

Ensuring Plurality of Opinion in Times of Major Change

Summary of the Second Report on the Development of Media Concentration and Measures to Secure Plurality of Opinion in the Private Broadcasting Sector

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I ENSURING PLURALITY OF OPINION AGAINST MEDIA CONCENTRATION

1 Concentration in Privately-Owned Television and on Media-Relevant Related Markets

Pursuant to the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag, RStV*), the KEK's mission is to safeguard plurality of opinion in nationwide private television, and notably to prevent one or more broadcasters from dominating public opinion.

Plurality of opinion in nationwide broadcasting requires journalistic and economic competition. One of the inherent risks of economic competition is a tendency towards business concentrations. To some extent, the anti-concentration rules of broadcasting law and those of competition law complement each other. However, in pursuing different aims – plurality of opinion on the one hand, maintenance of economic competition on the other – they have different starting points. The control of concentrations under competition law is concerned with the establishment or strengthening of market dominance, which is measured by market shares within a relevant market. Free-TV programmes, be they advertising-funded or fee-funded, have the economic characteristics of public property and insofar are not marketable. Thus the categories of competition law do not fit the type of competition which takes place among private broadcasters and between private broadcasters and their public counterparts by means of programming offers.

Therefore, the anti-concentration rules of the Interstate Treaty on Broadcasting revert to audience shares, the relevant measure for journalistic competition, as the main indicator for a predominant power over public opinion. However, the rules also reflect that journalistic competition exists alongside economic competition: audience shares are not the only thing taken into account, but also the market dominance of undertakings on “media-relevant related markets“.

2 Media-Specific Anti-Concentration Law

2.1 Constitutional Law

The mandate to secure plurality of opinion originates in the constitutional freedom of broadcasting, Art. 5 sec. 1 sentence 2 of the German Constitution (*Grundgesetz*), as specified by the case law of the Constitutional Court. Constitutional law requires the competent federal legislators to establish and maintain a “broadcasting order“ promoting the freedom of opinion

formation. This order must ensure that the variety of existing opinion can be articulated as broadly and as thoroughly as possible. Tendencies towards media concentration have to be prevented timely and as effectively as possible, because it is difficult to revert adverse trends once they have taken hold. The Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag - RStV) provides a uniform standard of media concentration control for nationwide television offerings.

2.2 The Interstate Treaty on Broadcasting

The Sixth Amendment to the Interstate Treaty on Broadcasting (*Sechster Rundfunkänderungsstaatsvertrag*), which came into effect on July 1st 2002, kept the threshold at which predominant power over public opinion is assumed to exist at an average audience share of 30 per cent (sec. 26 (2) (1) RStV). In addition, a new threshold of a 25% audience share was introduced, sec. 26 (2) (2) RStV, after which a company's position in related markets must be taken into consideration. When calculating the latter viewing figure, a bonus rule applies granting discounts of two per cent for the provision of qualified regional window programmes and a further three per cent for the allocation of broadcasting time to the window programmes of independent third parties. Irrespective of both these provisions, predominant power over public opinion can also be deemed to exist under the general rule of section 26 (1) RStV.

Another revision concerned the duty to allocate broadcasting time to a window programme provided by an independent third party according to section 26 (5) RStV. A company is now bound by this obligation not only if one of the channels attributable to it reaches an average annual 10 per cent audience share, but also if all the channels attributable to it together make up an audience share of 20 per cent.

2.3 European Law

The European Union has no express authority to regulate the area of broadcasting and, in particular, plurality of opinion in this field. Indirectly, however, on the basis of other competences, it does bring an influence to bear. The European Commission's policies, not primarily aimed at ensuring diversity of opinion but at securing economic competition, have mixed implications for pluralism. However, the European Union must observe the limits of its competences, both regarding the freedom to provide services and competition law. These limits follow, inter alia, from binding general-interest objectives. Both the European Court of Justice and the European Court of Human Rights have recognised a pluralistic media sector as a

legitimate public interest, therefore measures by the Member States to secure pluralism are allowed as long as they are proportional.

II CONCENTRATION IN THE PRIVATE BROADCASTING SECTOR

1.1 Development of TV Programme Offerings

Since the 1980s, the range of television offerings in Germany has developed dynamically. The number of television channels has grown steadily. According to the KEK's most recent annual list, in September 2003 it was possible to receive 53 private channels with a nationwide licence (July 2000: 46). This growing differentiation of offerings is also mirrored in long-term developments in audience shares. Since 2001 and 2002, however, both this movement towards a greater diversity of channels and the positive general economic trend have come to a halt. It is too early to say whether this is the definitive end or even a reversal of the movement towards differentiation. The ongoing economic difficulties faced by broadcasters are due in particular to declining advertising revenues, which depend on the general economic situation. With advertising still the primary source of revenue for private broadcasters, declining advertising spending due to a weak national and international economy has an impact on the trends in TV programming offerings. It is expected that the sector will pick up again when there is a general recovery.

The most important changes in the German television sector have been triggered by the insolvencies within former Kirch Group. This group's economic difficulties, however, do not represent an isolated phenomenon. It has been reported throughout the world that high debts, falling advertising revenues and the failure of merger or diversification strategies have caused a sharp decline in the market capitalization of many listed media companies. This forces many of them into more or less drastic restructuring measures. One of the reasons for Kirch Group's financial collapse were the economic problems of the pay-TV operator Premiere. So far no sufficiently large part of the population has been willing to pay the additional costs of a pay-TV service, not least due to the broad range of free-to-air channels available in Germany. Pay-TV in Europe, with the exception of BSkyB in Great Britain, has proven to be a heavily loss-making and risky business.

Many observers expect that, along with the Internet, the comprehensive digitisation of transmission systems for TV programmes will trigger a new positive and dynamic development. At

present, however, neither the economic development of the Internet nor the upgrade of broadband cable structures is meeting expectations.

The business failures within former Kirch Group may have led to some deconsolidation: at the end of 2002, for instance, the pay-TV operator Premiere cut its ties with the broadcasting groups in the free-TV sector. The sports channel DSF is now operating independently of ProSiebenSAT.1 Media AG. However, the general trend towards large integrated international media conglomerates continues. Besides this, the pay-TV market in Germany is still dominated by the programming platform Premiere. Moreover, measured by viewing habits, narrow, oligopolistic market structures can still be observed. In the field of nationwide television the four broadcasting groups ARD, ZDF, RTL Group and ProSiebenSAT.1 Media AG almost completely cover the demand for TV programmes. Their offerings account for more than 90 % of audience shares.

