

Cross-Media Relations: A Challenge for Media Concentration Control

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

**The German Commission on Concentration in the Media
(Kommission zur Ermittlung der Konzentration
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Overview of Results

Chapter I

Media Concentration and Ensuring Plurality of Opinion

1 Concentration in the Private Broadcasting Sector and on Media-Relevant Related Markets

Plurality of opinion requires journalistic competition, i.e. opinions competing at the intellectual and journalistic level. Even if more than one company is licensed to broadcast private television, this does not eliminate the danger of dominating public opinion. Some of the risks relevant under plurality aspects are, above all, a tendency towards business concentrations and to producing predominantly homogenous content with mass-appeal which is particularly prevalent in media markets.

2 Media-Specific Anti-Concentration Law in the Broadcasting Sector

2.1 Constitutional Law

The freedom of broadcasting which defines the scope of media concentration law is determined – as is seldom the case with fundamental rights – by the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*). The Court has emphasized that statutory regulations are necessary to ensure that the entire spectrum of opinions will be represented in broadcasting as fully as possible.

The Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag - RStV*) provides a uniform standard for nationwide television programs. The regulations are designed in such a way as to effectively prevent the risk of creating predominant power over public opinion. This constitutional parameter has to be taken into consideration when discussing changes to the Interstate Treaty on Broadcasting as well as when interpreting Section 26 (1) RStV. This especially excludes an interpretation of Section 26 (1) RStV that merely relies on the respective thresholds of 30% or 25% of audience shares, at which prevailing dominance over public opinion would be presumed. The German Commission on Concentration in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich – KEK*) shall not clear changes in ownership structure or grant a new license despite a prevailing dominance over public opinion for the sole reason that the thresholds in Section 26 (2) RStV have not been met.

2.2

Ensuring Plurality of Opinion in Nationwide Television pursuant to the Interstate Treaty on Broadcasting

As a matter of principle, nationwide private broadcasters may broadcast an unrestricted number of channels, unless the following applies: If a company and all channels attributable to the latter gain “dominance over public opinion”, no further licenses should be granted for channels that would be attributed to this company. Moreover, no acquisition of additional attributable holdings must be cleared.

The provisions on the “bonus rule” of Section 26 (2) sentence 3 RStV which came into effect when the Sixth Amendment to the Interstate Treaty on Broadcasting (*Sechster Rundfunkänderungsstaatsvertrag*) entered into force in 2002 were revised by the Seventh Amendment to the Interstate Treaty on Broadcasting (*Siebter Rundfunkänderungsstaatsvertrag*): Pursuant to Section 36 (2) sentence 2 in connection with Section 25 (4) sentence 1 RStV, the competence of determining the requirements for granting bonus points no longer lies with the KEK but was assigned to the state media authorities (*Landesmedienanstalten*) to be determined with a three-quarter majority. Another change was the introduction of Section 31 (2) sentence 4 RStV which permitted the reach of the regional windows in the context of digitizing transmission lines to fall short. Section 39a RStV regulates the cooperation between the state media authorities (*Landesmedienanstalten*), the Federal Network Agency (*Bundesnetzagentur*) and the Federal Cartel Office (*Bundeskartellamt*).

The Eighth Amendment to the Interstate Treaty on Broadcasting (*Achter Rundfunkänderungsstaatsvertrag*) changed the requirements for regional window programs of the two nationwide general-interest channels with the most extensive reach in Section 25 (4) RStV as of April 1, 2005. However, the state media authorities continue to determine by three-quarter majority if the requirements now set forth in detail in Section 25 (4) sentence 1 RStV apply when deciding whether or not to approve an individual window program. Nevertheless, when applying the bonus rule of Section 26 (2) sentence 3 RStV, the KEK now examines if the regional window meets the newly introduced criteria of Section 25 (4) sentences 2 to 5 RStV which include editorial and legal independence, a separate license and secured financing as a prerequisite for allocating broadcasting time.

The Ninth Amendment to the Interstate Treaty on Broadcasting (*Neunter Rundfunkänderungsstaatsvertrag*) provides for significant changes relevant to media concentration law when allocating broadcasting time to independent third parties: Pursuant to Section 31 (4) RStV, the competent state media authority may add as many as two additional pro-

posals under aspects of plurality when choosing a third-party broadcaster if it has received more than three applications which qualify for a license.

