

THE EUROPEAN INTEREST IN THE AMERICAN EXPERIENCE IN SELF-REGULATION

BERND-PETER LANGE* AND RUNAR WOLDT**

Precisely why the European media professionals and media policy makers are now interested in the American experience with the social responsibility of television is a justifiable question. In 1993, when the Bertelsmann Foundation and the European Institute for the Media first discussed a joint project on this particular area, one of the main reasons for it was a certain feeling of uneasiness or dissatisfaction among the German public over certain trends in the private and public broadcasters' television programmes. With due respect to our American colleagues who are present, it is fair to say that this feeling of unease also partly arose from programmes imported from the United States or made in Europe based on the American model of programming. So, what do we expect here in New York from a discussion over self-regulation and control of concentration?

In order to clarify this we first would like to return to the situation in European television, particularly Germany. Commercial television in Germany is about ten years old. It has established itself relatively quickly, and amongst viewers it is favoured equally alongside the established public broadcasters. Following the pioneer phase of private television, and with the setting up of strong private television companies like RTL and SAT 1, a radical change has come about in the programmes on offer and in the structure of the television market. As a result, at the beginning of the 1990s in Germany a public debate on two aspects of this change developed:

1. criticism of the alleged decline in the standard of programmes, for example an increase in programmes that are unsuitable for minors and sensationalist presentation of news and information; and
2. a trend towards concentration (of ownership) in private broadcasting.¹

* Head of Research at the European Institute for the Media, Dusseldorf, Germany. This article was written in connection with the conference entitled *Television Self-Regulation and Ownership Regulation: The American Experience*, held at the Columbia Institute for Tele-Information, Columbia University, New York City, March 10, 1995.

** Professor and Director-General of The European Institute for the Media, Dusseldorf, Germany.

¹ *Europaisches Medieninstitut: Bericht uber die Entwicklung der Meinungsvielfalt und der*

The general question is whether the so-called dual system, that is the juxtaposition of private and public broadcasters, is in a position to ensure that socially responsible programming is on offer. We are assuming here that social responsibility has two aspects: firstly, to avoid "negative trends" and, secondly, to provide a "positive" environment in which socially responsible programming can be promoted (for example, the requirement of diversity in programming and the provision of well-researched and reliable information). In Germany we have the interesting situation, confirmed by the Federal Constitutional Court,² that the private broadcasters actually have to fulfil lower requirements with regard to the variety in their programmes than do public broadcasters. Therefore, private broadcasting is permissible only if public broadcasting fulfils its extensive task. The Constitutional Court sees a responsibility with the legislators not only to protect broadcasting against undue influence from political powers, but also to provide a regulatory framework in which broadcasting (public and commercial) can fulfil its public service function. This understanding of broadcasting—as being a public service for which legislators are responsible, which has to be guaranteed by the state, and in which suppliers only can operate under certain conditions—is not unique to Germany; it is also true of the European tradition of broadcasting regulation.³

Over the last ten years, in Germany and many other European countries, public broadcasting has been weakened by competition from private television channels.⁴ Public broadcasting has many grave financial problems, which in some countries are due to the loss of advertising revenue and rapidly increasing programming

Konzentration im privaten Rundfunk, in Die Landesmedienanstalten (ed.): DIE SCHERUNG DER MEINUNGSVIELFALT, 127-220.

² Ruling of November 4, 1986 (BVerfGE 73, 118ff) (concerning the broadcasting law in Lower Saxony, F.R.G.).

³ In Britain, commercial broadcasting traditionally was regarded as a public service although distinct from the public broadcaster BBC. Since the introduction of a new regulatory system in 1985 and the emergence of cable and satellite television this general understanding has weakened, but still exists. In France, the most important public television channel was privatised in 1987, which caused a serious blow to the public television sector. However, French television remains one of the most highly regulated in Europe and both the public and the commercial sector have to fulfil certain obligations that are perceived as being in the public interest (e.g. offering domestically produced fiction programmes).

⁴ An analysis commissioned by the European Broadcasting Union ("EBU") showed that the European public broadcasters' average share of the audience in only five years decreased from 71.6% in 1988 to 59.4% in 1993 with a further decrease expected for the coming years. The decline in audience share was especially marked in Belgium, Germany, Holland, and Spain where the public broadcasters encountered an aggressive competition from commercial channels (EBU: Trends in European Public Service Broadcasting—An Economic Analysis, Grand Saconnex 6 (1993)).

costs. Critics often accuse public broadcasters of trying to adapt to be like private programmers, mainly by relying on entertainment programmes. At the same time, the critics lament the loss of identification and image in the public system. The arrival of new technologies also gives impetus to the discussion of the future prospects for and responsibilities of public broadcasting.