1.2 Development of Groups of Broadcasters

At present the strongest group of broadcasters in nationwide private television in terms of audience shares is RTL Group, owned by Bertelsmann AG. The viewing figures of the channels attributable to this group – RTL, RTL II, VOX, Super RTL and, since November 2002, n-tv – have exceeded those of ProSiebenSAT.1 Media AG since September 2002, taking over the lead previously held by Kirch Group. However, even after Kirch Group's dissolution following the business failures of its affiliates, the former Kirch subsidiary ProSiebenSAT.1 Media AG with its channels SAT.1, ProSieben, Kabel 1, N24 and NEUN LIVE continues to attract large audiences. The television sector is currently undergoing major changes due to technological progress and the collapse of the advertising market. After Kirch Group's dissolution, ProSiebenSAT.1 Media AG was affected by long-standing uncertainties about its new ownership structure. Since Saban Capital Group has only recently acquired the majority of ProSiebenSAT.1's shares, predictions about the development of its viewer ratings, also in relation to its chief commercial rival RTL Group, are difficult.

In recent years the channels provided by the public broadcasters have steadily achieved audience shares of between 40 and 45 per cent, forming a strong journalistic counterbalance to the private nationwide broadcasters. They have considerable potential for contributing to diversity of opinion. Mainly fee-funded, they are less affected by the decline in advertising revenues.

The **Bertelsmann Group** is pursuing a strategy of integration of all its main media divisions (television, production, rights trading, radio, the daily press, magazines, music, books, Internet services). By increasing its stake in RTL Group, Bertelsmann AG could further strengthen its decisive influence on this TV and radio subsidiary. In the television sector, RTL Group's acquisition of a stake in the news channel n-tv has widened the spectrum of its programme portfolio. In radio broadcasting, RTL Group could further consolidate its strong position by the acquisition of several holdings in radio stations from AVE. In spite of leading positions in television, TV production and radio broadcasting as well as strong positions in TV advertising, licensing rights trading and Internet services, the KEK did not find that Bertelsmann held a dominant position in any of the media-relevant related markets. Nevertheless, the fact remains that this group is by far the financially strongest media company in Germany, present in all sectors and apparently the best able to exploit the business ties between these sectors. This results in a potential threat to media diversity but does not justify the assumption that the Bertelsmann Group has dominant power over public opinion.

ProSiebenSAT.1 Media AG, previously Kirch Group's core division of free-to-air television operations, has been particularly affected by this group's insolvencies and dissolution. Vertical links to the upstream markets of fiction and sports rights trading and TV production were cut by various disposals of the insolvent KirchMedia GmbH & Co. KGaA's holdings and, in the end, by KirchMedia leaving ProSiebenSAT.1 Media AG as a shareholder. At present the group appears much less diversified than RTL Group, clearly keeping its focus on the television business, with its other divisions closely connected to these TV activities. ProSiebenSAT.1 Media AG still leads the TV advertising market, though it has suffered greater losses than RTL Group since the beginning of the advertising slump.

Although it may be exaggerated to speak of a "third force" in German nationwide television, considering the much lower viewing figures of the attributable channels, the extension of **EM.TV & Merchandising AG's** and **Tele-München Group's** respective activities is nonetheless remarkable. Tele-München Group has launched a special interest channel under the name Tele 5, while EM.TV & Merchandising AG (which holds a 40 % stake in Tele-München Group) has acquired, jointly with KarstadtQuelle AG, a majority interest in the sports channel DSF. For reasons of corporate integration the following channels are attributed to both these companies: Tele 5, RTL II, DSF, and Junior.

In addition to these three groups of broadcasters, the following media companies hold relevant stakes in German-language broadcasters: **Vivendi Universal S.A.**, **Time Warner, Inc.**, **Viacom, Inc.** and **The Walt Disney Company. News Corporation Limited** and **Fininvest**

S.p.A. (or **Mediaset S.p.A.**) have retreated from the German television market, mainly due to the business failures of the Kirch companies in which they had participated, but are still regarded as potential competitors or partners. With regard to Vivendi Universal and Time Warner, their mega-mergers of recent years are being put to the test. This could also affect their German TV holdings. Via MTV Network, Viacom has a strong presence with the young and music-conscious German audience. It competes intensely with the VIVA music channels in which Time Warner has reinforced its influence. Films, TV channels and print products under the brand name of **Walt Disney** are also popular with German consumers. In television this is mirrored by the viewing figures of Super RTL in the children's age group as well as those of the special interest channels Disney Channel and Fox Kids on the Premiere platform.

2 Links between Television Broadcasters and Other Media-Relevant Markets

When assessing the existence of dominant power over public opinion, the so-called media-relevant related markets have to be considered. The official explanatory memorandum to the RStV enumerates by way of example the markets for advertising, radio, the press, licensing rights trading and production. However, this list is not exclusive. As the KEK already observed in its first report, there are strong links between nationwide commercial broadcasters and upstream and downstream markets. Increasing diagonal concentration can also be found. In some market sectors, however, opposite tendencies become apparent, primarily connected with the dissolution of Kirch Group.

2.1 Broadcasting Rights for Films

On the market for the acquisition of fiction programming for television, the insolvencies within former Kirch Group had effects of deconsolidation. Important production firms were sold and KirchMedia, the owner of the largest film library in Germany, gave up its majority holding in ProSiebenSAT.1 Media AG. KirchMedia also announced its withdrawal from the rights trading sector. KirchMedia and ProSiebenSAT.1 Media AG concluded an extensive deal concerning the programming rights of KirchMedia but ProSiebenSAT.1's new majority holder Saban gave up plans to acquire the whole library. According to press releases, some parties are still interested in buying the film stock, but with further developments still uncertain, it is difficult at present to assess KirchMedia's position in the area of rights trading.