2.3 European Law

Community legislation also plays an increasingly important role in broadcasting. However, the European Union has no express authority to regulate the plurality of opinion in this field. It is only able to exert influence on the basis of other competences with regard to the common market. The European Commission's principal concern is not ensuring diversity of opinion but rather ensuring competition and economic diversity.

Chapter II Concentration in the Private Broadcasting Sector

1 Nationwide Television

1.1 Development of audiovisual media

The number of nationwide **television channels** has grown steadily, in particular between the years 2003 to 2006, when it almost doubled. Towards the end of the first half of 2006, 37 free-TV channels (eight of which were general-interest channels), 50 pay-TV channels and two channels in mobile-TV format were broadcasted. Another 59 channels had a broadcasting license but were not broadcast, however.

No significant changes occurred with regard to broadcasters and **broadcasting groups**. Based on viewing habits, narrow, oligopolistic market conditions can still be observed. With regard to nationwide television, the four broadcasting groups ARD, ZDF, RTL Group and ProSiebenSat.1 Media AG almost completely cover the demand for TV programs. In terms of average television viewing shares (viewing time), their offerings account for more than 90% of the viewers' television needs. In 2005, the programs of RTL Group achieved audience shares of 25.1% and those of ProSiebenSat.1 Media AG 22.2%, taken as an annual average, thus staying below the 30% threshold relevant to media concentration law. With an audience share of 43.8% on average, the programs of the public broadcasting stations counterbalance the channels of the two major private broadcasting groups. The remaining channels, including inter alia digital pay-TV channels, teleshopping channels, private regional television, foreign-language channels or so-called "open channels" (i.e. public access channels where, instead of professionals, ordinary citizens produce radio or television programs) reached an average audience share of 8.9% in 2005.

One of the latest developments is the broadcasting of channels in high-definition image quality, the so-called **HDTV standard** (High Definition Television). In Germany, the following channels are currently broadcast in HDTV standard: Sat.1 HD, ProSieben HD, Premiere HD (Premiere HD Film, Premiere HD Sport, Premiere HD Thema (channels of the Discovery Channel broadcast in HD)), ANIXE HD and HD Hit.

In April 2006, MTVmusic and ProSiebenSat.1 were the first mobile TV channels admitted for broadcasting via mobile terminal devices (**mobile TV**) in DMB standard (Digital Multimedia Broadcasting).

Alongside mobile TV, **Internet Protocol Television (IPTV)** represents another new development in the field of signal broadcasting. Internet television via DSL is said to have the potential to become a serious competitor to existing cable and satellite systems in the future as a fourth transmission system. The modernization of the network may cause direct competition between the cable network operators and DSL providers, by offering television, Internet and telephone in a package ("Triple Play") via both transmission systems.

The business models of commercial television are changing due to increases in the platform operators' marketing of channels in packages. As **platform operators** are not only network operators but also content providers and marketing agents, they act as the crucial link to the end user.

Fierce competition will arise among the individual channel and marketing platforms as they try to oust one another from the market. The new competitors are the telecommunications companies entering the market with their IPTV offerings. Competition will also intensify among the existing pay-TV platforms, as well, however. It is expected that the media convergence will cause a shift in market shares, with network and platform operators possibly assuming a key role.

1.2 Development of Groups of Broadcasters

The strongest group of broadcasters in terms of audience share in nationwide private television is, as before, **RTL Group**. At RTL Group and the group's parent company Bertelsmann AG, external shareholder influence has recently been reduced. For instance, RTL Television GmbH took over an additional 50% share of the operator of n-tv which had been held by CNN/Time Warner Beteiligungs OHG and thus became its sole shareholder. In the context of an overall evaluation of the activities carried out by RTL Group and its parent Bertelsmann

AG in the media sector, the KEK concluded that the potential influence on public opinion resulting from such activities corresponded roughly to that of a nationwide television broadcaster with an audience share of 27%, thus considerably below the 30 percent threshold at which predominant power over public opinion is statutorily presumed to exist. In addition, WAZ relinquished its indirect shareholdings in RTL Group. By launching the channel Traumpartner TV and with its stake in K1010's broadcaster, RTL Group expanded its activities in the television sector to encompass "interactive" digital programs. Furthermore, RTL Group already acquired licenses for four digital special-interest channels as early as 2000. These channels are to be broadcast in the context of a digital program bouquet. The pay-TV channels RTL Crime, RTL Living and Passion were launched on December 1, 2006.