Private television has won its place in the market, but there is criticism of the way this was achieved. Specific complaints include: too much violence in television programmes, cheap sex films, down-market entertainment, and a decrease in the amount of serious information given. In addition, there is the worry that a few large media concerns are splitting the market amongst themselves and that state regulation does not prevent this and may even have helped it.

Above all, the international study jointly organised by the European Institute for the Media and the Bertelsmann Foundation⁵ tried to identify those factors in regulation, in the market, and in the management of broadcasting companies which create, or help to ensure, favourable conditions for the social responsibility of television. Our comparison of the research results from ten countries (the United States, Canada, Australia, and seven European countries) showed that social responsibility in television basically results from a combination of four main factors:

1. the legal framework: for example, the constitution, general legislation, and specific broadcasting legislation;
2. licensing, supervision, and control;
3. market forces; and
4. editorial responsibility in management and in the journalistic profession.

Although in our investigation we knowingly selected countries which were culturally alike and which shared a similar stage of development in the broadcasting sphere, we found marked differences in the weighing of the four factors. Structures and experiences cannot simply be carried over from one country to another. However—and this brings us back to the original theme—the comparison nevertheless produced very interesting results and ideas in many areas that are worth following up.

In the case of the United States, what leads us to want to en-

⁵ The study was part of the preparatory work for the Carl Bertelsmann Prize 1994, which was awarded to the television channel with an outstanding record in social responsibility. The results of the international research will be published by the Bertelsmann Foundation in the second half of 1995.

quire further is the very different course taken by the development of broadcasting from that followed in Europe, as well as the altogether different "philosophy" which forms the basis of the American television system. Also, the extremely informative report by Eli Noam, Everett Parker, and Alfred Schneider⁶ contained many pointers which we would now like to take up and expand on to benefit possibly the European, but definitely the German debate.

In the following we would like to deal in more detail with some of the areas which appear to be particularly interesting in relation to the problems outlined above. First, we will deal with the experiences of self-regulation in the television industry—also in relation to other factors concerning social responsibility. Second, we will deal with the question of ownership regulation.

I. SELF-REGULATION

In principle, in the United States as in Europe, the organisation of broadcasting is tied to the public interest. The United States Supreme Court stated that, under the Federal Communications Act of 1934,⁷ a broadcaster is both station owner and trustee of a public resource.⁸ Positive demands on the broadcaster in terms of programming conditions or other obligations are less obvious. The firmly held right to the freedom of speech as stated in the First Amendment to the United States Constitution⁹ is very significant and creates a broad arena for private broadcasters' activities. Essentially, the organisation of broadcasting is based on the basic right of individuals and on the philosophy of competition among commercial companies.

Even though a large private broadcasting sector has been created since the introduction of the dual system in most European countries, there remains, in comparison to the United States, as already stated, a strong emphasis on state regulation. If one refers back to the four main factors contributing to the social responsibility of television mentioned above, the question that arises is whether the relatively minor role of the factor "state regulation" is evened out in the United States by the greater significance and respective tradition underlying the factors "self-regulation" and "responsible management."

⁶ This report will be published in the publication prepared by the Bertelsmann Foundation. See *supra* note 5.

⁷ Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1988 & Supp. V 1993)).

⁸ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁹ U.S. CONST. amend I.

The United States has the most significant commercial broadcasting system in the world. In addition, the relative weakness of the public broadcasting system also means that the commercial logic in broadcasting is altogether far and away more dominant than has been the case in Europe with its still strong public system and its relatively young private sector. Has an awareness of the social responsibility of television developed in commercial broadcasting in the United States? What form has it taken? Is self-regulation seen as an integral part of the system? How have these commercial foundations of broadcasting affected the balance between state regulation and control on the one hand and entrepreneurial responsibility on the other? For example, how do American commercial broadcasters themselves view the question of self-regulation and how does this affect their relationship with the regulatory body—the Federal Communications Commission ("FCC")? In which areas is the greatest consensus found? Where do the traditional points of conflict lie?

The relatively long history of commercial broadcasting in the United States also leads us to expect that with time a certain institutionalisation of self-regulation and self-control will develop, for example voluntary general commitments to responsible control by broadcasters within industrial associations or founding special institutions for self-control. If such initiatives are undertaken what are their concrete goals? Who participates? What form of organisation is chosen? What are their areas of authority? Which instruments can be used? Last but not least what can be said about the effectiveness of this initiative?

