THE GOAL OF PLURALISM AND THE OWNERSHIP RULES FOR PRIVATE BROADCASTING IN GERMANY: RE-REGULATION OR DE-REGULATION?

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INTRODUCTION

In Germany, as elsewhere in Western Europe, the past decade has witnessed a paradigmatic transformation of broadcasting from a traditional public-service monopoly with relatively few channels to a "dual," public/private, multi-channel system. In large measure this transformation has been driven by a major state-led infrastructural investment program, commenced during the 1980s, to promote the "new media" of cable and satellite. These new media rendered redundant the "scarcity of frequency" rationale for a continued public broadcasting monopoly and provided the opportunity to launch multiple private commercial channels. Not least in view of Germany's distinctive regulatory culture,[1] the process required a rigorous exercise in re-regulation. However, in important respects, the *formal* re-regulation masks a *substantive* de-regulation. Within the realm of broadcasting policy, economic goals have tended to prevail over cultural ones. This is particularly clear with regard to rules designed to limit the concentration of private media power. Regulatory policy has had a symbolic quality, legitimating what was from the start an already concentrated media industry structure and opening the legal doors to further concentration. The Federal Constitutional Court's guarantee of the vital role of

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[1] Regulation has traditionally played a central role in German public policy. This is nowhere more true than in the field of broadcasting policy. For a general discussion of Germany's "regulatory culture," see Kenneth Dyson, *Theories of Regulation and the Case of Germany, in* THE POLITICS OF GERMAN REGULATION 1-28 (1992).

the public broadcasters, strictly regulated to provide balanced and diverse programming (i.e., pluralism), is therefore of crucial significance. Strong public broadcasters are needed as a pluralistic counterbalance to the media power accumulated by a few large, less regulated private concerns.

I. THE *Status Quo Ante*: Public Service Monopoly

In the Federal Republic of Germany, it has always been axiomatic that broadcasting fulfils a special public-service role. Accordingly, "broadcasting freedom" cannot be assured by a *laissez faire* approach; it has to be *both* protected by negative restrictions (e.g., against political interference or dominance by strong social and economic actors) *and* positively promoted (e.g., through strong, publicly accountable and pluralistically representative, public-service broadcasters). German history has demonstrated both the potential for misuse of the medium and its sheer communicative power. Thus, in the view of no lesser authority than Germany's Federal Constitutional Court, broadcasting is not simply a "medium" but also a key "factor" for the functioning of democracy; it has the power to influence and shape opinion.[2] Moreover, the constraint of a relative "scarcity of frequencies" coupled with the high entry costs meant that broadcasting has historically been an activity open to only a limited number of operators. Until the 1980s, therefore, it was widely accepted that broadcasting should be exclusively the task of nine, non-profit-making, regional or occasionally inter-regional (i.e., *Land*-based or inter-*Land*), public corporations responsible for both radio and television.[3] Through their network, the Association of German Public Service Broadcasters (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, ARD*), these corporations have provided the First German TV channel (*Erstes Deutsches Fernsehen*), popularly known as "ARD"; they have also provided their own regional channels, the "Third Channel(s)." A second national television channel has been provided by a corporation organized collectively by the *Länder*, the Second German Television corporation (*Zweites Deutsches Fernsehen, ZDF*). The public broadcasters' remit has been the universal provision of a comprehensive, balanced and diverse range of programming that caters to German society's pluralism.

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[2] *See* Silke Ruck, *Development of Broadcasting Law in the Federal Republic of Germany*, 7 EUR. J. COMM. 219, 223 (1992).

[3] Unification added two more corporations. Meanwhile, however, an Inter-*Land* Treaty of July 31, 1997, has provided for the merger of two of the southern German ones into *Südwestrundfunk*.

The public corporations have been funded by income from a license-fee levied on TV households, supplemented by revenue from strictly limited amounts of advertising air-time. Free from the commercial pressures that typically arise from competition for advertising revenue and viewer ratings in competitive, commercial broadcasting systems, German public broadcasters have delivered serious and socially responsible programming, informing and educating as well as entertaining the public.

The accountability mechanisms for German public broadcasting are rather unique. They originated in the Western Allies' policies, immediately after the Second World War, to ensure that broadcasting in (West) Germany should be decentralized and controlled pluralistically. The post-war German elites, too, accepted that broadcasting should be controlled in a way that safeguarded its independence from the state (the hallowed principle of *Staatsferne*, literally "distance from the state"). They also accepted the fact that the mass medium should on no account fall under the control of any powerful social interest or interests. Formally organized as corporations under public law (*Anstalten des öffentlichen Rechts*), Germany's public broadcasting institutions are classic examples of distinctly non-state, non-market media. They have been controlled by internal broadcasting councils (*Rundfunkräte*)—or, in the case of the ZDF, by a television council (*Fernsehrat*). These internal regulatory bodies have each contained representatives of the country's "socially significant groups" (*sozial relevante Gruppen*): i.e., cultural bodies, churches, employers' associations, trade unions, and so on, alongside directly political representatives. This kind of "internal control" (*Binnenkontrolle*) of the broadcasters is designed to guarantee the balanced and diverse character—the "internal pluralism" (*Binnenpluralismus*)—of their programming. The state in Germany only exercises a background regulatory role through the enactment and limited supervision[4] of broadcasting laws. Yet, this activity too is decentralized; broadcasting legislation and supervision is covered by the "cultural sovereignty" (*Kulturhoheit*) of the constituent federal states (*Länder*) of the Federal Republic.[5]

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[4] *Rechtsaufsicht*, i.e., ensuring that all the broadcasters' affairs are conducted within their legal remit.

[5] For an account of the early development of the West German broadcasting system, see PETER HUMPHREYS, MEDIA AND MEDIA POLICY IN GERMANY ch. 3 (1994).

II. The Introduction of the New Media

The introduction of private commercial broadcasting from the mid-1980s onwards initially produced much controversy. On the one hand, a powerful coalition of forces favored commercial broadcasting. The advertising industry wanted an expansion of television advertising and competition between carriers of advertising (i.e., the abolition of the public broadcasters' monopoly of air-time that kept advertising charges high). Since the early 1970s, the electronics industry had lobbied energetically for policies that would promote the competitiveness of German industry in the looming Information age. Specifically, industry envisaged exciting new markets for cable systems, broadcasting satellites, satellite reception equipment, pay-TV decoders, new television sets, and so forth. The (then) state telecommunications operator—the *Bundespost*—wanted to develop the new technologies in order to assert its monopoly over the provision of infrastructure and key communications services.[6] Policy makers (national and *Länder*) were naturally eager to promote German industry in emerging international markets for new information and communications technologies. The CDU/CSU/FDP[7] coalition, in power since 1982 in Bonn, has clearly prioritized this goal over other concerns (e.g., competition policy, cultural concerns, etc.). Finally, German press groups, too, sought the opportunity to diversify into commercial broadcasting, not least in order to secure their share of media advertising revenue against future competition.

For their part, Germany's SPD were discomfited. They too wanted to reap the commercial advantages—for Germany, and for the *Länder* they governed— that were promised by the new media. Against this, they recognized that the mass introduction of the new media would mean the inevitable abolition of the public service broadcasting monopoly which they had always supported. In office in Bonn (1969-1982), the SPD had actually promoted the development of broadcasting satellites but at the same time imposed what the Christian Democrats had called a "cable blockade."[8] This rather contradictory policy reflected a deep-seated ambivalence

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[6] *Id.* at 195-203.

[7] Chancellor Helmut Kohl's *Christlich-Demokratische Union* or Christian Democratic Union ("CDU"), together with its Bavarian sister party, the *Christlich-Soziale Union* or Christian Social Union ("CSU"), have been in a coalition with Germany's small Liberal party, the *Freie Demokratische Partei* or Free Democratic Party since the latter switched from its earlier "social-liberal" coalition (1969-1982) with the *Sozialdemokratische Partei Deutschlands* or "Social Democratic Party of Germany" ("SPD").

