

Regulation of Broadcasting and Internet Services in Germany: a brief overview

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HANS-BREDOW-INSTITUT
für Medienforschung an der Universität Hamburg

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in cooperation with Thilo Wind*

***Regulation of Broadcasting and
Internet Services in Germany
A brief overview***

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Hans Bredow Institute for Media Research at the University of Hamburg

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1. Introduction

The following article intends to give an impression of the regulatory standing in Germany.¹ It is not an academic analysis, but just a way to further information to people who have so far not been exposed to media regulation in Germany at all.

The article only covers the regulation of those kinds of media, which relays information to general public by means of telecommunication; film and traditional press² are excluded from this description as well as the regulation of telecommunication³ is. Furthermore data protection⁴, the protection of privacy and special „privileges” media companies hold, e.g. the right to demand information from administrative bodies, are not the topic of this article. Moreover, the following overview does not cover the commercial law applicable to mass media either.

2. Background

When it comes to mass media communication, the current German regulation has to be seen in the context of historical developments as well as in respect of technical, economical and social conditions in Germany. It will be of help to understand the current standing by having a look at the history of German broadcasting.

In October 1923, broadcasting was launched in the Weimar Republic. After 1933 the National Socialists used the established centralized broadcasting system as a tool of propaganda. So after World War II the primary objective of broadcasting regulation was to provide independent and pluralistic programming; broadcasting was seen as an instrument of society rather than one of state. Especially the British Broadcasting Corporation (BBC)⁵ served as a model for German public broadcasters, which were set up in different states („Bundesländer”, the 16 German federal states), or a single broadcaster for some states jointly.⁶ Later on, these public broadcasters formed some kind of a network, the ARD (Association of Public Broadcasting Corporations in the Federal Republic of Germany)⁷. In 1963, a nation-wide TV broadcaster, the ZDF⁸, was established by treaty between the German states. Nowadays, the public broadcast companies have two nation-wide general interest channels. Together, ARD and ZDF offer also the following special interest channels: a children channel („KIKa”), a cultural chan-

¹ [March 2008] The regulatory framework changes rapidly, so please make sure that you have obtained the up-to-date version of this overview from <<http://www.hans-bredow-institut.de>>; An overview about German information society can be found at <<http://www.bmbf.de/en/publications/2703.php>>.

² See <<http://www.presserat.de/english.html>>.

³ The Telecommunications Act (TKG) can be found at <http://www.bmwi.de/BMWi/Navigation/Service/gesetze,did=21996.html>; some directives are available at <<http://www.iuscomp.org/gla/statutes/statutes.htm>>.

⁴ <http://www.bfd.bund.de/EN/Home/homepage__node.html>; mostly in German: <<http://www.datenschutz-berlin.de>>; <<http://www.datenschutz.de/privo>>.

⁵ <<http://www.bbc.co.uk>>.

⁶ Bavaria: <<http://www.br-online.de>>; Hesse: <<http://www.hr-online.de>>; Saxony; Saxony-Anhalt; Thuringia: <<http://www.mdr.de>>; Hamburg; Lower Saxony; Mecklenburg-West Pomerania; Schleswig-Holstein: <<http://www.ndr.de>>; Brandenburg: <<http://www.orb.de>>; Bremen: <<http://www.radiobremen.de>>; Saarland: <<http://www.sr-online.de>>; Berlin: <<http://www.sfb.de>>; Baden-Wuerttemberg; Rhineland-Palatinate: <<http://www.swr.de>> North Rhine-Westphalia: <<http://www.wdr.de>>.

⁷ Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, <<http://www.ard.de>>.

⁸ Zweites Deutsches Fernsehen, <<http://www.zdf.de>>, in English <<http://www.zdf.com>>.

nel („3sat“) and a documentary channel („Phoenix“). In addition, they join in the European cultural channel „ARTE“. The regional public broadcasters of the ARD also offer regional programmes. Moreover, each public broadcaster represented within the ARD offers several radio programmes for its respective home state(s). There are also two nationwide public radio programmes: „Deutschlandradio Kultur“ and „Deutschlandfunk“. All these services are complemented by a digital programme package including all television and radio programmes as well as three exclusive digital programmes.⁹ Besides these, there is a German international broadcaster, the „Deutsche Welle“.¹⁰

Broadcasting services have been offered by private entrepreneurs since 1984. Nowadays, analogue cable TV households have the choice of approximately 33 TV channels, public and private ones.

In 2007, some 54 % of all German households received television via cable, 4,1 % by means of terrestrial transmission and 41,8 % via satellite.¹¹ So far, more than 60 % of all Germans use online-services.¹²

3. Constitutional Basis

3.1. Basic Rights

The basic rights of communication are laid down in art. 5 para 1 of the German Basic Law¹³ (Grundgesetz, GG)¹⁴, which quotes:

„Everyone shall have the right to freely express and disseminate ones opinion in form of speech, writing and pictures, and to freely inform oneself by using generally accessible sources. Freedom of press and freedom of reporting by means of broadcast and by using film are guaranteed. There shall be no censorship.“

While the right to express ones opinion and informing oneself is first of all seen as a „classical“ civil right, the German Constitutional Court (Bundesverfassungsgericht, BVerfG)¹⁵ interprets the freedom of mass media communication, especially by means of broadcasting, according to a different underlying concept. According to the court’s point of view the freedom of media is not merely a subjective right, but also an objective guarantee, which states the obligation for the lawmaker to ensure that the media system works.¹⁶ The lawmaker has the duty to ensure that a free and open process of forming public and individual opinion is given. This includes further objectives like guaranteeing variety and diversity, and the fair

⁹ See for English information about ARD services <<http://www.ard.de/intern/>>.

¹⁰ <<http://dw-world.de>>.