But alongside this loosening of horizontal and vertical ties, contradictory trends can also be observed. Market surveys found that the ten largest production companies accounted for nearly 50 % of the whole volume of commissioned production. Moreover, to an increasing

extent, production companies are becoming vertically integrated into the broadcasters' value chain. Production firms that are affiliated with broadcasters have a competitive advantage over independent producers, in terms of both turnover and production volume. RTL Group has come out as market leader in the field of TV production, yet it is not market-dominant. In view of cost-cutting on the part of the broadcasters, a reduction in the number of small and medium-sized production companies has been predicted. However, due to the lack of up to date market studies, it is unclear whether this forecast has proved correct.

In the sector of bought-in fictional productions, a rather weaker demand for free-TV programming can be noted, as well as a tendency towards direct deals between broadcasters and studios. According to press reports, prices for bought-in productions have fallen, in particular for US-American feature films and series, whereas the demand for audience-attractive "blockbusters" remains unchanged. Bought-in productions still play a vital role in the operation of pay-TV, and this demand will probably be reinforced by digitisation and the consequent multiplication of channels. New market entrants usually need access to exclusive attractive content such as premium fiction films to be able to compete with the extensive offerings of established providers.

2.2 Rights to Children's Programming

The free-TV programmes most watched by children (based on a viewing period from 3am to 3am) are RTL Group's channels Super RTL, RTL and RTL II. Super RTL achieves the highest audience shares, partly by resorting to the extensive content resources of its shareholder Walt Disney Company. RTL Group's strong position in the children's programmes sector is important with a view to potential long-term audience loyalty to this group's channels. Its main competitors are the offerings of the public broadcasters.

Rights trading with children's programming mainly takes place on an international scale, with a couple of strong market participants. EM.TV & Merchandising AG is probably the most significant German player, although the data does not suggest that this company dominates the market in the sector of children's and youth programming.

2.3 Sports Rights

In the television sector, there has been a deconsolidation of sports channels with the separation of DSF and Premiere from former Kirch Group. It is remarkable that one of the new shareholders of DSF, KarstadtQuelle Group, should be entering the market of sports pro-

gramming without already having focussed its activities on the media markets, and that in acquiring this TV interest its main aim is to generate advantages for its traditional business (here: the sale of sports equipment).

With regard to vertical links, the previous report revealed tendencies towards concentration that favour media groups with large financial resources in the acquisition of the TV broadcasting rights for popular sports events (rising prices of sports rights, tendencies towards joint selling arrangements and the integration of sports rights agencies into upstream and downstream markets). In the meantime vertical integration between rights trading and broadcasting has weakened as a result of the dissolution of Kirch Group, and prices for attractive TV rights have declined sharply in spite of continuing competition for this rare commodity and some joint selling agreements on the part of monopolistic rights owners.

2.4 Rights to News Material

Television is one of the chief sources of information on current events in politics and public life, with a high potential for influence in this socially relevant field. On the market for the acquisition of informational and news material, one finds vertical integration, particularly between news agencies and broadcasters. One significant tie, though, was undone by the disposal of ProSiebenSAT.1 Media AG's holding in the news agency ddp.

Besides news agencies and bilateral exchange agreements between broadcasters, there are several more sources of information. With a view to the broadcasters' access to news material it is remarkable not only that the news channel N24 is integrated into ProSiebenSAT.1 Media AG, but also that RTL Group now has its own news channel at its disposal through its stake in n-tv. The centralized supply of news material to the channels of one group of broadcasters and the common use of information sources such as correspondents raises the potential danger that content be homogenised. At present, though, plurality of opinion does not seem to be endangered, thanks to the numerous alternative sources of information on offer.

2.5 TV Magazines

Business ties between broadcasters and the publishers of TV magazines are pertinent from the perspective of safeguarding plurality of opinion as they give a broadcaster the opportunity to enhance his chances of audience access by presenting his own channel more favourably. With 17 titles registered with the German Audit Bureau of Circulations (IVW) a broad variety of TV magazines are available. Heinrich Bauer Verlag dominates this market sector, with

Springer, Burda and WAZ also achieving high market shares. In the area of supplements, both Bertelsmann and WAZ have strong positions. Apart from the competing TV magazines and supplements, viewers can also use other sources of information, particularly electronic programming guides which will gain importance in the course of the digitisation of transmission systems.

2.6 TV Advertising

The sale of TV advertising time is still the primary source of income for commercial free TV broadcasters, in spite of upcoming alternative or complementary revenue strategies such as merchandising or value-added telephone services. The private broadcasters have therefore been strongly affected by the declining advertising revenues since 2001, with this negative trend continuing in 2002. This becomes particularly apparent when comparing the adjusted net turnover which in 2002 shrank 11.5 % against the previous year. The implications of the reduced volume of advertising for operators and for the diversity of offerings are all the more serious when one considers that the major channels of RTL Group, ProSiebenSAT.1 Media AG, ARD and ZDF together account for more than 90 % of the whole advertising turnover. The three biggest free-TV channels RTL, ProSieben and SAT.1 continue to represent an oligopoly on the advertising market. Both of the two large advertising marketing companies IP Deutschland and SevenOne Media now exclusively market affiliated channels.

2.7 Technical and Administrative Services for Digital TV and Pay-TV

Digital television technology has created new markets for services. Unlike analogue transmission, it requires multiplexing and conversion from analogue to digital. Moreover, digital pay-TV needs encryption, a conditional access system and subscriber management. Pay-TV channels are usually offered by platform operators in the form of packages. Other services provided by digital platforms include (basic) navigators and electronic programme guides (EPGs).

The digitisation of content and multiplexing are carried out in a playout centre. With regard to multiplexing, no concrete access problems, which could result from capacity constraints, have arisen so far. Such potential dangers have not yet been of practical relevance, partly because these areas are already heavily regulated.

Digital platform operators bundle both their own and third party channels into packages and distribute them to the consumers. The platform operator provides subscriber management

and customer services not only with regard to the subscribers to its own channels, but also to those of third parties. Packaging resembles the act of broadcasting insofar as in both cases content is arranged to form one complete offering on the basis of editorial choices and preferences.

Presently about four fifths of digital recipients in Germany are customers of the pay-TV platform Premiere. The cartel authorities' investigations into the German pay-TV market have so far focussed on this programming platform's monopoly-like position. When assessing ownership changes at Premiere, the KEK emphasized the key role of pay-TV channels for the development of digital television in Germany. Nonetheless, at the moment pay-TV channels have no decisive influence on public opinion-formation.