[8] It should be noted that the SPD did agree to a limited number of experimental cable television pilot projects.

about the new media on the part of the SPD. Sections of the SPD grass-roots (*Parteibasis*), the unions, and the Green party were extremely negative about the new media; even the churches worried about the possible negative effects of commercial broadcasting.[9]

When the CDU/CSU came to power in Bonn in 1982, the SPD's "cable blockade" was immediately overturned. Although broadcasting law and regulation were in the jurisdiction of the *Länder*, telecommunications policy was within federal jurisdiction. Therefore, the new CDU *Bundespost* minister was able to press full speed ahead with a program of massive state support for the introduction of cable and satellite (i.e. "telecoms") infrastructure. At the same time, CDU/CSU *Länder* began to enact their own laws to allow private commercial broadcasters to operate within—and from—their areas of jurisdiction. This, in turn, placed overwhelming pressure on the SPD *Länder* to do the same; otherwise, they would be effectively denying themselves the *Bundespost*'s cable investment, without being able to obstruct viewers in their *Länder* from receiving private satellite channels broadcast out of CDU/CSU *Länder*. Faced with these new realities, leading SPD politicians in the *Länder* began to prioritize the economic goals of broadcasting policy. The name-of-the-game for many *Länder* politicians—regardless of political color—became how to attract private media investment to their regions. From this point on, media policy in Germany became increasingly subsumed into what economists call locational policy (the term is *Standortpolitik*).[10]

III. The Constitutional Court's Key Role in the Re-Regulation of German Broadcasting

In post-war Germany's "constitutional-legalistic" political culture, major controversies over the broadcasting system have been resolved by the Federal Constitutional Court in Karlsruhe (the federal republic's "Supreme Court"), which has therefore acted "much like a legislature" in establishing basic guidelines for the broadcasting order.[11] Since the beginning of the 1960s the case law of the Federal Constitutional Court has established the broad parameters of broadcasting regulation within which the legislators of the individual *Länder* have exercised their freedom to maneu-

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[9] Humphreys, *supra* note 5, at 204-11.

[10] In 1984 the SPD national party conference also recognized the sheer futility of continuing to oppose private commercial broadcasting, albeit after a fierce debate and much grass-roots opposition.

[11] Wolfgang Hoffmann-Riem, Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries 119 (1996).

ver.[12] Thus, in its famous "First TV Ruling" of 1961,[13] the Federal Constitutional Court had ruled against the introduction by the federal government of a commercial national television service. This confirmed both the *Länder* jurisdiction for broadcasting and, on the grounds of the scarcity of frequencies and high entry costs of broadcasting, the public-service broadcasting monopoly. However, two decades later the Federal Constitutional Court, with a 1981 ruling,[14] actually paved the legal path for the introduction of commercial broadcasting by recognizing that the new media of cable and satellite (and new possibilities for terrestrial broadcasting) rendered obsolete the "scarcity of frequencies" rationale for a public broadcasting monopoly. In other words, in 1981 the Constitutional Court gave the *Länder* the legal green light to legislate for private commercial broadcasting. At the same time, however, the Court made it very clear that broadcasting regulation should not be characterized by a "free-for-all" (*freies Spiel der Kräfte*). Private broadcasting, too, had public service obligations; above all, it had to supply pluralism in the expression and formation of opinion (*Meinungsvielfalt*).

In this vein, the Constitutional Court suggested that multi-channel broadcasting now provided the scope for a new "external pluralistic" model of broadcasting wherein individual program services might reflect an imbalance, so long as the traditional goals of balance and diversity were supplied by the totality of broadcasting output. The supervision of multi-channel broadcasting could accordingly be provided by an "external control" authority placed above the broadcasters, rather than an "internal control" body within them as had always been the case with public corporations (as described above). From 1984 onwards the individual federal states (*Länder*) enacted a wave of legislation for private commercial broadcasting. The new *Land* laws varied considerably in their details, but essentially they attempted to do two things: to open up opportunities for private media investment; and to safeguard time-

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[12] *See* HUMPHREYS, *supra* note 5, at 338-442 (summarizing the Federal Constitutional Courts' key rulings on broadcasting through 1991); *see also* VINCENT PORTER & SUZANNAH HASSELBACH, PLURALISM, POLITICS AND THE MARKETPLACE: THE REGULATION OF GERMAN BROADCASTING (1991); Ruck, *supra* note 2, at 219-39. The Constitutional Court's rulings are reproduced in the journal *Media Perspektiven.*

[13] BVerfGE 12 (1961), 205, 1 Rundfunkentscheidung (Deutschland-Fernsehen). *See* HUMPHREYS, *supra* note 5, at 338.

[14] BVerfGE 57 (1981), 295, 3 Rundfunkentscheidung (FRAG/Saarlaendisches Rundfunkgesetz) (Third TV Ruling). Meanwhile, in 1971, a "Second TV Ruling," not referred to here, had confirmed the public-service monopoly. *See* HUMPHREYS, *supra* note 5, at 339-40.

honored standards and values, especially the constitutional-legal goal of pluralism, in broadcasting.

To this end, all of the individual *Länder* laws provided for the licensing and supervision of private broadcasters by a new tier of legally autonomous *Länder* regulatory authorities (*Landesmedienanstalten*). Following Unification there were fifteen of these authorities.[15] Generally, these regulatory authorities had pluralist supervisory boards composed of representatives of the "socially significant groups."[16] These provided for the pluralistic social control of private broadcasting in a manner that was analogous to the above-mentioned public-service broadcasting councils. Their key purpose was to ensure that private broadcasting was sufficiently pluralistic, especially with regard to diversity of opinion (*Meinungsvielfalt*). Following the Constitutional Court's 1981 ruling, this goal might now be achieved across a range of program services (i.e. "external pluralism"). Some (SPD) *Land* laws required "internal pluralism" from the private broadcasters, some (CDU/CSU) ones opted for "external pluralism," and the rest adopted mixed or transitional models.[17]

In 1986 the Court further clarified how pluralism in the emergent public/private "dual system" should be guaranteed. In its so-called "Fourth TV Ruling,"[18] the Court stressed that the public-service broadcasters future role was crucial: they should continue universally to provide a basic comprehensive service (*Grundversorgung*). The very constitutionality of private commercial broadcasting and its exemption from the same high programming requirements and from the same degree of close regulation (i.e. "internal control") depended on the public broadcasters' fulfillment of this key role.[19] The Court also stipulated that the private broadcasters should observe a basic standard of pluralism (*Grundstandard gleichgewichtiger Vielfalt*—literally "basic standard of balanced diversity"). This meant that all directions of opinion—including minority ones—should "have the possibility" of being expressed. Moreover, adequate measures should be taken by the leg-

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15 One regulatory authority for each of the united Germany's 16 *Länder,* except Berlin and Brandenburg, who shared one.

16 In some cases, there were smaller executive boards. For a detailed, critical overview, see HOFFMANN-RIEM, *supra* note 11, at 125.

17 HUMPHREYS, *supra* note 5, at 343; PORTER & HASSELBACH, *supra* note 12, at 57-59.

18 BVerfGE 73 (1986), 118, 4 Rundfunkentscheidung (Landesrundfunkgesetz Niedersachsen).

19 The Court has confirmed the bedrock nature of public service broadcasting in several subsequent rulings. Most notably, in 1987, it guaranteed their "continuity and development" (*Bestand und Entwicklung*), specifying that they should be able to expand into new technological and programming areas.

islators in the *Länder* and the media regulators to prevent the appearance of "dominant influence over the expression and formation of opinion" (*vorherrschende Meinungsmacht*). In other words, it was a constitutional-legal principle that media concentration should be counteracted.

IV. The "Media Ownership" Model of Concentration Control

The 1986 Federal Constitutional Court ruling at last provided the basis for the enactment by the *Länder* in 1987— after four years of hard negotiation in the inter-*Land* forum of the conference of *Länder* premiers (*Ministerpräsidentenkonferenz*)—of the "First Inter-*Land* Treaty on Broadcasting."[20] This, refined by a "Second Inter-*Land* Treaty on Broadcasting" of 1991,[21] included national framework rules for the new media and the regulation of the "dual" system along the lines recommended by the Constitutional Court. With regard to pluralism, the treaties first specified that the threshold for achieving "external pluralism" in the supply of new private television services was the availability of three national private commercial "generalist" channels provided by different companies. In the event of the availability of fewer than three such channels, then each private channel had to provide "internal pluralism."[22] Secondly, the treaties contained restrictions on the concentration of ownership of private commercial television channels. The "ownership model" of concentration control exhibited both "external pluralistic" and "internal pluralistic" elements. The former were fairly liberal, the latter more restrictive. External pluralism was to be assured by limiting the number of licenses held by a single nationwide private commercial broadcaster to a maximum of two channels each in radio and television, only one of which might be for a "generalist service" (*Vollprogramm*) or an "information service" (*Informations-Spartenprogramm*, i.e., a news and current affairs channel). Internal pluralism was to be guaranteed by strict limitations on individual shareholdings in generalist and information chan-

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[20] *Staatsvertrag zur Neuordnung des Rundfunkwesens (Rundfunkstaatsvertrag)*, Mar. 12, 1987, *reprinted in* Media Perspektiven, Dokumentation 81-102 (1987).