Looking at the structure of the United States television market, the question arises of how self-regulation can work when the commercial competitors have different requirements, for example, the big networks with their affiliates on the one hand and the cable television companies on the other. Is the self-regulation of one part sensible and effective or can it only function when at least the great majority of all the companies involved in the market participate in a system of self-regulation? Which other conditions must be present for successful self-regulation?

Another problem that also is found increasingly in European countries is the cooperation of broadcasters with independent production companies. What experience does the United States television industry have with the supervision of the criteria regarding social responsibility in programmes that external producers deliver? What rules and procedures have proved particularly worthwhile here?

The implementation of guidelines for social responsibility presupposes that structures exist within the broadcasting companies that create respective awareness of the problem among the parties involved at all different levels and of techniques that allow the implementation of such standards in the day-to-day practice of highly complex institutions. It was precisely this point that we recognised as very important in our international research.¹⁰ Without a respective strategy from above, for example from the management of a broadcasting company, neither state obligations nor even less self-commitment can be anchored on a long term basis in broadcasting organisations. Responsibility as a management task appears to be a fundamental element in effective self-regulation. Here Europeans are keen to learn more about the experience of the commercial broadcasters in the United States. From our research, we know that the large networks have traditionally set up their own standards and practices departments with specific responsibility for the supervision and execution of the guidelines for programme practice.¹¹ Different reports are heard about the actual significance and effectiveness of these institutions. Discussions about the decline in programme standards and the responsibility of commercial broadcasters are very topical in many European countries.¹² It would be very informative for us to receive more information and evaluations:

- about the status of social responsibility and self-regulation in the top levels of the management hierarchy of the commercial broadcasters;
- about the contents and practical relevance of codes and guidelines set by the management as part of company policy;
- about the internal structures, for example standards and practices departments, their position in the hierarchy, and their qualification and authority, along with their means of implementing guidelines in practice;
- about experience of other methods and procedures used to ensure social responsibility in the day-to-day practice of the commercial broadcasters; and

¹⁰ See *supra* note 5 and accompanying text.

¹¹ See *supra* note 5.

¹² In Italy, a pressure on programme quality resulted from the fierce competition between the public broadcaster, RAI, and the market leader in the commercial sector, the Fininvest group of Mr. Silvio Berlusconi, since the introduction of commercial television in the early 1980s. In France, the programming policy of the market leader, TF1, repeatedly has been criticized in public for its sensationalist and violent tendencies. In Britain, there has been a debate over a satellite television broadcast from abroad that contained programmes regarded as not suitable for the British audience because of their pornographic contents ("Red Hot Dutch" Case).

- about the relationship of these internal mechanisms to the state regulatory body, to any self-regulatory authorities of the private broadcasting industry, and, last but not least, to the public and to the individual viewer.

At the beginning we also mentioned the market as being one of the main factors contributing to the social responsibility of broadcasting. In Europe, over the last ten years since the emergence of private broadcasters, it has become increasingly clear to us what the implication of the heightened competition will be for financial resources and viewers—and also for the awareness of social responsibility. It has become clear that commercial, but also to a certain extent public broadcasters must follow certain principles to survive in the marketplace. On the other hand, it is also clear that in spite of all the constraints that are imposed on the competitors, a very broad range of options and strategies still is available for broadcasters. An entertainment programme can be innovative, but it also can be deliberately shocking and use cheap sensationalist effects to attract viewers. An information programme can be dynamic and investigative, but it can also deliberately invade people's private lives or try to attract attention with speculative half truths. The first (positive) alternative must also be available in a very tough competitive environment if a broadcasting system feels under obligation to the public interest. It is a management task to make this alternative clear within the company and to pass on the respective guidelines.

The question to our American colleagues is how do you evaluate the present influence of the market and competition on the safeguarding of social responsibility and self-regulation in the United States? What options and practical techniques have proved to be worthwhile in the United States maintaining standards? Where does the hard fight for market share have the strongest effect in terms of a weakening of self-regulation and self-control? In this situation what can the broadcasting company management do—possibly in cooperation with state authorities or with competitors in the market—to ensure the safeguarding of social responsibility?