Digital subscription TV involves the technical components of a specific access control system and smart-card decryption technology as well as the administrative component of subscriber management, including a clearing system. The conditional access system is, along with multiplexing and the compatible decoder infrastructure, the core element of system technology for access to the pay-TV market.

The essential part of the technical platform for digitally transmitted pay-TV is the decoder infrastructure. Kirch Group, through its dominant programming platform Premiere, succeeded in defining the patented standards for the digital reception of programmes (D-Box), and, with regard to access control, for encryption (Betacrypt-Conditional-Access-System) and connection. The former business strategy of Kirch Group still marks the market situation in Germany today. However, with changes afoot in Premiere's business strategy and on the market of digital reception equipment, this narrow market structure is likely to widen in the future.

With a greater choice of channels available, programming guides are becoming very important for access to digital TV. German broadcasting law provides a specific access regulation for (basic) navigators (see sec. 53 section 2 RStV). In contrast to the basic navigator, the EPG does not simply draw up listings of what is on offer but provides comprehensive information on programming that is journalistically arranged and offered as a specific media service. The development of the range of EPGs on offer shows signs of a remarkable market dynamic. The regulator should consider whether access rules comparable to those for the above-mentioned basic navigators should also be provided for the EPGs of third parties that contain more than one channel or package.

Third party EPGs need an interface - the so-called Application Programming Interface (API) – within the set-top-box system software. In a non-binding declaration (the “Mainzer Erklärung”) ARD, ZDF, Kirch Group, RTL and the state media authorities agreed to introduce the Multimedia Home Platform (MHP) standard, in order to make a common and open API possible, moving away from the previously prevalent (API-) Middleware d-box standard. However, according to current news reports, Premiere has not committed to when it will actually switch its D-Box 2 to MHP.

2.8 Means of Transmission

The use of digital technology involves significant changes for the transmission of TV programmes via cable and satellite, as well as terrestrially.

Of the available analogue transmission systems in Germany, the broadband cable network is the most important. Deutsche Telekom AG’s broadband cable network was upgraded only to a minor extent. Meanwhile it has been sold to foreign investors, but hopes of a rapid digital upgrade have been disappointed.

In recent years traditional transmission via analogue terrestrial channels has played an ever diminishing role. However, the digitisation of this medium is expected to create a turnaround. In 2003, terrestrial TV and radio broadcasting was switched over to digital transmission in the urban area of Berlin and Potsdam. It is also planned to introduce digital transmission in other states.

Direct satellite reception has, even for analogue transmission, gained significantly and steadily in importance. In the field of digital broadcasting, satellite is the most widespread means of transmission in Europe and will further strengthen its dominant position.

The Internet as the fourth possible mode of transmission for television still does not represent, on the whole, a true alternative to the traditional means of transmission mentioned above.

2.9 Local Television in Urban Areas

With regard to local television in urban areas („Ballungsraumfernsehen“), large-scale changes came with the dissolution of former Kirch Group. Before insolvency proceedings were opened at several Kirch-affiliated companies in April 2002, Kirch Group had exerted a

decisive influence on a nearly nationwide, network-like group of local broadcasters through its shareholdings, marketing and programming supply. These TV channels were used to expand the value chain by enabling the supplementary exploitation of content. Now, following the sale of Kirch Group's holdings in the stations tv.berlin and Hamburg 1, only Thomas Kirch's stake in the broadcaster tv.münchen remains.

Although some companies hold simultaneous interests in several operators of local television in urban areas (among them DFA Deutsche Fernseh Nachrichten Agentur and the Oschmann Group), this does not amount to dominance over a network of operators in terms of participation or editorial influence. The joint marketing of local channels demands a certain harmonisation of programming schemes. Yet the stations are no longer supplied with a uniform so-called framework programme ("*Rahmenprogramm*") nor with joint marketing, as provided by Kirch Group in the past. Thus the operation of local TV in urban areas, with its focus on local and regional events, currently contributes to plurality of opinion.

2.10 Teleshopping

One cannot deny outright the potential influence of teleshopping programmes on opinion formation. Both major groups of broadcasters in nationwide television, RTL Group and ProSiebenSAT.1 Media AG, are active in this field. The allocation of teleshopping windows in a group's TV programming can increase the range and revenue of affiliated teleshopping channels. However, the turnovers of both such integrated channels, RTL Shop and Sonnenklar TV, lie significantly below those of the established operators QVC and HSE.

2.11 The Press

The publishing groups with the highest circulation in the field of magazines and/or daily newspapers (Springer, Bauer, Burda, WAZ) all hold stakes in nationwide private broadcasters. However, some business ties have been loosened: no broadcaster any longer holds shares in Springer, for instance, and the Holtzbrinck Group has divested itself of its holding in the news channel n-tv. RTL Group has the strongest diagonal links with the market of magazines and newspapers, with its parent company Bertelsmann a shareholder of Gruner + Jahr. However, the group is considering giving up several newspaper interests. One must keep a critical eye on diagonal ties between television and the press because such links offer opportunities to increase influence on public opinion-formation through multimedia power over opinion and through cross-promotion.

2.12 Radio Broadcasters

In terms of audience figures on a national level, concentration in radio broadcasting is relatively small in comparison to the television market. The reason lies mainly in the regional structure of radio offerings and providers. Despite the extension of transmission areas brought about by improvements in cable and satellite technology, radio stations achieve only negligible market shares outside their core transmission areas. Nationwide offerings are of minor importance.

Due to broadcasters holding interests in other operators, partly outside their core transmission areas, horizontal concentration in the private radio sector has risen significantly. Market surveys support the prediction that the trend towards consolidation will not only continue but speed up. Some of the most eminent market players intend to expand further, among them RTL Group, the Burda Group, the Oschmann Group and Axel Springer AG, which recently made radio the focus of its broadcasting strategies. Moreover, in reaction to the economic and structural crisis on the newspaper market, the publishing firms, which are on the whole probably the biggest group of owners in the radio sector, are withdrawing from this market in a move to concentrate their efforts and resources on the core business of newspaper publishing and printing. Thus the Holtzbrinck Group justified the sale of its radio interests to RTL Group, citing a new strategy focussing on the print media. Nevertheless, none of the companies under investigation has apparently reached a position on a national level that would be comparable with that of the leading companies on the television or the news magazine markets.