[21] *Staatsvertrag über den Rundfunk im vereinten Deutschland*, Aug. 31, 1991, *reprinted in* Media Perspektiven, Dokumentation 105-72 (1991). This treaty catered to German Unification—which amounted to an effective extension of the West German model of broadcasting into the "Five New *Länder*." It also translated European legislation eliminating market barriers into German law. It also rendered more precise the ownership rules regarding private commercial television services.

[22] *See* Treaty of 1987, art. 8, I-III, VI; Treaty of 1991, par. 20 I-IV. This requirement was dropped from the 1996 Inter-*Land* Treaty, but by this time there were three national "generalist" channels operating.

nels. To be precise, any individual shareholder in such channels was limited to one single stakeholding below 50% and two more below 25%. Theoretically, these shareholding restrictions would ensure that broadcasting operations would be "pluralistic" associations of enterprises interested in broadcasting (*Anbietergemeinschaften*). Furthermore, the law stipulated that "comparable" means of influence (to direct shareholding) over programming, such as the possession of a dominant position in the supply of programs, should also be taken into consideration by the regulators. Yet cross-media ownership between press and nationwide broadcasting services was left conspicuously unrestricted.[23] Nonetheless, it was possible to argue that the inter-*Land* treaties, together with the wave of *Land* laws and the foundation of fifteen new regulatory authorities, constituted an extensive *formal* re-regulation of German broadcasting.

V. The Ineffectiveness of the "Media Ownership Model": Symbolic Regulation?

It is also possible to argue, however, that behind this formal re-regulation there was a *substantive* de-regulation. Thus Wolfgang Hoffmann-Riem, a leading authority on German broadcasting law and regulation, had suggested that the broadcasting re-regulation of the 1980s might have a mainly symbolic function, serving to provide "a politically and economically "well-ordered" entrance into a new age of broadcasting in accordance with the market model."[24] Hoffmann-Riem specifically referred to the work of the American political scientist, Murray Edelman, who had argued that business regulation was often largely symbolic in function: serving to produce political quiescence.[25] For example, Edelman had claimed that the U.S. Federal Trade Commission "ha[d] long been noted for its hit-and-miss attacks on many relatively small firms involved in deceptive advertising while it continue[d] to overlook much of the really significant activity it [wa]s ostensibly established to regulate: monopoly, interlocking directorates, and so on." Turning to

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[23] *Staatsvertrag über den Rundfunk im vereinten Deutschland,* Aug. 31, 1991, *reproduced in* Media Perspektiven, Dokumentation 105, ¶ 21 I-V (1991). Cross-media ownership rules were contained in individual *Länd* laws, but the absence of an inter-*Land* standard encouraged *Standortpolitik*-led deregulation. Several *Land* laws saw cross-media ownership as something to be positively welcomed. *See* Hoffmann-Riem, supra note 11, at 136; *see also* Porter & Hasselbach, *supra* note 12, at 121-29.

[24] Wolfgang Hoffmann-Riem, *Law, Politics and the New Media: Trends in Broadcasting Regulation, in* The Politics of the Communications Revolution in Western Europe 125-46, 144. (Kenneth Dyson & Peter Humphreys eds. 1986).

[25] Murray Edelmann, The Symbolic Uses of Politics 22-43 (1964).

broadcasting regulation, Edelmann singled out decisions permitting greater concentration of control as one of the areas where the Federal Communications Commission gave "rhetoric to one side"—waxing "emphatic in emphasizing public service responsibility"—while it gave "the decision to the other."[26] The U.S. antitrust laws also seemed to promote the growth of great industrial organizations.[27]

It is certainly significant that anti-concentration policy is the principal area in which the new regulators of private sector broadcasting in Germany have fallen short of adequately fulfilling the Constitutional Court's injunction to protect pluralism in German broadcasting. While the regulators (the *Landesmedienanstalten*) have generally been active in pursuing other infringements of broadcasting law (such as advertising quotas and standards), they have failed to curb media concentration and thus failed to adequately address the more serious threat of "dominant influence over the expression and formation of opinion" (*vorherrschende Meinungsmacht*)" against which the Court explicitly warned. What, then, explains their failure?

It has already been mentioned that during the 1980s media policy became increasingly subsumed into locational policy (*Standortpolitik*). The introduction of private commercial broadcasting quickly gave rise to fierce inter-regional economic rivalries. At the same time, the federal structure of the German broadcasting regulation—with no fewer than fifteen regional regulatory authorities—rendered effective regulation very difficult. A national satellite broadcasting service could apply for and receive a license in a *Land* where the media ownership rules were suitably lax; its programs could then be transmitted for direct-to-home reception (by rooftop satellite receiving dishes), or re-transmitted via the country's rapidly expanding cable infrastructure, right across the federal republic (though terrestrial transmission still needed a license from each *Land* concerned).[28] Clearly, those *Länder* with liberal regulation were placed strategically to attract the new media investment. Many observers have commented on the way regional legislators, in translating the Constitutional Court's injunctions on media pluralism into *Land* media laws, and the *Landesmedienanstalten*, in

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[26] *Id.* at 38-39.

[27] *Id.* at 40.

[28] This principle of recognition of transmissions lawfully broadcast elsewhere is spelled out in paragraph 35 of the Inter-*Land* Treaty. In fact, it not only applies to Germany. The principle applies across the European Union ("EU") following the 1989 EU Directive *Television Without Frontiers*. *See* Ruck, *supra* note 2, at 229.

translating the law (both *Land* media laws and inter-*Land* treaties) into regulatory practice, were under intense political pressure to prioritize the economic interests of their respective *Länder* which were vigorously competing to attract—or retain—media investment (i.e. *Standortpolitik*). A German political scientist Axel Zerdick neatly summarized the problem: "the objectives of the *Land* media laws, orientated less towards media policy than towards *Standortpolitik*, [had] led to a state of affairs in which too many *Landesmedienanstalten* controlled too few broadcasters who, at the same time, [were] being courted avidly by the respective *Land* governments."[29]

From a political-science perspective, the weakness of cross-media ownership regulation— amidst all the stricter formal restrictions—could be simply explained. As already noted, the large press companies had constituted one of the principal lobbies pushing for the introduction, and their own participation in, private broadcasting. Keen on stimulating regional investment, legislators and regulators in the *Länder* had readily obliged by actively encouraging diversification of the press into broadcasting. "This," Hoffmann-Riem has noted, "resulted in intensive, multimedia integration at the very outset of private broadcasting in Germany, which has increased ever since."[30] The major influence of press companies in German broadcasting was a "general trend" to which even those *Länder* that initially sought countermeasures "were forced to capitulate."[31] Moreover, by the time that the inter-*Land* treaties could be enacted for nationwide broadcast services, extensive cross-media involvement in commercial broadcasting had already occurred (e.g., the dominance of press ownership of the SAT 1 channel). In theory, of course, this did not prevent the formulation of cross-media rules to compel the *ex post-facto* de-concentration of the mass media. However, with respect to cross-media ownership, the rules for nationwide commercial broadcast services in Germany could be judged to have been tailored to market *faits accomplis* from the start.

Apart from sins of omission or commission, there were also serious problems of regulatory design and implementation. A major problem with the rules was that they were rendered difficult to implement effectively by the complex *Verflechtung* (interlocking webs of interests), which soon came to characterize the ownership

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29 Axel Zerdick, *Zwischen Frequenzen und Paragraphen: die Landesmedienanstalten als institionalisierter Kompromiß*, 129 BERTELSMANN BRIEFE 60-62 (1993).