ProSiebenSat.1 Media AG was recently sold to the financial investors Permira and KKR. KKR and Permira are considering merging ProSiebenSat.1 Media AG with SBS Broadcasting Group, which is part of their portfolio of shareholdings, in order to create a European TV group. This latest transaction was preceded by the KEK's refusal, for the first time, to approve a change in shareholder structure with regard to the proposed takeover by Axel Springer AG. Had approval been granted, Axel Springer AG would have achieved an influence over public opinion corresponding to an audience share of more than 42% in nationwide television. ProSiebenSat.1 Media AG has now expanded its activities to the pay-TV sector which had been limited to the free-to-air television sector up to now. ProSiebenSat.1 Media AG was granted licenses for the four pay-TV special interest channels Sat.1 Comedy, Lifestyle, Movie Channel and kabel eins classics. The channels Sat.1 Comedy and kabel eins classics have been on air since June 1, 2006 and are broadcast via the pay-TV platforms of Kabel Deutschland, Kabel Baden-Württemberg and Unity Media, as well as on the Internet via DSL cable networks. Furthermore, the KEK cleared five digital, free-to-air special interest channels under media concentration law (ProSiebenSat.1 Family, - Fiction, - Fun, - Favorites and - Facts). The contents of the channel ProSiebenSat.1 Mobile offered by MFD Mobiles Fernsehen Deutschland GmbH via its digital platform for mobile broadcasting services is determined entirely by ProSiebenSat.1 Media AG and therefore also attributable to it.

Disney group has added the digital children channels Toon Disney and Playhouse Disney to its program offering for children which is composed of the channels Super RTL, Disney Channel and Jetix. In addition to NBC Universal and The Hearst Corporation, the Disney group also has an indirect stake in the broadcaster of The History Channel, which is going to broadcast the additional pay-TV channels Crime & Investigation Network and The Biography Channel in the future.

EM.TV AG sold its indirect stake in **Tele München Group** to a company fully owned by Dr. Herbert Kloiber. As such, a deconcentration of Tele München Group and EM.TV AG was achieved. Just recently, the Swiss company Highlight Communications AG acquired share capital entitling it to vote in EM.TV AG.

Viacom Group expanded its activities in nationwide private television: After Viacom's take-over of VIVA Media AG and VIVA Plus Fernsehen GmbH, the group currently owns three music channels especially designed for Germany. The channel MTV2 Pop was re-launched as the children's channel Nick. VIVA plus was redesigned into the entertainment channel Comedy Central. VIVA Plus Fernsehen GmbH provides the entire content for the channel MTVmusic of MFD Mobiles Fernsehen Deutschland GmbH.

The US media group **NBC Universal** has also increased its presence on the German television market. It has launched two new free-to-air special-interest channels: the movie channel Das Vierte broadcast both in digital and analogue formats and the channel GIGA Digital designed for interactive applications. In addition, the group has a stake in the broadcaster of the pay-TV special interest channel The History Channel.

An increasing number of German and foreign **financial investors** are participating in the German media market, particularly in the sectors of TV broadcasting and cable network operation. With Saban Capital Group's holding in ProSiebenSat.1 Media AG as well as Permira Group's holding in Premiere's broadcaster, public attention was drawn to this recent development in the media sector. Under the aspect of ensuring plurality of opinion, the holdings of financial investors in private television broadcasters have not caused any problems as of yet since they either have no additional significant media holdings in Germany or the television holdings are not attributable to them.

2 Links between Television Broadcasters and Other Media-Relevant Related Markets

On the one hand, "media relevance" is a prerequisite to the application of media concentration law to a particular media market. On the other, it is decisive to assess to what extent such a media market is linked to nationwide television. The respective degree is determined from comparable performance features which characterize the potential influence on opinion. According to the legal practice of the Federal Constitutional Court (*Bundesverfassungsgericht*), these mainly concern the suggestive power, the scope of effect and up-to-dateness.

2.1 Audience Markets

2.1.1 Audio Broadcasting

In private audio broadcasting, nationwide offerings play a subordinate role with regional and local programs prevailing. The most important audio broadcasters which also hold stakes in private television are RTL Group, Burda Group and Springer Group. Despite each of these companies pursuing a strategy of expansion in audio broadcasting through shares in several broadcasters, no position has been achieved that would be comparable to the degree of concentration incumbents have in the television or newspaper market at national level. Nevertheless it has to be noted that the provider structure of audio broadcasting is characterized by constant change and horizontal concentration in the private radio sector has risen significantly. The media companies also increasingly pursue convergence-induced cross-media strategies and develop new business models, in particular on the sub-segments of Internet and mobile media.