¹¹ Numbers from 2007, Medien Basisdaten: <http://www.ard.de/intern/basisdaten/empfangssituation/technische_20reichweiten/-/id=54848/1hwge2l/index.html>.

¹² Numbers from 2007, Medien Basisdaten <http://www.ard.de/intern/basisdaten/onlinenutzung/soziodemografie_20der_20onlinenutzer/-/id=55174/oc4awv/index.html>.

¹³ Regarding the constitutional background cf. <http://www.servat.unibe.ch/law/icl/gm__indx.html>.

¹⁴ An English version of the German Basic Law can be found at <http://www.bundestag.de/htdocs_e/parliament/function/legal/index.html>.

¹⁵ <<http://www.bundesverfassungsgericht.de>>.

¹⁶ BVerfGE 7, 198 (204); 57, 295 (319).

chance of participating in public communication. However, the lawmaker has to fulfil this task without interfering with the journalistic autonomy of the media. Mass media communication has to function without any state interference.¹⁷ To fulfil these slightly paradoxical constitutional requirements the lawmaker uses both structural and procedural instruments for broadcasting regulation.

For the special broadcasting regulation, which is less „liberal” compared to press or film, two reasons are given: Firstly, broadcasting plays a special role in public communication, being suggestive, current and with spread-effect.¹⁸ Secondly, there is a specific risk of market failures when it comes to private broadcasting. There is a scientific debate going on between constitutional lawyers, on whether these assumptions for broadcasting are no longer valid when it comes to digitalisation, or, the other way round, the arguments given by the constitutional court can be applied to new media services as well.

However, due to these special constitutional requirements the role of the Federal Constitutional Court shall not be underestimated when regarding the structuring of the broadcasting system in Germany for the last 50 years.¹⁹ Several landmark-decisions²⁰ have had an exceptional influence on the law making process.²¹

3.2 Legislative Competence

As already mentioned above, Germany is a federal republic consisting of 16 states (Bundesländer). Therefore, legislative power is shared between the federation and the states. According to art. 70 para 1 GG the states have the legislative competence for the law making process unless the constitution provides a legislative competence for the federal state. There is a federal state competence for telecommunications, for combating economical concentration, and in respect of several other subjects, which can be of importance as far as media regulation is concerned. However, the competence to ensure the functioning of the media system remains in the hands of the states. Especially when it comes to the regulation of technical services, e.g. conditional access, the system of legislative competences can easily lead to conflicts between the federal government and the state governments. One example are the provisions for conditional access systems laid down in the Access Directive 2002/19/EC (art. 6)²² which have been transferred into national law (see art. 48 et seqq. Telecommunications Act, TKG) as well as by the Interstate Treaty on Broadcasting between the states (art. 53 Rundfunkstaatsvertrag, RStV).²³..

¹⁷ Hoffmann-Riem, *Regulating Media*, New York 1996, 119.

¹⁸ BVerfGE 90, 60 (87).

¹⁹ Some more information about German Law and a few abstracts of relevant cases can be found at: <<http://archiv.jura.uni-saarland.de/english/glsindex.html>>.

²⁰ See the compilation of links at <<http://www.ikmrecht.de/lehre/bverfge/index.html>>.

²¹ BVerfGE 12, 205; BVerfGE 31, 314; BVerfGE 57, 295; BVerfGE 73, 118; BVerfGE 74, 297; BVerfGE 83, 238; BVerfGE 87, 181; BVerfGE 90, 60.

²² Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); 7 March 2002, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML>>.

²³ The Interstate Treaty on Broadcasting and Telemedia (RStV) and further legal bases can be found at <<http://www.alm.de/366.html>>.

4 European Framework

National regulation in Germany has greatly been influenced by European legislation, and the influence it has on national law is getting stronger.²⁴ The European Community is assured of its competence for laying out laws for the media sector by using art. 49 EC Treaty²⁵, which empowers the EC to ensure the freedom of services provided within the community. Following the jurisdiction of the European Court of Justice (ECJ), mass communication services have to be treated as such services subsequently falling under the provision of art. 49 EC. The European Commission²⁶ issued a bundle of directives in order to harmonise the law of the Member States for ensuring the economic liberties within the Community. These Directives have to be transformed into national law. For content services covered by this article, especially the new Audiovisual Media Services Directive (2007/65/EC, AVMSD)²⁷, the Access Directive (2002/19/EC)²⁸ and the E-Commerce Directive (2000/31/EC)²⁹ are of major significance.³⁰ Besides that, German regulation has been affected by art. 81 and 82 EC and further rules concerning public companies.

Other important provisions of the European framework may also have great practical impact on the national legislation and regulation of the media markets. The European Commission assumes that according to Article 87 para 1 EC, the German financing regime of public service broadcasting based on fees is a case of state aid.³¹ On the basis of this interpretation, such a financing regime is only justified in the presence of the preconditions pursuant to Article 86 para 2 EC; a clear remit must exist.

In view of applicable legislation at the time when the decision was taken, the Commission understands that there is a general and broad definition of the mission in § 11 para 1 RStV (Rundfunkstaatsvertrag: the Interstate Treaty on Broadcasting) which is specified by the

²⁴ For latest legal information on national and European level see: Database on legal information relevant to the audiovisual sector in Europe (IRIS Merlin) at <<http://merlin.obs.coe.int/search.php?language=en>>.

²⁵ See for the consolidated version of The EC Treaty (EC) <<http://europa.eu.int/eur-lex/lex/en/treaties/index.htm>>.

²⁶ <http://europa.eu.int/comm/index_en.htm>.

²⁷ The final version of the Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (AVMS Directive) and for latest news about the modernisation procedure including the most significant changes in respect to the former „Television Without Frontiers” Directive see: <http://ec.europa.eu/avpolicy/reg/avms/index_en.htm>.