30 *See* HOFFMANN-RIEM, *supra* note 11, at 136; *see also* PORTER & HASSELBACH, *supra* note 12, at 124-26.

31 *Id.* at 136.

structure of the commercial television sector as influential media investors acquired multiple holdings in media companies and co-operated in several broadcasting operations (*Anbietergemeinschaften*—see above).[32] Moreover, it soon became obvious that there were even less transparent kinds of linkage and control at work in the private television sector (e.g., finance, program supply). Further, control of broadcasting operations could be assured through intermediaries, front-men, and even family members.[33] To cap it all, the *Landesmedienanstalten* were not endowed with adequate powers to determine the legal reality behind such complex relations of control. Notably, they did not have the same rights of investigation of broadcasters' internal affairs that the Federal Cartel Office enjoyed for ensuring fair competition in German industry at large. Therefore, the regulators of private commercial broadcasting were largely dependent on the cooperation of the media companies they were supposed to regulate.[34] The greatest obstacle to regulatory effectiveness, though, was the "competitive deregulation of competition policy" (*Wettbewerb um die Wettbewerbspolitik*) that derived from the decentralized regulation of a highly concentrated national media industry. Evidently, the control of media concentration needed to be conducted at a higher level than that of the individual *Land* authorities in order to prevent "soft competition policy" from serving as an instrument of regional *Standortpolitik*.[35] Yet coordinated, collective action by the *Landesmedienanstalten* themselves was marred by difficulties and disputes—occasionally reaching the courts—between regulators who appeared to have come to view themselves as "advocates of "their" companies, that is those headquartered within their jurisdictions."[36]

The symbolic and ineffectual nature of anti-concentration regulation became quickly manifest in an oligopoly of two giant national commercial "broadcasting families": notably, the Springer (press)/Kirch Group *versus* Bertelsmann/*Compagnie Luxembourgeoise de T'él'édiffusion* (CLT).[37] Both "broadcasting families"

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[32] HOFFMANN-RIEM, *supra* note 11, at 137-38.

[33] HORST RÖPER & ULRICH PÄTZOLD, MEDIENKONZENTRATION IN DEUTSCHLAND: MEDIENVERFLECHTUNGEN UND BRANCHENVERNETZUNGEN 192 (1993).

[34] Dieter Dörr, *Kontrolle braucht Durchsetzunsbefugnisse, in* MEDIA PERSPEKTIVEN 42-47 (1995).

[35] Jürgen Heinrich, *Keine Entwarnung bei Medienkonzentration: ökonomische und publizistische Konzentration im deutschen Fernsehsektor 1993/94, in* MEDIA PERSPEKTIVEN 297, 298 (1994).

[36] HOFFMANN-RIEM, *supra* note 11, at 137.

[37] *See* Europäisches Medieninstitut, *Bericht über die Entwicklung der Meinungsvielfalt und der Konzentration im privatem Rundfunk gemäß* ¶ 21, *abs.* 6 *Staatsvertrag über den Rundfunk im*

(*Senderfamilien*) had significant interests in a number of program services; above all, they each controlled one of the two main "generalist" private channels (*Vollprogramme*). Bertelsmann/CLT controlled RTL and Kirch/Springer controlled SAT 1. Between them RTL and SAT 1 accounted for the lion's share of private sector viewing time and television advertising revenue in Germany. Bertelsmann is the world's third largest multimedia concern, with global interests in printing, book and magazine publishing, the record industry, and recently film and broadcasting production. Leo Kirch is Germany's leading dealer in program rights,[38] and also a major shareholder (35%) in Springer, which has a large share of the newspaper market. Leo Kirch's son, Thomas Kirch, appeared to have a controlling interest in Germany's third and only other major generalist private broadcasting channel, PRO 7.[39]

The PRO 7 case presented a classic illustration of the problems for effective regulation outlined above. The fifteen *Landesmedienanstalten* were divided over whether the channel should be counted as belonging to Leo Kirch's broadcasting "family." Thomas Kirch held a 47.5% share in PRO 7 and 3% more were held by PRO 7's managing director, formerly a top executive of Leo Kirch's. Moreover, it was widely believed that PRO 7 was dependent on the Kirch group for finance and program supply. Since Leo Kirch already had a major (direct and indirect) holding in the major "generalist" channel SAT 1, he should in theory—under the media ownership rules described above—have been prevented from having a significant interest (i.e., 25% or more) in another "generalist" channel.[40] However, the Schleswig-Holstein regulatory authority which had licensed PRO 7 declined to accept that PRO 7 was under the control of Leo Kirch. The *Landesmedienanstalten* repeatedly failed to collectively resolve the issue.[41]

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vereinten, (Deutschland, in DIE LANDESMEDIENASTALTEN (HSRG), DIE SICHERUNG DER MEINUNGSVIELFALT; BERICHTE, GUTACHTEN UND VORSCHLÄGE ZUR FORTENTWICKLUNG DES RECHTS DER MEDIENKONZENTRATIONSKONTROLLE VOM HERBST 1994, at 127-220 (1995). The European Institute for the Media was commissioned to produce this report on concentration in the private broadcasting sector for the Association of the private broadcasting regulatory authorities (*Landesmedienanstalten*). It presents detailed information on the then ownership and control relations.

38 He had started out as a supplier of programming to the public broadcasters.

39 PRO 7 also controlled a subsidiary called Kabelkanal (now Kabel 1).

40 Or in an information-orientated thematic service, e.g., a news channel.

41 Schleswig-Holstein later tightened up its rules, introducing a prohibitive "family clause." Meanwhile, however, PRO 7 transformed itself into a publicly quoted company, partly to avoid the charge that it was part of the Kirch group, and the broadcaster moved to Berlin. One condition for the award of a Berlin license was that Thomas Kirch reduce his

The rival media "families" were loosely identified with the two main political parties.[42] Bertelsmann, which appears to have a special relationship with the SPD, is based in Social-Democratic North Rhine-Westphalia, as is the principal Bertelsmann/CLT television operation, RTL. The politically conservative Kirch group is based in Christian Social Union (CSU) governed Bavaria. These two *Länder*—Social Democratic NRW and Christian Social (i.e. conservative) Bavaria—were key protagonists in the *Standortpolitik*.[43] The high degree of media concentration in the Federal Republic, and the regulatory weakness of the *Landesmedienanstalten* led to serious discussion from 1994 onwards about how Germany's anti-concentration rules might be reformed. Predictably, "the question of ownership rules in private television has been . . . one of the most intensely discussed topics in the German media policy debate."[44] Numerous and loud were the calls from many quarters for more restrictive ownership rules and for more effective regulation. The unions, churches, regulatory bodies, media experts and academics, and many SPD party organizations called for action. The CDU/CSU, too, recognized the need to take action.[45]

In 1994 the *Länder* regulatory bodies (*Landesmedienanstalten*) themselves proposed a re-regulation of media ownership.[46] They suggested that the problem of the debasement of regulation by inter-*Land* competition for investment—the *Standortpolitik* problem—could be overcome by their closer cooperation (e.g., a special joint review body for license applications). They also suggested that media ownership should no longer be based on the size of an interest's stakeholding, but rather on the audience share controlled by individual media owners. An "audience share model" of regulation would, it was felt, most likely overcome the thorny problem of *Verflechtung* (complex interlocking webs of interest);[47] it

holding in PRO 7 below 25%. However, the new media ownership rules of 1996 have allowed him to increase his holding again, to 60%!

42 *See, e.g,* Hans Kleinsteuber & Bettina Peters, *Media Moguls, in Germany in* JEREMY TUNSTALL & MICHAEL PALMER, MEDIA MOGULS 184-205 (1991).

43 The fact that they are especially large and populous *Länder* gave them extra weight in the inter-*Land* media policy debate.

44 Christa-Maria Ridder, *Germany, in* MEDIA OWNERSHIP AND CONTROL IN THE AGE OF CONVERGENCE 65 (Int'l Inst. of Communication ed. 1996).

45 The positions of the various parties and interests, including the relevant media industry interests, are presented in HERMANN KRESSE, PLURALISMUS, MARKT UND MEDIENKONZENTRATION: POSITIONEN (1995). The journal *Media Perspektiven* has also presented the positions of the main parties to the debate. *See also* Landesmedienastalten (Hsrg.), *supra* note 37, at 127-220.

