very specific reasons, namely by ensuring access to information or in cases where the level of broadcasting fees would lead to a not appropriate burden for the broadcasting licence fee payers.[41]

Advertising on public channels is only permitted to a very limited extent (that is, only 20 minutes per day except Sunday on the two main nationwide television channels of ARD and ZDF, and only on weekdays before 8 pm on television, on radio in certain time slots). Advertising revenues lower the amount of the licence fee that viewers must pay, thus contributing to a fee affordable to everyone. Advertising is considered to be compatible with the public service remit, as long as it does not become the primary source of revenues.

## VI. Control of Media Concentration

The Interstate Treaty on Broadcasting also contains provisions against media concentration in the commercial broadcasting sector. The rules are based on an audience market share test. No additional broadcasting licence may be granted to a commercial broadcaster, if its audience market share reaches 25 per cent or more. If the market share of an entity, i.e. in case of a takeover, comes close to the 25 per cent threshold, its position and strength in related markets can be taken into account to measure the total market share. The evaluation is carried out by the Commission for the Evaluation of Media Concentration ("*Kommission zur Ermittlung der Konzentration im Medienbereich*" (KEK). This Commission consists of independent experts and advises the Media Authorities of the *Länder*.

## VII. Licensing Procedure for Analogue Terrestrial Broadcasting

The Federal Government passes the regulation that allocates certain frequency bands to certain uses according to the international coordination. To the extent that the spectrum regulation assigns frequencies to broadcasting, it is also subject to the approval of the *Länder*. The federal Telecommunications Act states that the assignment of frequencies for the broadcasting of programmes requires a prior broadcasting authorisation of the competent state Media Authority. The supervision of all matters concerning Telecommunications is mission of the Regulatory Authority for Telecommunications and Postal Services ("*Regulierungsbehörde für Telekommunikation und Post*" (RegTP)).

The allocation of frequencies between the public and private broadcasting sector is usually arbitrated at state level. The operation of a transmitter network is subject to a separate licence granted by the RegTP. For historical reasons, i.e.

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41 Libertus, Rechtsschutz gegen die staatsvertragliche Rundfunkgebührenfestsetzung, AfP 2001, p. 23 (26).

due to former allied law, terrestrial broadcasting networks are operated almost exclusively by certain ARD regional broadcasters or by *Deutsche Telekom*. ZDF, regional public broadcasters in East Germany, as well as all commercial broadcasters rely on *Deutsche Telekom* terrestrial broadcasting networks for transmitting their programmes and services.

## VIII. Digital Terrestrial Broadcasting

Digitial terrestrial television has been started in some of the *Länder* by now, i.e. Berlin and parts of *Brandenburg* in 2003 as well as parts of Northrhine-Westphalia in 2004. Part of Northern Germany, Bavaria, Saxonia, Hesse and Rhineland-Palatinate are going to start in 2005. The rules in place regarding digital terrestrial broadcasting can be found in the revised Interstate Treaty on Broadcasting in the broadcasting regulation on state level.

The Interstate Treaty on Broadcasting within its analogue/digital switchover-regulation stipulates that transmission capacity for digital terrestrial broadcasting should be divided between public and commercial broadcasters on a 50:50 basis. Moreover, public broadcasters shall be entitled to run their own multiplexes. The regime used for authorising analogue broadcasters, in particular content related conditions, can be used for digital broadcasting as well. Regimes for digital terrestrial broadcasting have already been put into place in some states.

On the federal level, a kind of “memorandum” exists that deals with the transitional process from analogue to digital transmission. The memorandum is the result of the work of the Digital Broadcasting Initiative (“*Initiative Digitaler Rundfunk*”), a steering committee initiated by the federal government and comprising representatives of the federal government, the state governments, regulatory authorities, broadcasters, manufactures, consumer organisations, and others. According to the final report of this committee, the analogue switch-off for terrestrial television broadcasting shall be 2010, a date, which is now legally fixed within the revised Telecommunications Act and some broadcasting laws of the *Länder.*[42]

As regards terrestrial digital audio broadcasting (T-DAB), it is worth noting that the transmission operating services for DAB services have been subject to calls for tender by RegTP on the federal level. Licences were awarded to joint ventures between certain regional ARD broadcasters, *Deutsche Telekom* and state Media Authorities representing commercial radio operators.

The assignment of digital network capacities to public and commercial broadcasters takes place on the state level and differs from state to state.

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42 Grünwald, Analoger Switch-Off, 2001, pp. 132 et seq.

## IX. Licensing for the Provision of Cable Television

The operation of transmission capacities on a cable network requires a telecommunications licence. The establishment of the network itself is not subject to a licence[43].

In some states, the provision of broadcasting programmes over cable networks is subject to a prior notification procedure. State broadcasting laws contain rather strict rules dealing with the retransmission of permissible programming. Decisions are taken by the competent Media Authority. Priority is given to certain programmes of public service broadcasters, to certain programmes of private broadcasters licensed for reception in the particular region, and to local community channels ("open channels"). If the capacity of the cable network is not sufficient to retransmit the programmes of all broadcasters applying for it, the state Media Authority decides on the ranking, predominately taking into account the need for pluralism.