²⁸ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); 7 March 2002; <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0019:EN:HTML>>.

²⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>>.

³⁰ See *Holznel/Orlandi*, Transposition of the EC „Television Without Frontiers“ Directive. Advertising, Sponsorship and Programme Quotas. Hamburg 1993; Holznel, Broadcasting Law and Regulation of the EC, in: Holznel/Möller (Eds.): Media Law in Europe, München 1995, 1.

³¹ See K (2007) 1761 endg. recital 74 et seqq.; in the same direction pointing: *Thum*, Gebührenfinanzierung und EG-Beihilferecht, NVwZ 2007, pp. 521 seqq.; see also about the issue: *Stulz-Herrnstadt*, Nationale Rundfunkfinanzierung und europäische Beihilfenaufsicht im Lichte des Amsterdamer Rundfunkprotokolls, Berlin 2004.

broadcasters themselves with legally binding effect.³² By and large, this process is considered to be in compliance with European legislation. With respect to the definition of the mission for additional digital channels and media services, however, the Commission sees deficits with respect to the precision of the definition.

Germany takes an essentially different legal viewpoint.³³ Germany – rightly - assumes that this in fact is not a case of state aid as defined in Article 87 para 1 EC. Firstly, there is no „favouring“, since the criteria identified by the European Court of Justice in the *Altmark-Trans* ruling are complied with. The public service broadcasters only receive the net costs for fulfilling their public service mission.³⁴ Germany also holds that the financing regime for public service broadcasting is not a state measure nor uses state resources. The final decision of the Commission is based on an informal agreement between Germany and the Commission in which several concessions have been made and which have to be implemented by the end of 2008.

This includes various instruments such as a „three-steps-test“ for new or changed digital services including online services of public broadcasters to measure their importance for the fulfilment of the given constitutional task, as well as appropriate ex post controls and the clear separation of public broadcasters' commercial activities from their public service obligations. This test can be seen as a German version of BBC's Public Value Test, however, it reflects the requirements of German law. These changes represent simultaneously the fixation and limitation of the public broadcaster's current state of services, hence making the application of the new rules obligatory to new public services.

In 2007, the new „Audiovisual Media Services Directive“ has come into force. Compared to the former „Television Without Frontiers“ Directive its regulatory scope was extended as non-linear services such as on-demand services are being covered now. The directive contains different rules for linear (television) and non-linear services (on-demand). The new remit was chosen due to the proceeding convergence of media and is therefore designed to cope with its new challenges. Today, there is a period of two years for the Member States to transpose the provisions into national law.

Additionally, the European regulatory framework regarding the telecommunication sector including the Access Directive is also subject to a major revision. The European Commission's review proposals were adopted in November 2007 and will be, on next stage, discussed under the co-decision procedure in the European Parliament.³⁵

When it comes to the protection of minors the basic freedoms set out in the EC Treaty play a major role regarding any cross-border business between the Member States. In addition, the rules of the Audiovisual Media Service Directive and the E-Commerce Directive with regard to broadcasting and telemedia have to be observed.

³² K (2007) 1761 endg. recital 224.

³³ See notification of the Federal Government, printed in *Funkkorrespondenz* (6) 2007, pp. 28 et seqq.; see also to this legal viewpoint: *Wiedemann*, Public Service Broadcasting, State Aid, and the Internet: Emerging EU Law, *European State Aid Law Quarterly* 4/2004, pp. 595 et seqq.

³⁴ For the criterias see: Case C-280/00 *Altmark-Trans*, European Court reports 2003, I-7747, recital. 88 et seqq. <<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>>; *Held/Schulz*, *Europarechtliche Beurteilung von Online-Angeboten öffentlich rechtlicher Rundfunkanstalten*, Berlin 2004, pp. 31 et seqq.

³⁵ <http://ec.europa.eu/information_society/policy/ecommm/tomorrow/index_en.htm>.

The question if DVDs and videos rated by an organisation from another European Member State may be judged as unrated under German Law and therefore fall under distribution restrictions was subject to a recent decision of the European Court of Justice. The Court ruled that the respective provision (art. 12 para 3 sentence 2 JuSchG) restricts the free movement of goods laid down in art. 28 EC. However, the Court found the German restriction to be justified on grounds of public morality and public policy under art. 30 EC since the national rules have established a system in which the rating procedure is readily accessible and can be completed within a reasonable period and a decision of refusal is open to challenge before the courts.³⁶

5 The Legal Framework in Germany

Provisions for broadcasting and so-called telemedia can be found in the Interstate Treaty on Broadcasting and Telemedia (Rundfunkstaatsvertrag, RStV).³⁷ As in Germany broadcasting is regulated by independent state laws the Interstate Treaty's main objective is to lay down a harmonized framework for nationwide broadcasting. Besides that, there are specific media laws and interstate treaties for public broadcasters.³⁸

A service is defined as broadcasting by the Interstate Treaty on Broadcasting, if it is intended to be received by the general public, transmitted by means of telecommunications and if it is characterised by a so-called presentation („Darbietung“). Included in this definition is classical broadcasting and – to some extent – live-streaming and web-casting. If a service lacks the feature of a presentation and is, moreover, not to be ranked as a telecommunication service by means of the Telecommunication Act, but represents an electronic information or communication service it has to be classified as a telemedia service, e.g. teleshopping, television and radio text and most of the internet services.