46 *See Lübeck Resolution of Sep. 17,1994, cited in* KRESSE, *supra* note 45, at 162-72. .

47 *Verflechtung* would be considered redundant when media companies could control outright as many companies as they wanted up to the audience share limit.

would be conducive to improved transparency in the ownership and control relations in the sector. The German regulators suggested that the critical limit for undue ownership concentration should be set at the point when an interest controlled more than 25% of the television audience market. However, the German media industry immediately responded by claiming that a 25% limit of audience share would severely damage German competitiveness and encourage foreign takeovers of German broadcasting interests. The Kirch group called for a 35% audience limit.[48] Bertelsmann called for a limit of at least 30%.[49] These limits, of course, were liberal enough not to affect these concerns' current investments or even their further expansion into private broadcasting. Indeed, these large media concerns—which dominated the industry lobby— saw the "re-regulatory" exercise as an opportunity to carve out more freedom for their future expansion in the emerging age of global media operations, digital TV, and the much discussed "convergence" between telecoms, computing, and broadcasting.[50] The pro-liberalization lobby made much of the competitive threat posed by foreign media interests.[51] The current rules had, it was pointed out, already led to the German channel VOX being rescued by Rupert Murdoch's News International (he took a 49.9% stake in the channel) because current rules ruled out the obvious German media interests. As seen, the Luxembourg-based broadcasting multinational CLT was a major player in the German market.

There followed a fairly protracted process of political tugging and hauling. At first, the SPD called for stricter regulation along existing lines to protect pluralism in broadcasting, and was skeptical about the audience-share model. The CDU/CSU, by contrast, did not see a significant threat to broadcasting pluralism given the number of channels, both public and private, on offer to the German viewer. The CDU/CSU therefore lent its weight broadly to the industry position. Indeed, the CDU/CSU employed the concurrent issue about how much to raise the household broadcasting licence-fee, the public broadcasters' principal source of income, as a lever in the negotiations concerning re-regulating media ownership laws. The license-fee issue presented an opportunity to pres-

48 Kirchgruppe, *Die Zukunft gestalten - Perspektiven einer vorwärtsgerichteten Medienpolitik, in* KRESSE, *supra* note 45, at 159.

49 Bertelsmann AG, *Die medien-, kommunikations- und technologiepolitische Position des Hauses Bertelsmann, in* KRESSE, *supra* note 45, at 123.

50 MARTIN STOCK ET AL., MEDIENMARKT UND MEINUNGSMACHT: ZUR NEUREGELUNG DER KONZENTRATIONSKONTROLLE IN DEUTSCHLAND UND GROßBRITANNIEN 2 (1997).

51 Ridder *supra* note 44, at 67. *See e.g.*, Bertelsmann AG, *supra* note 49, at 118.

surize the SPD, the "champion" of the public-service broadcasters, into conceding to a liberal regulatory framework for media ownership.[52] However, the SPD position was ambiguous: influential elements within the SPD were very sensitive to the interests of Bertelsmann, a concern which—as mentioned—was friendly to the SPD and which was headquartered and invested heavily in the SPD heartland of North-Rhine Westphalia, Germany's most populous *Land.* In reality, not much separated the most influential policy makers; behind the political symbolism, both parties catered to considerations of regional economic policy (*Standortpolitik*).

Consequently, after a series of negotiations on policy details, which was steered by a small number of high-ranking *Land* politicians and legal experts in the state chancellories of the *Länder,* a new regulatory framework was agreed upon. It embraced the audience-share model and abolished the existing media ownership rules that had sought to prevent the excessive accumulation of channels and majority shareholdings in broadcasting companies. Henceforth "generalist" and other information-relevant channels could be accumulated and also owned in their entirety by individual investors, until their combined audience share exceeded the stipulated limit. The lengthy section of the "Third Inter-Land Treaty on Broadcasting"[53] devoted to the "Safeguarding of Diversity of Opinion" (*Sicherung der Meinungsvielfalt,* Paras. 25-34) provided a mixture of clear-cut numerical rules and less clear-cut, general stipulations which would allow for considerable regulatory flexibility in their implementation.[54]

The treaty established a precise threshold of 30% of the total national television audience, including that of the public-service broadcasters. Once a concern's channels had reached this threshold, that concern would be assumed to have acquired "dominant influence over the expression and formation of opinion" (*vorherrschende Meinungsmacht*), and its further expansion would be

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[52] Since 1970, decisions on raising the level of the license-fee had been made by the premiers (*Ministerpräsidenten*) of the *Länder.* To help them, they had established their own advisory body called the Commission for Assessing the Financial Requirements of the broadcasting corporations (*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* - KEF). This latter body, however, was not really independent of the politicians and the process of setting the licence fee presented scope for political bargaining. Further scope for political leverage during the period under review arose from the fact that the *Länder* politicians were in the process of negotiating a reform of the license-fee procedure following the Federal Constitutional Court's "Eighth Broadcasting Ruling" of February 1994. *See infra* notes 73-76 and accompanying text.

[53] *See Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge vom 26.8/11.9.1996 (Dritter Rundfunkänderungs-staatsvertrag), reprinted in* MEDIA PERSPEKTIVEN, DOKUMENTATION (1996). The treaty came into force on January 1, 1997.

[54] STOCK ET AL., *supra* note 50, at 2-3.

blocked. In calculating the audience shares attributable to individual media interests, only holdings of 25% or more of the capital or voting shares in broadcasting operations were to be counted. Once an individual investor went beyond this so-called "insignificance threshold" (*Bagatellgrenze*), then the audience share of the broadcasting operation in question would be fully attributed to the individual investor. Below the "insignificance threshold," an individual investor's influence was deemed not to be significant and no audience share whatsoever would be attributed to that investor. Far less clear-cut was the provision that other, "comparable" sources of influence (e.g., program supply) would also be taken into account by the Commission for Determining Media Concentration (*Kommission zur Ermittlung der Konzentration im Medienbereich*—"KEK"), the expert body established to implement the new audience share rules. The KEK was empowered to investigate excessive cross-media ownership (through the *Landesmedienanstalten*) but "media-relevant related markets" (*medienrelevante verwandte Märkte*) would be taken into consideration only when a television concern approached the 30% audience share threshold. What constituted "approaching" 30% was left to the KEK to decide.

The KEK was a new inter-*Land* body composed of six experts in broadcasting and business law, to be appointed by the *Länder* premiers (and reappointable once). The KEK was the body ultimately responsible for safeguarding pluralism and counteracting media concentration in the national broadcasting market (i.e., not local or regional). The KEK examines license applications to the individual *Landesmedienanstalten* and has the last say about licensing decisions in so much as they might affect media concentration. Its decisions may only be overturned if at least three quarters of the *Landesmedienanstalten* agree. The KEK is also charged with the task of ensuring transparency of ownership and control in the television sector, in cooperation with the *Landesmedienanstalten* which are at last endowed with stronger information rights and powers of investigation *vis-a-vis* the media industry. As intended, the establishment of the KEK may well help overcome the problems arising from the decentralized regulation of national private broadcasting, in particular the influence of *Standortpolitik*. However, critics have pointed out, the mode of selection of the members of the KEK—by the prime ministers of the *Länder*—carries the danger that the KEK will not be sufficiently independent of the state (*staatsfern*), a key principle of German broadcasting regulation. Some have suggested, too, that the body is too "technocratic," and fails to repre-

sent the range of German society (e.g., in the manner of the *Rundfunkräte* of the public broadcasters).[55]

Another promising innovation is the provision that broadcasters with an audience share of 10% or more should make available air-time ("windows") to "independent third parties" *(unabhängige Dritte)*, i.e., small broadcasters who are independent of their "host" major broadcasters and who commission or produce their own window programs.[56] This rule therefore guarantees a measure of "internal pluralism." It is based on policy as already practised in SPD North-Rhine Westphalia (for broadcasters applying for terrestrial frequencies in this populous *Land*) and the concept was promoted enthusiastically by the SPD *Länder* in the negotiations over the new inter-*Land* treaty. The 10 per cent threshold for triggering window requirements had been described by the industry lobby as a "crass interference in the broadcasting freedom of private broadcasters."[57] The large broadcasters worried that such programs might be "ratings killers." Nonetheless, it was accepted by the CDU/CSU as part of the overall compromise package. On the one hand, the concept has seen the appearance of interesting "window" programs like *Spiegel-TV* and *Stern-TV*, and a range of regional "windows"; on the other hand, some have questioned the genuine independence of certain "third party broadcasters."[58] While doubts remain about the practical implementation of the rule, this innovative idea certainly offers one feasible way of promoting media pluralism within the oligopolistic broadcasting market that has developed in Germany.