In the United States the management aspect carries particular weight, as it is here that the development to a multi-channel broadcasting system is furthest advanced. However, in many European countries experience is showing that with the increasing number of offers, the chances of thorough state supervision of television programmes being possible is becoming ever smaller. In this re-

gard, effective self-regulation achieves extra significance—although we are convinced that self-regulation alone will not be sufficient to guarantee the social responsibility of the broadcasting system.

From a European perspective it would be exciting to know—and this is our last suggestion in this first section—how far discussion in the United States already has gone with regard to the prerequisites for regulation and self-regulation in the forthcoming age of new technologies. With digitalization and compression, the competitive situation will change dramatically and bring with it new challenges.

II. OWNERSHIP REGULATION

The second important area of discussion in our meeting concerns experiences with regulation and control in media concentration. This theme currently is being discussed intensively in Europe, at the level of nation states and at the European Union in Brussels. Particularly in Germany, a public debate has arisen due to criticism of the lack of effective control of economic concentration in private broadcasting.¹³ It aims to find ways and means of ensuring the greatest possible diversity and plurality in the media and at the same time to avoid the possibility of overregulation limiting the competitive chances of private companies.

The United States has a long tradition of controlling economic concentration. In Europe, particularly well known examples are the divestiture of the telecommunications industry¹⁴ and the "Fin-syn rules," which prevent vertical integration between television networks and programme production.¹⁵ However, in recent years, a number of mergers, takeovers, and alliances between larger companies in the media industry, telecommunications companies, and film production companies made their appearance in the headlines of the European trade press,¹⁶ and as of the end of 1995 the "Fin-syn rules" no longer will be effective.¹⁷

¹³ Die Landesmedienanstalten, *supra* note 1.

¹⁴ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

¹⁵ Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382 (1970).

¹⁶ Examples are: telecom operator US West bought significant share of Time Warner Entertainment, see Geraldine Fabrikant, *U.S. West to Work with Time Warner*, N.Y. TIMES, May 17, 1993, at A1; telecom operator Nynex acquired a share of media group Viacom, see Geraldine Fabrikant, *NYNEX Aid for Viacom in its Bid*, N.Y. TIMES, Oct. 5, 1993, at D1; Viacom and Blockbuster Entertainment acquired Paramount film production, see Geraldine Fabrikant, *Viacom is Winner over QVC in Fight to Get Paramount*, N.Y. TIMES, Feb. 16, 1994, at A1.

¹⁷ Evaluation of the Syndication and Financial Interest Rules, Memorandum Opinion and Order, 8 F.C.C.R. 8270 (1993).

It is our impression that in Europe very little is known about the valid rules on ownership restrictions in the United States, particularly in the field of the media. Since at the moment the European discussion about the control of media concentration appears to be open to new concepts, ideas, and suggestions—the opportunity now is available to analyse the American experience in more detail. Amongst others, it concerns the following problem areas:

1. Which criteria are used in the control of concentration in the field of the media?¹⁸
2. Which thresholds should be applied to the use of the criteria?
3. Which institutions should be involved in the control of the media industry? Do they have at their disposal specific powers to investigate, for example, to obtain dated form media companies?
4. What is the significance of licensing or the renewal of licenses in the control of media concentration?
5. To what extent should and can vertical integration and cross media ownership be incorporated into the control of media concentration?

The last point leads to a development that will become even clearer with regard to new technologies: the diversification of many larger media organisations into previously well defined separate sectors of the industry and the associated integration of various stages of media production and distribution within the larger enterprises. "Cross-border networking" and "strategic alliances" are additional key words of the present reorganisation in the entire field of communication and information industries. As with many other social and economic developments, the United States is clearly ahead of Europe. In the context of "multimedia" and the "information highway," we hear of the great interest of the telecommunication and computer industries in the area of media. Within the United States and on both sides of the Atlantic, cooperation is taking place with the aim of achieving the best possible starting position in the battle for future markets. From the point of view of the "big players," in the future the media, and particularly broadcasting, appears to be only one part of the whole production and distribution process.

In the United States, how advanced is the discussion about the

¹⁸ In Europe, alongside the traditional criteria of restricting the number of outlets under the control of one enterprise and the level of capital shares in a media company, there is discussion about limiting the market share based on audience figures.

necessity of state regulation of these new market structures? Are there any definite starting points for building these changes into the existing anti-concentration regulations or for introducing completely new regulations? What could the criteria and measures here look like? Is it only about the control of concentration in relation to the American market or are international alliances also included?

We hope we have made both the European situation and our interest in the way the American media system functions clear. It is precisely because the starting points are different that we can learn from one another. We will listen attentively.