In the past, conflicts arose between federal and state governments about the regulation competences for Internet services. Due to agreements between the federal government and the states, the former partly overlapping differentiation between „tele services“ (federal level) and „media services“ (states' level) was replaced by the consistent term of „telemedia“. The federal lawmaker therefore enacted the Telemedia Act (Telemediengesetz, TMG)³⁹ while on state level various special provisions for these services were incorporated into the Interstate Treaty on Broadcasting.⁴⁰ The latter applies primarily to content matters of telemedia services and especially journalistically-editorially designed offerings and includes provisions like an advertising rule and the right for the affected person to reply in case of an assertion of fact by the service provider. The Telemedia Act, however, mainly regulates the economical aspects of these services. It contains numerous liability rules for providers of telemedia services laying down the conditions under which the providers are liable for their own as well as illegal third

³⁶ Case C-244/06, „Dynamic Medien“, Decision of 14 February 2008, <<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>>.

³⁷ For an English version of the Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty, RStV) see <<http://www.alm.de/366.html>>.

³⁸ All state media laws (in German only) can be found at <<http://www.alm.de/365.html>>.

³⁹ The Telemedia Act (TMG) is currently available in German only at <<http://bundesrecht.juris.de/tmg/index.html>>.

⁴⁰ For the term „telemedia“ within the scope of the Interstate Treaty on Broadcasting see art. 2 para 1 sentence 3 RStV; see also the special section about telemedia services, art. 54 to 61 RStV.

party content. Besides the liability rules the Telemedia Act determines the requirements for both the informational and data protection obligations of service provider. Obligations to provide information about the service provider can also be found in the Telemedia Act. As there is a variety of new services while the traditional broadcasting is changing it still remains difficult how to classify specific services.

Furthermore, these changes are also consistent with the current regulatory system of protecting minors which is already coping with the effects of technical convergence since 2002.

5.1 Public Broadcasting

In the so-called dual system – a broadcasting order in which public and private broadcasters co-exist⁴¹ – public broadcasters according to the German Federal Constitutional Court shall fulfil a specific function. As the Court supposes that economically driven private broadcasting tends to seek mass appeal and disregards minority interests, a basic provision („Grundversorgung“) has to be offered by public broadcasters. According to the Court the above-mentioned deficits of private broadcasting are acceptable as long as public broadcasters ensure basic provision.⁴² However, neither are private broadcasters prohibited from ensuring this basic provision nor are they obliged to offer such a basic provision. How the tasks of public broadcasters have to be described and specified is one of the main points of debate in German media policy.

To enable the public service broadcasters to fulfil their tasks the states have to guarantee the necessary funding. Households keeping a broadcasting receiver ready for reception are bound to pay broadcasting fees. The amount to be paid is defined in a complex process in which an independent expert commission, the so called Commission for the Assessment of Financial Requirement (Kommission zur Ermittlung des Finanzbedarfs der öffentlich-rechtlichen Rundfunkanstalten, KEF)⁴³ is involved. The KEF has to scrutinise the plans of public broadcasters in view of an efficient use of money. Finally, the suggestions of the KEF regarding the amount of the broadcasting fee have to pass all state parliaments to become binding. This process was subject to the most recent dispute between the public broadcasters and the state governments which was eventually settled by the German Constitutional Court.⁴⁴ The Court pointed out that in this case, the state parliaments acted unconstitutional when modifying the amount of the broadcasting fee estimated by the KEF. At the same time, the Court emphasised the general possibility for the state parliaments of departing from the KEF decisions but only under the premises of information access or adequate financial burdens for the recipients. By this ruling, the Court held up its notion that broadcasting must remain free from any state interference. Once again the Court reconfirmed the principles of the German funding system as well as the necessity for public broadcasting to extend their services to new technological areas originating from media convergence (see below). With this finding the court continues its rulings about broadcasting fees, thereby pointing out that fees are only constitutional in light of fulfilling the public broadcasters' constitutional tasks and their special function within

⁴¹ See *Libertus*, Essential Aspects Concerning the Regulation of the German Broadcasting System, Köln 2004, pp. 11 et seqq.; <<http://www.rundfunk-institut.uni-koeln.de/institut/pdfs/19304.pdf>>.

⁴² BVerfGE 73, 118 (157).

⁴³ In German only: <<http://www.kef-online.de>>.

⁴⁴ Decision (in German only) at: <http://www.bundesverfassungsgericht.de/entscheidungen/rs20070911_1bvr227005.html>.

society. Besides the broadcasting fees as a primary source of funding, the public broadcasters are permitted to earn money by means of advertising and sponsoring. There are advertising restrictions for public broadcasters which, in the first line, attempt to prevent these broadcasters from predominantly using economically driven programming. For example, public broadcasters are not allowed to broadcast advertisements after 8 pm.

One feature that characterises public broadcasters is an internal supervisory body („Rundfunkräte”, ZDF: „Fernsehrat”), in which so-called socially relevant groups, like trade unions, employers associations, churches, environmentalist groups etc. are represented. It is the task of these bodies to monitor the legal requirements and to make sure that diversity in programming, i.e. representing the manifold opinions to be found in society itself, is achieved. Besides that, each state government provides a legal supervision with limited powers. The head of the public broadcasters, the director (German: „Intendant”), is elected by the respective internal body.

While all public broadcasters bare the same basic structure, there are significant differences between them, just to take the social relevant groups which are represented in the internal supervisory body as an example. Since 1999 the public broadcasters which are members of the ARD and the ZDF have had the permission to use digital transmission, to offer programme guides and to bundle programmes (art. 19 RStV). Furthermore, they are allowed to offer so-called programme-aligned online-services (art. 4 para 3 ARD-, ZDF-, DW-G). Apart from these clear tasks, experts disagree on the variety of activities which may, or have to, be granted to public broadcasters. Some argue that in a changing media environment public broadcasters have to offer new media services, and, because of art. 5 para 1 GG, they have the right to do so without any special authorisation by the lawmaker. They refer to the so-called „development guarantee” mentioned by the Federal Constitutional Court in various decisions.⁴⁵ Others argue that public broadcasters are restricted to traditional broadcasting and, for this reason, a specific permission by the lawmaker is at least indispensable to offer new media services.