However, the new media ownership limitations have left the oligopoly largely untouched; the rules even allowed scope for the further expansion of firms like KirchGruppe and Bertelsmann in the broadcasting sector. Moreover, the new rules contain only a single paragraph specifically referring to digital broadcasting, which is the technical delivery system of the future. This paragraph demands "equal, appropriate and non-discriminatory" conditions of access for all TV services to a digital platform (and to the

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55 Dieter Dörr, *Massnahmen zur Vielfaltssicherung gelungen, in* MEDIA PERSPEKTIVEN (1996).

56 This should amount to a minimum of 260 minutes per week, of which a minimum of 75 minutes should be in prime viewing time. A window producer would have to be independent of the broadcaster and would be licensed by the relevant *Landesmedienanstalt.* If a window producer does not emerge consensually, the broadcaster is allowed to shortlist three candidates. The *Landesmedienanstalt* would then choose the one that promises to contribute the most to diversity.

57 VPRT, *Zusammenfassung der VPRT Position zum materiellen Medienkonzentrationsrecht für den privaten Rundfunk,* BONN, May 23, 1996.

58 Klaus Ott, *Zufall, na klar,* SÜDDEUTSCHE ZEITUNG, Feb. 4, 1998.

platform's electronic program guide). Significantly, the Kirch group had already launched a 17-channel digital TV service in the summer of 1996 and, already a dominant player in the German program rights market, secured a United States billion dollar deal with five Hollywood studios for the exclusive pay-TV rights to their output over the next few years. For its part, Bertelsmann has been able to proceed with the merger, already announced in the spring of 1996, between its television subsidiary Ufa and the giant Luxembourg-based broadcasting multinational CLT, thereby increasing its control over the RTL broadcasting "family." Despite years of controversy about media concentration and a good deal of *formal* re-regulation, the new ownership rules seemed designed to accommodate precisely this kind of merger. Moreover, the enduring weakness of cross-media ownership regulation combined with the fact that the "insignificance threshold" had been raised from 10% to 25% in the final stage of the political negotiations, meant that the mighty Springer press concern's[59] direct stakes in the major "generalist" channel SAT 1 (20%) and the country's principal sports TV channel DSF (24.9%) counted for nothing. (This is certainly different from the 16 percent of audience-share that a 10% "insignificance threshold" would have meant). Also uncounted was the fact that Springer had an indirect holding of a further 20% in SAT 1 through its 40% holding (but significantly not a majority holding) in another direct SAT 1 investor, the Aktuelles Presse Fernsehen company.[60]

The largely symbolic nature of the inter-*Land* treaty of 1996 could not be clearer. In the words of one respected commentator, it amounted to a "capitulation on the part of the policy makers to Germany's most powerful media concerns Kirch and Bertelsmann." Virtually the only concentration that the latest regulation ruled out now was *their* merger.[61] Not ruled out by the audience-share model, however, were joint ventures between them. Thus, in June 1997 Kirch and Bertelsmann announced plans to embark, together with Deutsche Telekom, on a digital pay-TV joint venture. "Bertelkirch," as some commentators now playfully referred to them, proposed to merge *Premiere*, the analogue pay-TV

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59 In which Kirch had a 35% interest.

60 Horst Röper, *Mehr Spielraum für Konzentration und Cross ownership im Mediensektor*, MEDIA PERSPEKTIVEN 609-20 (1996).

61 *See* Klaus Ott, *Der Triumph des Leo Kirch*, SÜDDEUTSCHE ZEITUNG, Jan. 4, 1997, at 4.

channel which they already shared with Kirch's recently-launched DF 1 digital pay-TV venture.[62]

VI. The Public Service Broadcasters: A Pluralistic Counterbalance

At first sight, Germany's "dual" broadcasting system appears to be very pluralistic. Most German homes now receive multi-channel television. By the beginning of 1997, two thirds of German homes (24.9 million) were passed by cable, and 44.6% of homes (16.7 million) were actually connected. Moreover, by mid-1997 around 28% of homes in West Germany (7.4 million) and more than 50% in less-densely cabled East Germany (3.3 million) had satellite television receivers.[63] Alongside the main "generalist" private commercial broadcasting channels—SAT 1, RTL and PRO 7—these homes can receive a range of smaller or thematic services: VOX, Deutsches Sport Fernsehen (DSF), Kabel 1, Premiere (an analogue pay-tv service), n-tv (a news channel), RTL 2, Super RTL, and two new music channels. Cable and satellite also carry a number of foreign channels as well as all the main German public channels. Furthermore, regional public-service channels are broadcast nationwide by satellite, and new public-service satellite channels have been introduced in joint ventures with other European public broadcasters (e.g., the Franco-German cultural channel ARTE). However, as seen, the ownership of the private television sector is highly concentrated.

Moreover, the three main private channels—SAT 1, RTL, and PRO 7—account for around 40% of total viewing, as much as the public-service channels (with around 20% of viewing being spread among other channels). Between them, SAT 1, RTL, and PRO 7 account for three quarters of the private sector's share of the overall audience market.[64] These three "generalist" channels also account for 83% of the private television sector's advertising revenue, and three quarters of the overall German television advertising market.[65]

Given this degree of concentration in the private sector, the role of the public-service sector in the dual broadcasting system

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[62] The Federal Cartel Office, however, has expressed its concern about the joint venture on competition policy grounds. At the time of writing, the joint venture is subject to European Commission scrutiny.

[63] Detailed data on the German media are published every year in *Media Perspektiven. Basisdaten,* and *Frankfurt am Main.* The 1997 edition is the most recent edition as of the time of writing.

[64] 1996 figures, published in Media Perspektiven 72 (1997).

[65] *Id.* at 11, 20.

becomes all the more important as a pluralistic counterbalance. However, recent developments have by no means offered encouragement to the public-service broadcasters. Firstly, the commercial broadcasters have significantly eroded their audience share. Although audience trends appear to have stabilized at the levels noted above, there remains the fear that a further fall in viewing levels would be very damaging for the legitimacy of the television license-fee. Secondly, the public broadcasters have become much more dependent upon their license-fee income, as private commercial broadcasting has dramatically damaged their supplementary advertising revenues. The public broadcasters' advertising airtime has remained strictly limited[66] and they have no longer been able to charge monopoly prices for it. By contrast, the private broadcasters have been allowed very liberal advertising limits.[67] The latter have been able to undercut the public broadcasters' advertising rates and still see their advertising revenue increase dramatically. Thus, between 1989 and 1996, the total advertising revenue of the private television sector grew from DM 642.3 million to a staggering DM 6.2 billion.[68] At the same time, the public broadcasters have seen an absolute decline in their advertising revenue. In 1985 the ARD and ZDF drew no less than DM 1.4 billion in advertising revenue from television. By the end of 1996, the figure had collapsed to DM 648.4 million.[69] Thirdly, competition for program rights has inflated prices particularly for the strategic kind of programming that attracts mass audiences, notably sports events and recently released films. Commercial concerns, with very deep pockets, have been able to out-bid the public broadcasters for these program rights. Witness Leo Kirch's recent deals with Hollywood's major studios; Kirch has also acquired the rights for the 2002 and 2006 soccer World Cups! Finally, the public broadcasters have also faced political attacks. The commercial broadcasting lobby, and some allied politicians, have called for the eventual abolition of all advertising by the public-service broadcasters. Politicians as important as Bavaria's prime minister (*Ministerpräsident*) Edmund Stoiber (CSU) and Saxony's prime minister Kurt Biedenkopf (CDU) have even suggested that the ARD's First Chan-