The various forms of co-operation in radio broadcasting could raise concerns about plurality, with respect not so much to ownership but to content concentration. In this context the influence of suppliers of "frame programming" („*Rahmenprogramm*") is significant. In order to standardize the tone of the programming they provide, suppliers may take essential programming decisions which can go as far as the choice of music style, for instance. In addition, marketing companies could also prove to be influential. They make up so-called "Kombis" (combinations of selected stations to be marketed together) that are lucrative for the individual broadcaster thanks to the volume of advertising involved, but which lead to the stations themselves becoming increasingly standardized because radio stations are particularly suited to joint marketing if they reach an audience which from a socio-demographic perspective is as homogenous as possible. This facilitates cost reduction, in particular for the more expensive parts of the programme such as journalistic features and news coverage. The road to standardization is simplified by the removal of legal obligations aimed at securing

diversity which regulate in-house production – as recently occurred in the revision of the Hamburg State Media Law. This enables in particular the owners of several radio stations to develop synergies between them. Such deregulation can increase existing trends towards concentration.

2.13 Online Media

Through the Internet, new structures of journalistic competition are emerging where publishing houses compete with television companies, thereby undermining traditional market structures as regards journalistically arranged online content. But not only television stations, newspapers and publishing houses compete for users with their news and information services or entertainment offerings. Other competitors include radio stations, Internet service providers, web portals and search engines, as well as specialized suppliers of online information and news.

III INTERNATIONAL REGULATORY TRENDS CONCERNING MEDIA CONCENTRATION

Media laws are currently under review in several countries. Obvious tendencies towards deregulation in the proposed laws often face broad political and public opposition.

1 USA

The FCC decided on 2nd June 2003 to relax several of its rules restricting the ownership of radio and TV stations and newspapers. In nationwide TV, the concept aims at limiting horizontal concentration through the formation of ownership groups and at curbing the influence of the Broadcast Networks. According to current law, the common ownership of TV stations which together reach more than 35 % of all US television households is not allowed. Under the proposed rule this cap on audience reach is increased to 45 per cent. The new local TV ownership rule allows the common ownership of up to three TV stations on markets with 18 or more TV stations, and of up to two TV stations on markets with 5 to 17 stations. The rules restricting vertical concentration were completely abandoned in 1995. Since then vertical concentration is considered only indirectly by way of attribution rules. With regard to cross-ownership between broadcasters and newspaper publishers, a multi-layered approach is proposed, regulating the common ownership of TV and radio stations and press companies. The FCC continues to regard the rules restricting the ownership of local radio stations by a

single person within a single market as necessary in the public interest. However, it did revise its methods of market determination. The FCC retained the provision, dating as far back as 1946, that prohibits mergers between any of the top-four television networks. According to the agency, this ban on shareholding in more than one TV network is still necessary in order to promote competition on the national TV advertising market and the market for the acquisition of programming rights, and to safeguard plurality on the local markets. The new ownership rules were published by the FCC on 2nd July 2003 but have not yet taken effect due to political initiatives within the Senate and Congress and because of a court decision.

2 Great Britain

The new Communications Bill applies both to telecommunications networks and services (individual communication) and to the networks and services of the electronic media (mass communication), thus regulating both fields by one single set of rules. Nonetheless the bill does not intend to break completely with the traditional laws regulating telecommunications and the media. For the television and radio sector, the Broadcasting Acts 1990 and 1996 continue to apply, subject to their adjustment to the new provisions of the Communications Bill. The law provides for the establishment of the Office of Communications (OFCOM), which will take over the tasks and competences of five separate regulatory authorities in the fields of telecommunications and media which are to be dissolved. The need to acquire a licence to operate telecommunications and broadcasting services will be abolished in wide parts of these sectors and replaced by a mere notification duty, while the licence requirement is retained for the transmission of TV programmes via satellite and cable. In the field of media concentration law, the legislator has provided for drastic changes. However, they do not go as far as to leave the securing of competition on media markets completely to general competition law, which is deemed to be adequate to deal with aspects of consolidation, efficiency and consumer sovereignty, but not to tackle issues of diversity of opinion, the general public's participation in the media and the freedom of the publisher. The revised Communications Bill only retains a bare minimum of the current rules. After much at times fierce and controversial debate, the Government and the majority leaders in the Upper House have reached agreement on the proposed reforms, which include stricter cross-media-ownership control through a "Public Interest Plurality Test". The bill was passed on 17th July 2003.

3 Italy

The Legge Gasparri was supposed to enter into force in the autumn of 2003. The draft of this new communications bill focuses on structural changes in public television, softer restrictions

on advertising for commercial broadcasters and changes to the anti-concentration rules in private television. In future, the whole media market will be taken into consideration when establishing the relevant market shares in the course of the anti-concentration assessment, whereas the previous rule applied a 30 per cent limit for the television sector alone. The proposed market definition is based on the concept of an integrated communications system ("Sistema integrato della comunicazione", "SIC" for short), i.e. on the assumption that digital content is transmitted via different transmission systems (television, radio, print media, audio recordings, film and advertisements), and therefore all these forms of transmission are to be taken into account. The new bill provides revised anti-concentration rules which, among other things, allow for the continued terrestrial transmission of Rete 4. The current cross-media-ownership provision prohibiting media companies that own more than one TV station from possessing newspapers shall be applicable only until the end of 2008. From the year 2009 on TV operators shall be allowed to acquire newspaper publishing firms.

4 Switzerland

The key aim of the proposed communications bill which was passed by the Swiss *Bundesrat* on 18 December 2002 is to secure a strong "service public" while at the same time loosening restrictions on private broadcasters. The subsidization of private local or regional broadcasters through the TV licence fee (known as Splitting) shall not be reduced but expanded, in order to promote the "service public" on the local markets too. Other reforms concern the administrative structure. A newly established commission (Commission on Telecommunications and Electronic Media, *Kommission für Fernmeldewesen und elektronische Medien*) shall be responsible for broadcaster licensing and for undertaking measures against media concentration. The proposed legislation provides extensive instruments for combating media concentration. Former regulatory insufficiencies shall be countered by a new rule allowing for concrete measures in the event that plurality of opinion and diversity of ownership are endangered. This rule takes into account all media-relevant markets with an influence on opinion-formation, including upstream and downstream markets such as rights trading and distribution. The Competition Commission will be consulted in the assessment of market dominant positions by way of an institutionalised consultation process. However, it remains with the new Commission on Telecommunications and Electronic Media to decide whether a market dominant position threatens plurality of opinion. If so, possible remedies are the allocation of transmission time to independent third parties, obligations to co-operate with other market participants, to lay down an editorial charter, to adjust business and organisational structures or to divest of business divisions. Other changes affect the licensing procedure: among oth-

erwise equal applicants, those who are the least dependent on other broadcasters or media companies must be favoured.