5.2 Regulation of Private Broadcasting and Internet Services

In order to better understand the regulative system of private broadcasting and internet services in Germany it is more beneficial to take a look at different fields of regulation rather than the legal framework laid out for the corresponding services. The following is meant to describe these different fields of regulation.

5.2.1 *Market Entry: Licensing and Ownership Rules*

Private broadcasters require a licence.⁴⁶ The process of licensing is structured by the state media laws, and, for nation-wide television, by the Interstate Treaty on Broadcasting. Apart from criteria known from general trade law like reliability of the applicant, the licensing process is designed to guarantee a maximum of programming diversity within the broadcasting market, or that at least the effect of compelling influence on public opinion is prevented. Some state media laws quote different additional requirements. In some states it is stipulated

⁴⁵ See BVerfGE 73, 118 (158); 74, 297 (324); 83, 238 (298); 90, 60. See also the decision (in German only) at: <http://www.bverfg.de/entscheidungen/rs20070911_1bvr227005.html>.

⁴⁶ Art. 20 para 3 RStV stipulates an exception for forms of narrowcasting.

by media law that broadcasters must assure to produce parts of their programme contents in the respective state, a condition which has been challenged by the European Commission as being discriminatory. Foreign broadcasters, however, do not need a licence in case of re-transmission via cable, if their programme observes the rules of the European Convention on Transfrontier Television (Europäisches Übereinkommen über das grenzüberschreitende Fernsehen, 1989)⁴⁷. Though, these broadcasters have also to be aware of the regulations laid down in the Interstate Treaty on Broadcasting.

To prevent compelling influence in the area of nation-wide television programmes a special regulation has been laid down in the Interstate Treaty on Broadcasting (art. 26-30 RStV).⁴⁸ Based on the audience market share model, the system sets up a threshold of 30 % of the broadcasting market. Owning more than this audience market share is regarded as having a compelling influence on public opinion and will subsequently lead to actions by the competent State Media Authority. A lower threshold of already 25 % of the audience market share applies if a company dominates a media-relevant related market (like newspapers, journals or Internet services) or if the company's overall influence on broadcasting market and media-relevant related markets can be compared to an audience market share of 30 %. All programmes are added to a company's audience market share if the company is related to the broadcaster in a way closer defined by the RStV. To judge the influence a company has on public opinion lies with the responsibility of an expert commission, the Commission on Concentration in the Media (Kommission zur Ermittlung der Konzentration im Medienbereich, KEK)⁴⁹.

The licensing procedure, including reasons under which a licence can be revoked, is laid down in the different state media laws. Some of them have adopted the ownership-rules of the Interstate Treaty on Broadcasting; others still follow the old model of multiple ownership restrictions. Until August 2008, even nation-wide broadcasters have to apply for a licence in one of the German states. When the new legislation comes in force, there will be a special commission responsible for nation-wide licences.

For telemedia services there is no licensing or registration needed at all. Art. 20 para 2 RStV contains procedural rules for the decision whether a service falls under the provisions for broadcasting or telemedia.

5.2.2 Programme Requirements

5.2.2.1 Programme Guidelines and Programme Quotas

In the so-called dual system due to the constitutional propositions, the commercial pillar is not completely free of programme-related requirements. So one can find programme guidelines in the Interstate Treaty on Broadcasting (art. 3, 41 RStV), and in the state media laws, which state that general channels have to ensure at least a minimum of diversity; all German and

⁴⁷ <<http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm>>.

⁴⁸ Besides that, the General Antitrust Law (GWB) is applicable to media companies, as well.

⁴⁹ <<http://www.kek-online.de/cgi-bin/esc/englisch.html>>; in 2006 the KEK refused the German-German acquisition of the private broadcasting company Pro7Sat.1 Media AG by the publisher Springer as a result of the above cited provisions in the Interstate Treaty on Broadcasting and Telemedia. By taking into account the publisher's activities on other markets, namely the print media market, the KEK considered them being related to the broadcasting market, and, thus, being incompatible with the rules of the Interstate Treaty, case from 10.01.2006 - KEK 293-1, only in German at <<http://www.kek-online.de/cgi-bin/resi/v-ent/416.html>>.

foreign programmes have to be orientated at specific common-shared values like the dignity of mankind or global peaceful co-existence. These programme requirements are formally regarded as strict legal obligations, however, in practice they serve mainly as orientation points for debates on media quality.

The quota for European productions laid down in art. 4 AVMS Directive is mandatory for all broadcasters according to art. 6 RStV.

5.2.2.2 Protection of Minors

In 2003, a coherent legal framework for the protection of minors within broadcasting and new services was introduced in order to cope with the new challenges in the field of media which are evoked by technical development and further media convergence.⁵⁰ That aimed to remedy the existing and particularly disjoint regulation and competences of the corresponding supervisory bodies. Therefore, two laws have been enacted, The Protection of Young Persons Act (Jugendschutzgesetz, JuSchG)⁵¹ at federal level and the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (Jugendmedienschutzstaatsvertrag, JMStV)⁵² at state level.⁵³

Roughly speaking, the Protection of Young Persons Act deals with „data media“-content which is physically available, like books, audio CDs, DVDs etc. To some extent, telemedia services are covered, as well (e.g. rating of harmful content, rules for access in public places). The access to films in cinemas is covered by this law too.

The Act differentiates between harmful content and content not suitable for certain age groups. Harmful content is rated by an official administrative authority: the Federal Department for Media Harmful to Young Persons (Bundesprüfstelle für jugendgefährdende Medien, BPjM)⁵⁴. On request of other institutions the authority puts harmful media (data media and telemedia) on a list (the „index“) which results in restrictions of the distribution to minors as well as advertising (restrictions for data media can be found in the federal Act; restrictions for telemedia are subject to states' regulation).