66 They are allowed 20 minutes of advertising per day, except on Sundays.

67 They are allowed to devote up to 20% of their air-time, including Sundays, to advertising.

68 American billions, i.e., 1,000,000,000.

69 *See Id.*

nel might be closed down to cut costs and rationalize the public-service sector.[70]

VII. The Federal Constitutional Court Rules Again in Defense of Broadcasting Pluralism

In 1994 Germany's public broadcasters received support from a familiar quarter: namely, the Federal Constitutional Court. As long ago as 1984 the Greens (*die Grünen*) had lodged a complaint with the Bavarian Administrative Court in Munich against the financing of the early cable television pilot-projects from a (very small) share of the broadcasting license-fee, the "cable penny."[71] Ever since, the "cable penny" has been used to finance the private broadcasting regulatory authorities (the *Landesmedienanstalten*). This case was passed all the way up to the Federal Constitutional Court which used it as an opportunity to take up a much broader position on the future funding of the public-service broadcasters by the license-fee.[72] In its "Eighth Broadcasting Ruling" of February 22, 1994,[73] the Court stated categorically that the public broadcasters' role was all the more important in view of the evident shortcomings of the commercial broadcasters. It noted their inadequate "breadth of content" and "thematic variety."[74] The Court reiterated the principle first expressed in its famous 1986 "Fourth TV Ruling" introducing the dual system—that the constitutional-legal *conditio sine qua non* for allowing private commercial broadcasting was the "continuity and future development" of a strong public broadcasting sector. Specifically, the Federal Constitutional Court ruled in favor of establishing a new procedure for setting the license-fee that would depoliticize the business. The Court ruled that the advisory Commission for Assessing the Financial Requirements of the Broadcasters (the KEF), which had been effectively an

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[70] *See Thesen zur Strukturreform des öffentlich-rechtlichen Rundfunks, reprinted in* Media Perspektiven 104-08 (1995) (originally published by the state chancellories of Bavaria and Saxony). In their view, the public broadcasters provided more "by far" than their constitutional-legal remit to provide a "basic comprehensive service" (*Grundversorgung*) required. The ARD, they argued, had evolved from being an association serving the *Länder* broadcasters collectively into a large, excessively staffed and resourced concern.

[71] The complainants argued that the "cable penny" was illegitimate on the grounds that 99% of license-fee payers would receive no service for the amount they paid. They further argued that the cable penny was a special tax that would primarily benefit private commercial interests.

[72] This was quite characteristic of the Federal Constitutional Court. In several of its TV rulings the Court had used very specific and narrow issues to make far-reaching pronouncements on the broadcasting system.

[73] BVerfGE 90 (1994), 60, 8 Rundfunkentscheidung (Rundfunkgebühren), *reprinted in* Media Perspektiven Dokumentation (1994).

[74] *Id.* at 40-41.

instrument of the *Länder* politicians, should in the future be established legally as a body that is genuinely independent of the politicians and broadcasters. The broadcasters, though, should be involved in the process; their own calculation of what is required financially to allow them to fulfill their constitutional-legal remit would be the central focus of the committee's future deliberations. Subsequently, the "Third Inter-Land Treaty on Broadcasting" of 1996, along with providing the new media ownership rules, implemented this latest ruling in detail.[75]

The most recent ruling of the Federal Constitutional Court came in January 1997. Again, this ruling originated in a very specific case, dating back several years, that had been passed up through the various levels of the German legal system. Following the award by the Bavarian media regulators of a broadcasting license to the DSF sports channel in 1992, the Berlin regulatory authority complained to the Bavarian Administrative Court. The license had been awarded despite the reservations of several of the *Länder* regulatory authorities, based on the suspicion that the channel was under the effective control of Leo Kirch and that this amounted therefore to a breach of the then operative media ownership laws.[76] When the Bavarian Administrative Court granted an injunction suspending DSF's license pending further legal deliberation, the Bavarian regulatory authority appealed to the Bavarian Constitutional Court on the grounds that its "broadcasting freedom" was being infringed by the license suspension while the main case was still under review at the Bavarian (and later Federal) Administrative Court.[77] When the suspension was overturned, the Berlin regulatory authority appealed directly to the Federal Constitutional Court to have it re-instated. However, in its 1997 Ruling the Federal Constitutional Court ruled against the Berlin authority on the formal procedural grounds that it had not first directed this appeal for reinstatement of the injunction to the Federal Administrative Court where the main case was still *sub judice.* Characteristically, though, the Federal Constitutional Court used the opportunity to re-state some constitutional-legal first principles concerning media concentration which the Federal Administrative

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75 *Dritter Rundfunkänderungsstaatsvertrag,* Artikel 5.

76 At the time, Kirch had a minority 24.5 per cent share in DSF. Springer, in which Kirch had a 35 per cent share, had a 24.9% share in DSF. Silvio Berlusconi's Rete Invest had a 33.5% share in the channel. Kirch was a business partner of Berlusconi's in Italian and Spanish pay-TV.

77 According to Bavarian media law, the Bavarian regulatory authority was actually the "broadcaster" of private television services in Bavaria in a manner analogous to the former British Independent Broadcasting Authority.

Court should take into account in making its ruling on the central case. Thus, the Federal Constitutional Court restated the importance of preventing the formation of any dominant influence over the expression of opinion (*vorherrschende Meinungsmacht*). The Court emphasized the preventative aspect, since media concentration was especially difficult, if not impossible, to rectify in the media industry. Significantly, the Federal Constitutional Court denied that regulation was rendered redundant in the age of multichannel broadcasting. The ever closer integration of the different parts of the media industry, both horizontally and vertically, posed the threat that dominance in one part might be used to gain influence in other parts as well. Once again, the Court had made a principled statement about the danger of media concentration.

However, it was unclear how general principles would translate into detailed regulatory practice. The Federal Administrative Court did rule, in March of 1997, that the Bavarian media authority had insufficiently determined the real control relations within DSF, and therefore it did revoke DSF's license. However, by this time the "media ownership model" of concentration control in the broadcasting industry had been reformed to the "audience share model," which rendered this ruling completely irrelevant. As seen, the 1996 Inter-*Land* Treaty that had already taken effect on January 1, 1997 removed all previous ownership restrictions, provided that the audience share of a broadcasting company did not exceed 30% of total audience share. Therefore, the channel received a provisional license to continue to broadcast from the Bavarian regulatory authority for private broadcasting. In fact, DSF is now set to become jointly (50:50) owned by Kirch and Bertelsmann subsidiary Ufa-CLT within the auspices of their new digital TV joint venture. Whether this degree of concentration will be acceptable depends on the decision of the newly-established KEK, and ultimately the European Commission.

VIII. Conclusion and Outlook

In German media law it is axiomatic that broadcasters fulfil a key democratic role: they exercise a potentially powerful influence on the process of democratic opinion formation. It has always been deemed crucial, therefore, that public policy be geared towards guaranteeing a plurality of media sources and a diversity of opinions in media output. Indeed, in post-war Germany pluralism in broadcasting has been a fundamental injunction of no lesser authority than the Federal Constitutional Court. Accordingly, the in-

troduction of the new media and the expansion of commercial broadcasting has occasioned a considerable amount of *formal* re-regulation including various safeguards for "diversity of opinion" (*Meinungsvielfalt*) and media ownership rules designed to forestall the development of "dominant influence over the expression and formation of opinion" (*vorherrschende Meinungsmacht*).

However, with regard to media ownership rules, this formal re-regulation has appeared to amount to little more than "symbolic politics" (as conceptualized by Murray Edelman). The principal determinant of media policy in the late 1980s and 1990s has been the policy makers' perceptions of what is in the economic interest of their jurisdictions (*Standortpolitik*). The private broadcasting sector has been characterized by a high degree of media concentration (by any measure, whether ownership, audience share, or advertising revenue). It is certainly the case that the latest media ownership rules contain some important innovations and corrections for the failings of the old ones. The "windows" for independent third parties (*unabhängige Dritte,* i.e., small window broadcasters independent of their "host" major broadcaster) provide a constructive means of safeguarding pluralism in an oligopolized market. The extension to the *Landesmedienanstalten* of information and investigation rights equivalent to those of the Federal Cartel Office is an unqualified—and long overdue—improvement. Even if the individual *Landesmedienanstalten* have lost much of their independent authority to the KEK, these new powers should make them, together with the KEK, more effective regulators. The establishment of the KEK itself should help counteract the problems arising from the decentralized regulation of a national industry, notably *Standortpolitik* (regional competition to attract or retain media investment). Nonetheless, the fact remains that the audience share model legitimizes the status quo—namely, the highly oligopolistic structure of the German private broadcasting industry—and even allows for the further expansion of the key players.