IV SUPERVISORY PRACTICE UNDER SEC. 26 TO 32 OF THE INTERSTATE TREATY ON BROADCASTING

1 Procedural Issues

The KEK has no immediate powers of investigation against third parties and is only entitled to procedural rights (Sec. 21, 22 RStV) through the respective competent state media authority.

Conflicts have arisen when state media authorities did not consistently fulfil their obligation to submit to the KEK all concentration issues related to nationwide private television (sec. 36 (1), 37 (1) and (3) RStV). The KEK was not able to assess some applications for licence extensions or for the replacement of a licensee by another affiliate of a group because the competent state media authority did not regard the KEK as competent to deal with such cases and did not submit the relevant documents.

The fact that the KEK lacks its own information rights and investigative powers also leads to there being gaps in its information: in spite of the broadcasters' duty to report ownership changes in advance, in several cases the KEK only became aware of transactions after they had taken place, for example from gathering information published after the event. And even after it has made a decision on a particular transaction the KEK is sometimes insufficiently informed about further developments which are of relevance from the perspective of anti-concentration control.

- In order to secure effective and uniform nationwide anti-concentration control, it is essential to strengthen the KEK's independence. Therefore we once again propose that the KEK itself should decide on the scope of necessary investigations, for example by stipulating in sec. 36 (1) sentence 3 RStV: "The KEK and the KDLM shall establish on their own authority the facts which are relevant for their decisions, in particular they shall be entitled to enforce the procedures laid down in sections 21 and 22."

The KEK also has only limited investigative powers to carry out its autonomous functions, i.e. drawing up the concentration report and the programming lists and establishing audience

shares. Audience shares are still determined by analysing generally accessible specialist publications, although the 1997 law regards this only as a transitional solution (see sec. 34 clause 1 RStV). As regards the annual lists of programme suppliers drawn up by the broadcasters, the level of information is likely to improve in the future. In view in particular of the difficulties involved in assessing the shareholdings and comparable influences of foreign companies, we repeat the suggestion made in our first report, proposing:

- to amend the European Convention on Transfrontier Television and to conclude administrative agreements facilitating cooperation and the mutual exchange of information with foreign regulatory bodies.

Similarly, it would be helpful in the assessment of media-relevant related markets and for reporting on media concentration if information could be exchanged with the German Federal Cartel Office. A first move in this direction is the proposed amendment of Sec. 39 RStV by the 7th Amendment to the RStV, according to which the state media authorities, in the course of fulfilling their responsibilities, cooperate with the Federal Cartel Office and the Regulatory Authority for Telecommunications and Post (*Regulierungsbehörde für Telekommunikation und Post*) and deliver information to them on their request.

2 Supervisory Practice and the Necessity of Legislative Reforms

2.1 Section 26 of the RStV: Ensuring Plurality of Opinion in Television

During the period under review, the 6th Amendment to the Interstate Treaty on Broadcasting introduced a “bonus rule” into the second provision governing when dominance over public opinion can be presumed to exist. As a result, when determining the audience share of RTL Group, the KEK had to examine whether a bonus was to be granted for the regional windows within the full channel RTL. The bonus requires the window programmes to be integrated into the group’s general-interest channel with the highest number of viewers “to an adequate extent and at least to the previous extent”. An “adequate extent” demands – as is explicitly stated in the conditions under which regional windows fully count towards the amount of broadcasting time of independent third party programme windows (see sec. 31 (2) sentence 3 RStV) – that the regional windows have a weekly transmission time of at least 150 minutes, are journalistically independent and reach altogether at least 50 per cent of national television households (see sec. 31 (2) sentences 2 and 3 RStV).

However, according to the draft of the 7th Amendment to the Interstate Treaty as adopted by the minister-presidents of the German states (the consent of the state parliaments still outstanding), the bonification of regional window programmes by way of concessions regarding audience shares will solely depend in future on the condition that the two big nationwide free television channels incorporate window programming of at least the same duration and regional scope as was in their programming schedule as of 1 July 2002.

- The KEK however holds it to be indispensable that granting bonus points for regional window programmes according to sec. 26 (2) sentence 3 RStV continues to be contingent upon the criteria currently in place, i.e. their actual minimum range, their journalistic independence and their weekly minimum duration. The proposed bonus rule is not compatible with the existing system of media concentration law. It raises constitutional concerns and should not become effective law. In addition, unlike under the proposed amendment, the KEK should continue to be competent in the enforcement of this rule.

The possible influence of companies in related media-relevant markets has been of particular concern with a view to RTL Group and Bertelsmann AG. However, in spite of their leading positions in television, TV production and radio broadcasting as well as strong positions on the TV advertising market, in the rights trading sector and in the Internet sector, the KEK could not find any evidence of market dominance.

The KEK commissioned a study to be carried out by a communications scientist at the Hans-Bredow-Institut, Hamburg, on the issue of which criteria should be applied for the overall assessment under sec. 26 (2) sentence 2, 2nd Alternative RStV of a company's activities in television and on media-relevant related markets. The paper was presented in summer 2003 and is available on the KEK's website (see: www.kek-online.de under: Information/Publikationen). It outlines a model for taking account of media-relevant markets in a consistent and practical way in the context of the existing evaluation system based on audience shares (*Zuschaueranteilsmodell*). So far, the KEK has had no occasion to look into the ideas presented in the study within the context of a concrete case.

Broadcasting Time for Independent Third Parties (Sections 26 (5) and 31 of the RStV)

In the period under review, the KEK was involved in licence proceedings concerning the reallocation of broadcasting time to independent third parties in the full channels RTL and SAT.1. The KEK did not question the competent media authority's leeway as to the choice of licensee. However, its participation in such proceedings in accordance with the provisions of

the Interstate Treaty requires a comprehensive legal review of the Interstate Treaty's standards for the choice and licensing of independent third parties.