In severe cases laid down in the Act the restrictions for data media are effective irrespective of a decision by the BPjM (examples are glorification of violence and pornography).

When it comes to content not suitable for certain age groups rating is performed by self-regulatory bodies: the Voluntary Self-Regulation of the Film Industry (Freiwillige Selbstkon-

⁵⁰ Cf. for a more detailed overview concerning the protection of minors: Final Report, Study on Co-Regulation Measures in the Media Sector; Study for the European Commission, Directorate Information Society and Media, June 2006, pp. 48 et seqq.: <http://ec.europa.eu/avpolicy/docs/library/studies/coregul/coregul-final-report_en.pdf>; Project homepage: <<http://hans-bredow-institut.de/forschung/recht/co-reg/index.html>>.

⁵¹ <<http://www.bmfsfj.de/bmfsfj/generator/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/juSchGenglisch,property=pdf,bereich=,sprache=de,rwb=true.pdf>>.

⁵² <http://www.kjm-online.de/public/kjm/index.php?show_1=94,57>.

⁵³ *Schulz/Held, Together they are Strong? – Co-Regulatory Approaches for the Protection of Minors within the European Union*, in: C. von Feilitzen, U. Carlsson (Ed), *In the Service of Young People. Yearbook 2005/2006 from the International Clearinghouse on Children, Youth and Media*. Göteborg 2006, available at <http://www.nordicom.gu.se/common/publ_pdf/232_Regulation_Awareness_Empowerment.pdf>.

⁵⁴ <<http://www.bundespruefstelle.de/bmfsfj/generator/bpjm/information-in-english.html>>.

trolle der Filmwirtschaft, FSK)⁵⁵ and the Self-Regulation of Entertainment Software (Unterhaltungssoftware Selbstkontrolle, USK)⁵⁶ which is responsible for video games.

The Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting lays down rules for the providers of telemedia and broadcasting services. First of all, the Interstate Treaty states which content as such is illegal and therefore forbidden in broadcasting and telemedia content, i.e. first and foremost content which violates the penalty law (e.g. child pornography or so-called glorification of violence). Second, some content which is illegal in television broadcasts may be legal in telemedia services, if the content is not accessible by minors (e.g. pornography). Service providers may comply with these rules by installing adequate instruments such as an age-verification-system. Third, telemedia service providers have to ensure that content not suitable for certain age groups is provided in a way that children and young persons of the respective age do usually not have access to this content. Providers are able to meet these requirements by observing a time-shade-regulation or by „other means“, like access-blocking software. Whoever offers television in more than just one German state is required to name an appointee responsible for the protection of minors. The same goes for the providers of telemedia services which offer their service on a commercial basis; however, small providers are not required to do so.

The observance of all legal requirements by both broadcasters and telemedia service providers which is stipulated in the Interstate Treaty lies with the State Media Authorities. In order to ensure a consistent application of the Interstate Treaty the Commission for the Protection of Minors in the Media (Kommission für Jugendmedienschutz, KJM)⁵⁷ was established as a central regulatory body. In its competence falls the rating of content while the State Media Authorities execute the Commission's decisions. When it comes to Internet services, the Commission is supported by an organisationally related state body called „jugendschut.net“ which monitors these Internet services.

The regulatory concept of the Treaty is based on the idea of „regulated self-regulation“:⁵⁸

As long as broadcasters and providers of telemedia act in accordance with the judgements of self-regulatory bodies and those bodies act within the scope of their discretionary power, the state authorities are not allowed to impose sanctions on the broadcaster or provider. However, this self-regulatory „protection shield“ depends on the condition that the respective self-regulatory body has been certified by the KJM. The certification may be revoked if a self-regulatory body do not act in compliance with the requirements laid down in the Interstate Treaty. For television the Voluntary Self-Regulation of Television (Freiwillige Selbstkontrolle Fernsehen, FSF)⁵⁹ is the certified self-regulatory body, whereas for telemedia services, the Voluntary Self-Regulation of Multimedia Service Providers (Freiwillige Selbstkontrolle Multimedia-Diensteanbieter, FSM)⁶⁰ has gained certification by the KJM.

⁵⁵ <<http://www.spio.de>>, (with few information in English).

⁵⁶ <<http://www.usk.de>>.

⁵⁷ <<http://www.kjm-online.de>> (German only).

⁵⁸ Cf. *Schulz/Held*, Regulated Self-Regulation as a Form of Modern Government, 2002; Interim report available at <<http://hans-bredow-institut.de/publikationen/apapiere/8selfreg.pdf>>.

⁵⁹ See <<http://www.fsf.de/fsf2/international/summary.htm>>.

⁶⁰ <<http://www.fsm.de/en>>.

Furthermore, the state authorities are empowered to enact statutes and guidelines for the protection of minors and, thus, regulate this self-regulation.

5.2.2.3 Advertising Rules

Advertising and programming have to be distinguishable for the recipients (so called distinction rule). This is not the only but by far the most important objective as to the regulation of advertising.

Broadcasters have to observe special rules on advertising and sponsoring. Most of the German advertising rules for broadcasting are a word-by-word incorporation of European requirements (former „Television Without Frontiers”-Directive, now: Audiovisual Media Service Directive). Since there are already several reports on these requirements available in English we will refrain from further repetition in this article.⁶¹

Apart from these advertising restrictions, the Interstate Treaty on Broadcasting allows forms of split-screen advertising (art. 7 para 4 RStV) and virtual advertising, as long as virtual advertisements replace real existing ones (e.g. in football stadiums; cf. art. 7 para 6 RStV).