There remain dissenting voices. Academic media experts have carefully analyzed the weaknesses of the new rules.[78] Journalists in certain newspapers (e.g., the "alternative" *tageszeitung* and the liberal *Süddeutsche Zeitung*) have drawn attention to the inadequacy of the rules. Germany's media union IG Medien censured the new rules for "kow-towing" to the media industry and being unlikely to

[78] *See generally* STOCK ET AL., *supra* note 50 (providing a comprehensive critique of the new rules).

effectively counteract media concentration.[79] Similarly, Germany's Green party condemned all the mainstream parties (i.e., SPD, CDU/CSU, and the small liberal FDP) for their "conniving with" (*Kungelei*) Kirch and Bertelsmann; the SPD's "genuflection" (*Kniefall*) before the media concerns attracted their particular scorn.[80] There was a degree of disquiet among the SPD grassroots as well. However, these forces were—and still are— marginal to the regulatory policy process which was, as seen, effectively a negotiation between the SPD and the CDU/CSU *Länder* governments. Once the SPD pragmatists, motivated by regional *Standortpolitik*, gained the upper hand within the party, the SPD *Länder* accepted the CDU/CSU's "package deal" that effectively acknowledged the need for the future development of the public broadcasters in return for more liberal media ownership rules. Although there may exist a significant critical constituency in the wider media policy community, there remains little prospect of an effective political coalition for a future tightening up of the rules.

In the future, therefore, the role of the public-service broadcasters will be more vital than ever, as a counterbalance to the accumulated media power of Germany's large private broadcasting concerns. In Germany, this special role of the public broadcasters has repeatedly been underlined by the Federal Constitutional Court. However, the public broadcasters in Germany—as elsewhere in Western Europe—face a very severe challenge; the very legitimacy of the license fee may be jeopardized by possible future developments in the media marketplace (e.g., a fragmentation of TV audiences, a serious decline in their audience share). The big question for the coming decade is whether the German public broadcasters' constitutional-legal guarantee of their continuity and further development is enough to sustain them against market forces. They are functioning in a political arena where economic interests appear to be overriding social and cultural goals of media policy.

As for concentration in the private broadcasting sector, the legal process so far has proved to be too slow and unwieldy to cope with market *faits accomplis*. In the past, the Federal Constitutional Court has played almost a pro-active role (strictly speaking, of course, it always has to react to appeals brought to it by other actors) in broadcasting policy, defining the parameters of regulation

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[79] IG Medien, Konzentrationsregelung ist Kotau vor Konzernen, *Presseinformation der IG Medien*, STUTTGART, Mar. 11, 1996.

[80] Bündnis 90/Die Grünen, *Kniefall vor den Medienkonzernen*, PRESSEDIENST, June 11, 1996.

at key stages in the development of the broadcasting system. For example, the Court ruled on matters such as whether the central government might control a television channel (the First Broadcasting Ruling), the constitutionality of private television (the Third Broadcasting Ruling) and the balance between private and public broadcasting (several rulings since 1986). As far as media concentration is concerned, in its Fourth Broadcasting Ruling (1986) the Court warned about the dangers and called upon the policy makers to prevent "dominant influence over the expression and formation of opinion" (*vorherrschende Meinungsmacht).* However, critics point out that the Court has failed to seize the one obvious opportunity since then to translate principle into practice: namely, the DSF case.[81] In defense of the Court, its ability to intervene in DSF was constrained by the legal process itself which actually commenced in the administrative courts and therefore had to follow the formal "ladder" of appeals; in any event, the Court was bound to point out that other legal means had not been exhausted. The real problem, though, is that by the final DSF verdict, both the media market's evolution and the re-regulation of media concentration control had rendered the verdict obsolete. Therefore, all that remains is yet another Constitutional Court ruling reiterating the *principle* of media pluralism and pointing out that this principle will not be rendered obsolete by new technological developments.

The European Union may be the ultimate obstacle to the German media concerns' ambitions. The European Commission has a track record of already having thwarted one digital pay-TV joint venture between Bertelsmann and the Kirch group together with Deutsche Telekom. In 1994, Brussels blocked the establishment of the Multimedia Service Gesellschaft ("MSG") on competition policy grounds. The joint venture, it was argued, would have very likely created, or reinforced, a dominant position in three separate markets: namely, Bertelsmann and Kirch in the market for pay-TV services (they already jointly-control Germany's only pay-TV channel); MSG in the market for the technical services associated with digital pay-TV (i.e., "gateway systems" for conditional access and subscriber management, electronic program guides, etc.); and Deutsche Telekom in the market for cable network services (DT had a quasi-monopoly of cable systems).[82] Currently, the Euro-

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[81] Klaus Ott, *DSF wird weitersenden,* SÜDDEUTSCHE ZEITUNG, Mar. 21, 1997.

[82] Emma Tucker, *Brussels Closes Off A Multimedia Gateway,* FIN. TIMES, Nov. 10, 1994, at 3.

pean Commission is examining the Kirch group's and Bertelsmann's latest plans to embark on yet another joint venture to launch a digital TV platform, again in association with Deutsche Telekom, in what looks like an "MSG Mark Two." While EU competition commissioner Karel van Miert conducts his investigations into the latest proposed joint venture, the development of digital pay-TV in Germany remains temporarily halted. This state of affairs has drawn the German federal government into the affair, since German national economic interests are plainly at stake. The German media industry's complaint is that while "Europe" is blocking German companies, American companies are free to expand in digital TV, the delivery system of the future. Chancellor Helmut Kohl himself is reported to have lobbied the Commission in support of the Bertelsmann/Kirch joint venture and made clear to Commission President Jacques Santer his belief that Germany's media ownership rules suffice to protect media pluralism.[83]

In the multi-channel future, it has been suggested that the most appropriate kind of regulation for television will be general economic regulation; pluralism will be adequately safeguarded by competition policy. However, when top Bertelsmann executive Mark Wössner dared to moot such ideas in Germany, at the annual Munich media conference in 1996, he met with fierce opposition. In Germany, he was emphatically reminded, media regulation fell under the cultural sovereignty of the *Länder.* It could never be allowed to become a federal or EU competence. However, the theme has not died away.[84] It is clear that the economic stakes involved in media policy are high and, with the costs and risks of investment in digital TV, they are becoming higher all the time, not least for the German *Länder* North-Rhine Westphalia and Bavaria, respectively the host states of Germany's leading media concerns Bertelsmann and KirchGruppe. As this article has argued, the successive regulatory frameworks for limiting media concentration, produced by the *Länder,* have not been notably effective thus far. A factor contributing to this ineffectiveness has been the economic ambitions in the media field of the *Länder* (*Standortpolitik*). It is, of course, too early to judge the efficacy in safeguarding pluralism of the latest rules provided by the 1996 inter-*Land* treaty (which came

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83 *See* Klaus Ott, *Kohl für Kirch und Vaterland; Wie sich der Kanzler für die digitale Fernseh-Allianz einsetzt,* SÜDDEUTSCHE ZEITUNG, Jan. 6, 1998; *see also* Klaus Ott, *Freund Kohl in geheimer Mission,* Süddeutsche Zeitung, Dec. 17, 1997; Martin Walker, *Brussels Risks War with Kohl,* THE GUARDIAN, Feb. 2, 1998, at 12 .

84 Klaus Ott, *Länder sind schlechte Medienwächter: die Kontrolle des Kommerz-Fernsehens wäre in Bonn und Brüssel besser aufgehoben,* SÜDDEUTSCHE ZEITUNG, Oct. 15, 1997.

into force on January 1, 1997), yet it is clear that they allow for the continuance of a concentrated industry structure. Therefore, it is entirely legitimate to suggest that competition policy—at the national and EU level—should play a greater role in broadcasting regulation in the future.[85] However, since broadcasting is also about democracy—and in Germany this understanding is particularly strong—regulation has to be about more than merely economic regulation.

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85 *Id.*