As regards digital broadcasting programmes, the basic conditions applying to programmes to be retransmitted are included in the Interstate Broadcasting Treaty. A prior notification procedure is in place in order to verify that these conditions are met. As a general rule, the network capacity available for digital broadcasting programmes is subdivided into three sectors. The first one contains must-carry services (e.g. public service channels and bouquets up to a maximum of three digital channels), and all local and regional programming (up to one digital channel). Roughly another third of the cable capacity should be made available for various other programmes and services, including new media services ("*Mediendienste*"), based on principles of pluralism of opinion. The last third (the size of which actually depends on the total network capacity) is subject to the free disposition of the cable network operator.

The Interstate Treaty on Broadcasting also regulates the provision of technical services, such as conditional access systems and navigation tools. They are subject to notification requirements. A Media Authority may prohibit the provision of a conditional access service or a navigator, if it violates the requirement of granting fair, reasonable and non-discriminatory access.

Parallel to these broadcasting regulations access rules from the Framework Directive and from the Access Directive have been transferred into the revised Telecommunications Act 2004.

The Interstate Broadcasting Treaty also requires that a dominant operator providing services that consist of bundling and marketing of programmes must apply non-discriminatory terms to all programme providers. The Media Authorities of the *Lände*r have jointly passed binding guidelines on access to digital gateways. These rules have been in force since 1 November, 2000.

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43 Baker & McKenzie, Telecomunication Laws in Europe, p. 141.

### X. Satellite Broadcasting

No frequencies are awarded as such to broadcasters. Satellite broadcasting licences are awarded to content providers by the relevant Media Authority of a state.

## D. Future Policy Implications and Demands on the German Broadcasting Regulation

Digital technology and the convergence phenomenon are revolutionising broadcasting making possible multiple channels, interactivity, broadband TV, pay-per-view and other digital services. Indeed, this change, occurring on a global scale, may well be the most significant development in communications in general and on the national level.[44]

The result is that broadcasting is moving rapidly into an apparently far more competitive and market driven environment. A central question for broadcasting regulations in all countries is therefore how well this burgeoning (and converging) market will serve the public interest.[45]

The impact of changing technology on markets suggests a further danger that the new technology will replace former public monopolies with private monopolies. Monopolies are always a matter for concern, but in a democratic society private monopolies in the media must be a matter for special concern preserving the necessity of sector-specific regulation:

- The new technology creates strong pressures towards a broadcasting industry where audiences are fragmented and yet ownership is concentrated. This is because high quality multimedia content is expensive to produce, but relatively cheap to edit or to change and trivially cheap to reproduce. It therefore has high fixed costs and low marginal costs – the natural creators of monopolies;
- High quality material can still be produced and yet costs very little per unit provided that it reaches a large number of people (exploiting economies of scale) and/or provided that it is used in a wide variety of different formats (exploiting economies of scope), but the exploitation of these economies of scale and scope imply concentration of ownership;

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[44] See Holznagel, Rechtspolitische Leitlinien für die digitale Kommunikations- und Medienordnung, Juristen Zeitung 2001, 905, and McGougan, The Challenge of Convergence to Audiovisual Regulation, in Marsden/Verhulst (Eds.), Convergence in European Digital TV Regulation, 1999, pp. 175 et seq.

[45] This also was an important topic of the White Paper of the British Government „A New Future for Communications“ (http://www.communicationswhitepaper.gov.uk). which led to the 2003 UK Communications Bill which led to the 2003 UK Communication Bill. See also Libertus, Das britische Whitepaper „A New Future for Communications“ – Inhalte und Implikationen für die Regulierung elektronischer Kommunikation, MMR 2001, pp. 292 et seq.

- Thus while one source of monopoly, spectrum scarcity seems to be gone, it has been replaced with another – the natural monopoly of economies of scale and scope on the one hand plus the natural scarcity of talent on the other;
- In addition, bottlenecks in gateways mean that particular consumers may well become reliant on a single supplier running proprietary systems of middleware without securing interoperability46.
- The German broadcasting model is observed quite critically by the European Commission under state aid aspects. This refers especially to the definition of the public service remit, the acquiring of transmission rights, the selling of advertising slots, online activities and, in general the financing.

The implication of these themes is that the market on its own cannot produce the full benefits of the new technology for society as a whole.[47] Equally the deficiencies in the market cannot be filled just by negative regulation. Current and future technical changes with broadcasting and the Internet operating globally, and with more intense commercial pressures makes regulation less effective. Rules are not appropriate for judging quality.

What German public policy and broadcasting regulation in future therefore requires is a positive force that would act as a counterweight to the private concentration of ownership, deliver national coverage so as to counteract fragmentation of audiences as well as ensuring “universal access” to prevent a digital divide of the society into information “haves” and “have-nots”.

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46 Problems may especially arise in the field of search engines as new bottlenecks or as far as interoperability in digital interactive television is concerned. See Machill/ Welp (Hrsg.), Wegweiser im Netz. Qualität und Nutzung von Suchmaschinen, 2003; Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on interoperability of digital interactive television services (Com (2004) 541 final).

47 The phenomenon of market failure can be found in the broadcasting sector. See Graham, Broadcasting Policy in the Multimedia Age, in Public Purposes in Broadcasting, 1999, p.19,26 et seq.). According to Schulz/Held/Kops, Perspektiven der Gewährleistung freier öffentlicher Kommunikation, ZUM Sonderheft 2001, it also can be found in the online sector.

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