The distinction rule for advertising applies also to telemedia services (art. 58 RStV). Besides this, the Interstate Treaty on Broadcasting does not impose the same detailed rules on telemedia services like on the broadcasting sector. However, there are specific rules for teleshopping.

5.2.2.4 Limitation of Exclusive Rights

To make socially relevant information accessible to everyone, each broadcaster has specific rights to report gratuitous from events that are open to the public and, at the same time, of general interest (short news provisions, art. 5 RStV). The organizer of such an event is obliged to grant access to every licensed broadcaster within the European Union. Furthermore, by virtue of transforming art. 3j of the AVMS Directive (former art. 3a TWF Directive) the Interstate Treaty includes provisions concerning the transmission of events which are of major importance for the public (art. 4 RStV). The provisions contain procedures as regards the reception of these significantly important events not only on pay-TV, but also at least on one, for the public generally accessible, free-TV channel. The Interstate Treaty on Broadcasting lists the events covered by this regulation.

5.2.2.5 Liability

Apart from transparency rules and the obligation to name the editorially responsible service provider, the liability regulation is mainly case law. For telemedia services specific liability rules have been set out in art. 7 to 10 Telemedia Act.⁶² Hence, the German provisions are in line with the European standards stipulated in art. 12 to 14 E-Commerce Directive.

⁶¹ See Final Report, Study on Co-Regulation Measures in the Media Sector; Study for the European Commission, Directorate Information Society and Media, June 2006, pp. 57 et seqq.: <http://ec.europa.eu/avpolicy/docs/library/studies/coregul/coregul-final-report_en.pdf>; Haak, German Broadcast Advertising Law, <<http://www.ojr.de/index.html?/1996/36.htm>>; Bird&Bird, Evolution of new advertising techniques – Germany, <http://ec.europa.eu/avpolicy/docs/library/studies/finalised/studpdf/tab_de.pdf>.

⁶² The Telemedia Act (TMG) is currently available in German only at <<http://bundesrecht.juris.de/tmg/index.html>>.

5.2.2.6 Regulation of Transmission and Services for the Distribution of Programmes

Broadcasting needs transmission capacities to reach the audience. The regulation of this technical part of telecommunication lies within the purview of the German federal government. Its general framework is laid down in the Telecommunications Act (Telekommunikationsgesetz, TKG)⁶³; among others, it contains rate and access rules which apply to companies with significant market power. The competent regulatory body is the Federal Network Agency (Bundesnetzagentur, BNetzAg)⁶⁴. One major aspect of regulation in the TKG concerns the frequency management. The BNetzAg carries out international frequency agreements and, hence, draws up a National Table of Frequency Allocation and a Frequency Usage Plan. The latter allocates the usage of frequencies either to broadcasting or to other purposes.

Whether a frequency can be used by public broadcasters or private broadcasters is decided according to procedures laid down in the specific media regulations set by the states. State Media Authorities are responsible for allocating spectrum to private broadcasters. The new rules that will come into force in August 2008 will allow the allocation of spectrum to so called platform providers (these platforms, for instance, bundle programmes for mobile TV (DVB-H and DMB)). In the meantime, such allocations can be based on rules that allow trials on new techniques and services.

Unlike for example the situation in the United States, the cable operators in Germany were formerly seen as service providers transmitting only the broadcasting signals. Thus, State Media Authorities have been empowered, backed by state media laws and in accordance to legal criteria at hand, to determine programmes which have to be carried by broadcasting cable network operators. The system still applies to analogue cable systems and to radio programming. Art. 52 RStV lays down a must-carry-model as regards digital cable systems. The law designates a number of programmes which every digital cable operator must carry: Some programmes of the public broadcasters, local channels and so-called open channels („Offene Kanäle“)⁶⁵. Another part of the network capacity has to be allocated according to criteria defined by law (like the diversity of programming). The cable network operator is free of further legal obligations concerning the allocation of the remaining capacity. The model is designed to serve both the objectives of broadcasting regulation and the possibility for cable operators to use their cable network according to their own business models (e.g. broadband Internet, telephony).

Furthermore, the Interstate Treaty on Broadcasting provides regulation for services with relevance to broadcasting and telemedia, such as conditional access systems, programme guides and programme-bundling (art. 53 RStV). Conditional access services have to be offered on non-discriminatory basis and under fair and reasonable conditions in order to stay in line with the Access Directive 2002/19/EC. The same applies to basic programme guides which are designed to give access to all services offered on a platform. New rules for the bundling of programmes by platform providers will come in force in August 2008.

Companies offering these kinds of services are obliged to give notice to the respective State Media Authority in charge, which then registers the service if it complies with the legal re-

⁶³ The Telecommunications Act 2004 (TKG) can be found at <<http://www.bmwi.de/BMWi/Navigation/Service/gesetze,did=21996.html>>; The Act had been amended in 2007 of which is a version available in German only at <http://bundesrecht.juris.de/tkg_2004/index.html>.

⁶⁴ <<http://www.bundesnetzagentur.de>>.

⁶⁵ Publicly funded channels to which anybody has access to cast his self-produced programmes.

quirements. The State Media Authorities may, in co-ordination, decree statutes in order to concretise the procedures in question.⁶⁶

5.2.2.7 Supervision

The regulation of broadcasting services is carried out by the State Media Authorities⁶⁷ („Landesmedienanstalten“)⁶⁸. They are not part of the state administration, but independent agencies; therefore, they have internal bodies consisting of representatives of socially relevant groups (like the internal supervisory councils of the public broadcasters, see 5.1) or they are composed of experts. The administrative director of the authority prepares and executes the decisions taken by the internal body. First and foremost the State Media Authorities are responsible for licensing broadcasters, and, in addition to that, for the supervision in view of all the above-mentioned fields of regulation (protection of minors, advertising and programme guidelines). The institutions also take part in the frequency management.