The total viewing time which must be allocated to independent third parties can be reduced by the time devoted to regional window programmes as long as the regional windows reach at least 50 per cent of all national television households, among other conditions. The legal term "range" (section 31 (2) sentence 3 RStV) denotes the number of television households in which the regional window can be received. This means that at least one TV set in the household is actually equipped to receive channels containing regional windows in the transmission area. In the absence of sufficient available data, the KEK was compelled in both procedures concerning the allocation of third party broadcasting time to investigate the issue of the minimum range of the regional windows itself. The investigations revealed that the regional windows in the main channels RTL and SAT.1 reach more than 50 % of national television households.

In the proceedings in which the third party is consensually elected by the state media authority and the broadcaster of the main programme, the choice of licensee may be lawful even if it is not the optimal applicant from the standpoint of diversity of opinion. As regards plurality, the window programme's contribution to plurality within the main channel takes precedence over the aspect of diversity with regard to the independent third parties themselves. In both proceedings handled by the KEK this latter aspect was a point against the elected applicants, both of which had already held the third party licence previously. One of the elected applicants, DCTP, also holds third party licences for both the main channels RTL and SAT.1. Nevertheless, this did not constitute a legal ground for objection to their being re-elected by the state media authorities of Rheinland-Pfalz (LPR Rheinland-Pfalz) and Niedersachsen (NLM), which had taken all the relevant aspects into account.

The regular licence period for third party programmes is three years and this can only be extended for an important reason (section 31 (6) sentence 4 RStV). The window programmes' contribution to variety of opinion is actually reduced by the fact that they are almost entirely scheduled for late night or early morning. The KEK recommended that such programmes be scheduled significantly earlier in future tenders.

2.2 Section 27 of the RStV: Ascertaining Viewer Ratings

Still applying the transitional provision of section 34 sentence 1 RStV rather than commissioning a company to ascertain audience shares as provided in section 27 RStV, the KEK's

findings are usually based on the publicly accessible data published by AGF/GfK television research. Although this data has improved through its inclusion of EU foreigners, by taking into account the use of digital channels, and due to the broadening of AGF's publication practices, information gaps and uncertainties remain with regard to these figures.

These pertain, for example, to the audience shares of the pay-TV platform Premiere. AGF/GfK does not publish these figures. According to Premiere, the viewing figures it collects itself are comparable with the AGF/GfK figures. Furthermore, the KEK does not have any data on the monthly viewer ratings for the third party windows on RTL and SAT.1, nor for the separately licensed DCTP programme within VOX.

- The continuing insecurity in determining viewing figures demonstrates that the procedure for ascertaining viewer rates as provided in the statute (section 27 RStV) must be implemented without delay.

2.3 Section 28 of the RStV: Attribution of Channels

When applying the attribution rule of sec. 28 (1) sentence 1 RStV, mere holding companies that essentially do not fulfil independent business purposes are not taken into account. Otherwise the 25% limit on direct holdings could be circumvented by interposing an intermediate holding. This is why for the attribution rule to be applied in accordance with the constitution and with the purpose of the RStV, holdings can only be regarded as indirect (Sec. 28 (1) sentence 2 RStV) if the intermediate company has its own entrepreneurial purpose and is not merely used as a holding. This can be gleaned for instance from the articles of association, the ownership structure and the actual functions of the group's intermediate companies.

As long as managerial rights remain with the debtor (under the procedure of self-administration ("*Eigenverwaltung*")), the status of insolvency does not refute the legal presumption that control is triggered by majority ownership (sec. 17 (2) of the Joint Stock Corporation Act, Aktiengesetz - AktG) and, therefore, does not interrupt the attribution chain under sec. 28 (1) sentence 2 RStV, 15 et. seq. AktG. If the court has ordered self-administration in insolvency, the debtor, despite being insolvent, continues to dispose of voting rights in its subsidiaries. When regular insolvency proceedings are opened, however, the attribution chain is interrupted.

In several cases the issue arose of joint control by two minority shareholders or by one minority shareholder together with a majority owner (see sec. 28 (1) sentence 2 RStV, 17 AktG

and sec. 28 Abs. 1 sentence 4 RStV). In the case of a partnership, further conditions must be fulfilled for joint control to be deemed to be in place – circumstances which go beyond the partners' typical common interests and managerial power and due to which a consistent common influence based on long-lasting concurrent interests can be expected.

Within a group, not only are a broadcaster's channels attributed to the shareholders in that broadcaster, but also the other way round, so that all the channels attributable to shareholders in a broadcaster are also attributed to that broadcaster (arg. e sec. 28 (1) sentence 3 and sec. 29 sentence 1 RStV). In contrast, the mutual attribution of TV interests between two different groups requires links between the groups which go beyond their mere co-operation as the joint shareholders of a broadcaster. This has not been established to be the situation in any case so far.

BSkyB's acquisition of shares in Kirch PayTV GmbH & Co. KGaA led to the attribution of the channel Premiere to BSKyB according to sec. 28 (2) sentence 2 no. 2 RStV, on the grounds of contractually agreed powers of influence, even though BSKyB did not acquire shares in nor exchange contracts with Premiere itself but rather on the level of its parent company. Similarly, attribution between the VIVA and VIVA Plus broadcasters and Time Warner Group has been established. The attribution of some third party channels on the Premiere pay-TV platform to Premiere was accepted in cases where this platform operator had secured powers of influence on the third party's programming decisions, in other cases attribution was denied.

2.4 Section 29 of the RStV: Changes in the Ownership Structure

Any proposed change in the ownership structure of a broadcaster or a company to which a channel is attributed and any change in other relevant influences on them must be notified. Only concrete changes are notifiable, which means that the transaction must be definite and its main features must already have been settled. It is not possible to apply in advance for clearance of possible acquisitions up to a certain stake. The notification duty applies not only to changes in ownership by transfer of interests, but also to contracts regarding the exercise of voting rights, such as voting trust agreements and fiduciary (trust) agreements.

In the period under review, many companies carried out internal restructurings. In most cases, companies constituting mere intermediary holdings were added or replaced. Even internal restructurings must be notified because they change the formal ownership structure of a broadcaster. If the KEK finds that such restructurings have no material effects whatso-

ever on ownership structure, particularly on the shareholdings of the parent companies, and also leave the powers of influence unchanged, then they are irrelevant from the perspective of anti-concentration law and do not have to be cleared. However, this does not follow from the mere fact of the companies involved being fully-owned subsidiaries of a group, but depends on all the circumstances of the actual case, particularly on the function of the respective companies.