The State Media Authorities are granted several instruments to sanction infringements of the existing rules. At first, the authority gives formal notice that there has been a breach of licence conditions or legal requirements by a broadcaster and imposes an order of omission to prevent further legal breaches. If the infringement continuous there might be further actions against the provider to remedy the breach of law (like temporary suspension of the licence). Under certain circumstances the authorities may also fine service providers. Finally, the topmost instrument in hands of the authorities represents the revocation of the licence. However, the broadcasting regulation in Germany is facing general problems, which can also be found in other countries, as regards an effective implementation of the rules.

In order to evade these regulatory problems the State Media Authorities have tried to establish some informal instruments of regulation, the so-called „regulation by raised eyebrows“, i.e. co-operating with the broadcasters, and promoting public awareness for problems within the broadcasting system and stimulating research in this area.

Additionally, German broadcasting regulation has to cope with the federal governing system, which enables broadcasters, to some extent, to choose a State Media Authority of a respective state, which applies less strict procedures to infringements. This conduct has led to some kind of „forum shopping“ by broadcasters and telemedia services.⁶⁹ The new rules for licences for nation-wide broadcasters (see 5.2.1.) will reduce this problem.

Already now, the State Media Authorities have formed a nation-wide association, the Association of State Media Authorities (Arbeitsgemeinschaft der Landesmedienanstalten, ALM)⁷⁰, which has set up working groups on different subjects.

⁶⁶ See for Statute on the freedom of access to digital services in accordance with section 53 para 6 RStV, <http://www.alm.de/fileadmin/Download/Gesetze/Zugangssatzung_2005-englisch.pdf>.

⁶⁷ A List of all State Media Authorities is available at <<http://www.alm.de/351.html>>.

⁶⁸ Baden-Wuerttemberg : <<http://www.lfk.de>>; Bavaria: <<http://www.blm.de>>; Berlin/ Brandenburg: <<http://www.mabb.de>>; Bremen: <<http://www.bremische-landesmedienanstalt.de>>; Hamburg/ Schleswig-Holstein: <<http://www.ma-hsh.de/>>; Hessen: <<http://www.lpr-hessen.de>>; Mecklenburg-West Pomerania : <<http://www.lrz-mv.de>>; Lower Saxony: <<http://www.nlm.de>>; North Rhine-Westphalia: <<http://www.lfm-nrw.de/>>; Rhineland-Palatinate: <<http://www.lpr-online.de>>; Saarland: <<http://www.lmsaar.de>>; Saxony: <<http://www.slm-online.de>>; Saxony-Anhalt: <<http://www.msa-online.de>>; Thuringia: <<http://www.tlm.de>>.

⁶⁹ See *Hoffmann-Riem*, *Regulating Media*, New York 1996, p. 137, 144.

⁷⁰ Association of State Media Authorities, <<http://www.alm.de>>.

For the different bodies involved in the youth protection system see above (see 5.2.2.2). When it comes to Telemedia services, the State Media Authorities are empowered by law to take appropriate measures (including the interdiction of services and the order to block content) if they (in case of youth protection the KJM) determine an infringement of the legal requirements. On this basis they are also able to fine providers in case of any legal breach. However, they have to observe the primacy of self-regulation (see 5.2.2.2), when it comes to youth protection.

6 Outlook: Foreseeable Changes

One main task for the German lawmakers is the implementation of the provisions of the Audiovisual Media Services Directive. It remains to be seen whether the states will make use of the possibility to loosen the rules for product placement. As regards the scope of broadcasting regulation the Lawmakers might opt for dropping the criteria of „presentation“ („Darbietung“) for assuming that a service is broadcasting and opting for „linearity“ as the decisive factor.

Moreover, the legal framework for the definition of the remit of public broadcasters has to be revised as a consequence of the settled dispute between the European Commission and the German states (see above 4). Respective changes will be incorporated into the amendment of the Interstate Treaty on Broadcasting in its 12th changed version. An agreement on this subject is expected to be reached before the end of 2008.⁷¹

In addition, the model of financing public broadcasting by broadcasting fees has increasingly been questioned since the fees also have to be paid by owners of Internet PCs and since the Federal Constitutional Court found the recent federal states' decision to keep the amount of the fees lower than the broadcasters' demand to be unlawful. Different financing models are under consideration.

Due to an evaluation performed by the Hans-Bredow-Institute on behalf of the federal government and the states the current system to protect minors is likely to be changed in some points. Possible changes could, for example, affect the labelling of computer games not suitable for certain age groups and the system of Internet filter programmes.⁷²

Another big issue will be the European Commission's renewal of several telecommunications directives which might affect German Broadcasting regulation, e.g. when it comes to spectrum allocation and „must carry rules“ for cable transmission.

The „must carry rules“ are subject to an infringement procedure initiated by the European Commission against Germany, arguing, that the German State lacks the obligation to fully transpose the requirements laid down in the Universal Services Directive 2002/22/EC.⁷³ Moreover, the German national rules are also currently challenged by a German cable network provider at a German court which submitted its legal concerns to the ECJ which now

⁷¹ See *Schulz*, The public service broadcasting mandate seen as the process of its justification, Berlin 2008.

⁷² Hans-Bredow-Institute, Study on the German system on the protection of youths in the media (Analyse des Jugendmedienschutzsystems), Hamburg 2007 (in German only), among others: pp. 58 et seqq; pp. 145 et seqq.; available at <<http://hans-bredow-institut.de/forschung/recht/071030Jugendschutz-Endbericht.pdf>>.

⁷³ Infringement procedure 2005/4815.

has to determine whether the provisions of a certain state media law comply with the requirements laid down in the Directive.⁷⁴

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