Ownership changes in quoted joint stock companies, including those made through stock exchange trading, must be notified if they cause the transfer of more than 5 % of the capital or voting rights, or if they lead to holdings reaching, exceeding or falling below the 25 %, 50 %, or 75 % thresholds. This notification duty is reasonable because due to the transparency rules of the Securities Trade Act, the company in question soon comes to know of all the changes that must be notified. In addition, companies that hold a broadcasting licence or to which broadcasters are attributable must ensure that the notification duties of section 29 RStV can be complied with, e.g. through disclosure rules in their partnership agreements.

Broadcasters, in particular smaller ones, frequently executed ownership changes before the KEK had declared them to be acceptable or the competent state media authority had cleared them. The KEK suggested in its last report that sec. 29 RStV should be supplemented with an explicit prohibition on effecting changes prior to their approval, with breaches of such provision resulting in transactions being provisionally invalid. In this context the KEK proposed to introduce a three-month decision period from receipt of the necessary information, on the model of section 41 (1) sentence 3 of the Act against Restraints of Competition (GWB) and Art. 7 (1) of the European Merger Regulation. So far the legislator has not taken up this proposal, referring in particular to the unsolved issue of the states' legislative competence for such a measure (Art. 74 No. 1 of the Constitution). Thus, the available procedural tools remain sadly inefficient.

V CONCLUSIONS

The Interstate Treaty's anti-concentration rules are exclusively designed to counter the dangers of dominant opinion in nationwide television. They do not provide for explicit limitations of diagonal concentration. Links and interaction between different media markets are only taken into account in the assessment of dominance over public opinion. It is thus all the more disturbing to find the standards for this specific, broadcasting-oriented anti-concentration law lacking in constancy and consistency.

By introducing a maximum audience share limit of below 30 per cent in the 3rd Amendment to the Interstate Treaty, the legislator made it clear that the existing market structure of two large groups of private broadcasters alongside the public broadcasters was tolerable in terms of anti-concentration law. In the 6th Amendment to the Interstate Treaty, a lower threshold of 25 per cent was set up, but at the same time the rule granting bonus points for the allocation of regional and third party window programmes was introduced, ensuring that this lower limit would not become a real test case. The collapse of Kirch Group has caused the erosion of one major “broadcasting family”. While the channels controlled by ProSiebenSAT.1 Media AG have, so far, maintained their ratings, the group is undergoing a restructuring process under the new leadership of Saban Group. In this situation, media concentration control is called upon to enforce the current model of safeguarding plurality of opinion.

The current model of ownership limitations based on audience shares (“*Zuschaueranteilsmodell*”) has, in principle, stood the test of time. Nonetheless, the increasing number of corrections and amendments give rise to concerns that this model could be compromised in order to protect particular interests, and its principal aim of pluralism disregarded as irrelevant. The official reasoning behind the new bonus rule did not justify why regional window programmes with a limited broadcasting time and the contributions of independent third parties which are, in practice, mostly shown late at night or early in the morning should have a compensatory effect of up to five percentage points on nationwide viewer ratings. The KEK called for a factual justification of these compensatory effects, applying minimum standards which relate to the range of regional window programmes. Consequently, the issue arose of whether the existing regional window programmes actually fulfil these criteria. This prompted the further legislative initiative to incorporate into the law by means of the 7th Amendment to the Interstate Treaty on Broadcasting that the scope of window programming activities as of 1st July 2002 – which varied widely in the various regions – shall suffice to provide a permanent audience share bonus, regardless of future developments and reviews. With a view to ensuring plurality of opinion, this is unsatisfactory and raises constitutional concerns.

In spite of these imperfections in the television specific anti-concentration rules, the recurring proposal to rely exclusively on competition law must be dismissed. Precautions against the abuse of economic power alone cannot ensure the constitutional requirement that pluralism be secured. Besides, as regards the free-TV offering which has no payable market price, the yardstick of the competition rules does not fit. Precautions against economic abuses can have complementary effects on dominance of opinion, but one must keep in mind that while economic and journalistic competition may overlap, they are not the same thing. Mixing objectives is ineffective both in competition law and media law.

It may still be practicable, in cases where an audience share of less than 30 % is achieved, to combine the media law notion of a 25 per cent audience share with the competition law notion of a dominant position on a media-relevant related market in order to arrive at a threshold at which dominant power over public opinion can be assumed to exist (see sec. 26 (2) sentence 2, 1st Alt. RStV). However, the overall evaluation of activities in television and on media-relevant related markets needed to ascertain an influence comparable to that of a 30 per cent audience share in television (sec. 26 (2) sentence 2, 2nd Alt.) is extremely problematic. A position on a “media-relevant related market” can only be assessed referring both to aspects of media law (“media-relevant“), and competition law (“market“). Further complications arise because of the equation of a 5 percent TV audience share with a dominant position on any media-relevant related market, or with the equally weighted active influence on opinion-formation ascertained by an overall evaluation. To add to this confusion of criteria, the audience share may be reduced by two percentage points for regional window programmes and by another 3 points for independent third party programmes, which insofar are supposed to neutralise the market dominance or significant influence on opinion which has been found to exist. This combination of concepts from media and competition law is not equal to the complex task of securing pluralism. It should at least give rise to a move towards more straightforward and transparent rules on media concentration.

Times of radical change call for vital legislative reforms on issues such as employment, economic growth, health care or pension schemes. In the long run, however, it is equally important that the basic principles of our social order are kept in mind and not dismissed as irrelevant. Carelessness in dealing with plurality of opinion, a fundamental democratic value, would have negative long-term consequences.

This report, therefore, is not only intended to give an account of developments in concentration, but also to warn against such tendencies. Our observations demonstrate that only economically strong broadcasting groups will provide competitive programming, and that changes of control and ownership rights in established broadcasters can cause lasting changes in the whole programming spectrum. The findings also confirm once again that integration between the different media markets, with the various interests of the market players involved, results in a threat to diversity of opinion. Only a comprehensive evaluation of all these factors can ensure effective anti-concentration control in nationwide private television that meets constitutional requirements.