The various forms of cooperation in audio broadcasting could give rise to concerns about plurality under the aspect of journalistic concentration. In this context, the influence of framework program providers is significant. In order to standardize the tone of the programming they provide, providers may make essential programming decisions which can go as far as the choice of music format which is essential for audio broadcasting. This also affects marketing companies, such as RMS. They make up so-called "Kombis" (selected stations are combined and marketed together) that are lucrative for the individual broadcaster due 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 is as homogenous as possible from a socio-demographic perspective. From a media law perspective, the relation between radio marketing and an attribution of the broadcaster requires clarification.

2.1.2 Newspapers

On the daily newspaper market, a few publishing groups have large circulation shares. The three major publishing houses have a market share of just under 40%. These large publishing groups are opposed by a large number of small and medium-sized publishing houses which provide local and regional coverage. More than half of the administrative and urban districts offer only one newspaper with local or regional information. An increase in horizontal concentration, which could also adversely affect the plurality of opinion, is restricted by the control over press mergers. Considerable negative effects on the plurality of opinion through

diagonal ties between the daily press and nationwide television are not expected at present: Especially due to Axel Springer AG's TV holdings in ProSiebenSat.1 Group which are not attributable and the reduced extent of the newspaper-related activities of Bertelsmann AG via its stake in Gruner + Jahr, the ties between the broadcasters of nationwide television and publishers of daily newspapers have to be considered as being rather weak.

2.1.3 TV Magazines

The four largest publishing houses achieve a total market share of 97% on the TV magazine market. Three of these, Bauer, Springer and Burda, hold an interest in broadcasters of nationwide private television. The potential influence exercised on public opinion by program titles is directly related to the choice of program. Publishers of TV magazines operating on this market and with business ties to broadcasters are provided with the opportunity of enhancing their chances of access to audiences by presenting their own channels more favorably. With regard to individual programs, this may not only result in higher audience shares but also in the enhancement of the ties between the audience and certain programs on a medium and long-term basis. Holdings in this sector therefore have to be taken into special consideration when making an assessment under media concentration law despite the possibly less extensive journalistic content of such magazines.

2.1.4 Popular Magazines

With the companies Bertelsmann/Gruner + Jahr, Bauer, Burda and Springer, the largest publishers of popular magazines also hold a stake in nationwide private television. The titles of these publishers have a share of approximately 40% of the titles registered with the German Audit Bureau of Circulations (*Informationsgemeinschaft zur Feststellung der Verbreitung von Werbeträgern e.V.* – “IVW”), the circulation of which is not assessed according to the publication interval of the total popular magazines. According thereto, Burda has the strongest position with 13.60% followed by Bertelsmann with 11.64%, Bauer with 8.69% and Springer with 6.79%. Particularly in the case of Bertelsmann AG, two strong market positions in the sectors television and popular magazines are combined thus generating cross-promotional possibilities.

Current magazines, among which titles such as “Der Spiegel”, “Focus” and “Stern”, play quite an important role when determining the subjects of the sociopolitical discussion (agenda-setting). Target group magazines (for example women’s magazines) and special-interest titles on subjects such as know-how, recreational activities, etc. may have an influence on the opinion of its readers.

2.1.5 Online Media

Online media is generally regarded as beneficial to plurality of opinion. The editorially prepared contents become relevant under media concentration law only if they are offered by television broadcasters or their affiliates.

A potential influence on opinion is particularly prominent with regard to search engines as they influence the user’s selection decision in the way they prepare hit lists, via search and organizing criteria, ranking orders or recommendations. In addition, Internet technology companies, such as Internet Service Providers (ISPs), are responsible for the editorial design of their own websites and thus compete with the content available on the websites of traditional media companies. An ISP acts as a gateway and thus may exert control on Internet access. Cooperations between ISPs and companies of the media sector are established regarding content, as cross-media ties between T-Online and the newspaper “Bild”-Zeitung (Bild.T-Online.de) and Burda (www.bunte.t-online.de), respectively, show.

The increase in high-speed broadband connections (for example, ADSL2, VDSL or cable modems) and new methods of data compression expedite the development regarding the transmission of moving images, television programs and television-like services via the Internet (IPTV). Market research institutes forecast a sharp increase in use of the Internet for watching television. It is forecast that in 2010 between 1.3 and 3 million households in Germany will receive television via the Internet.

2.1.6 Local Television in Urban Areas

The term “local television in urban areas” (“*Ballungsraumfernsehen*”) refers to channels which are only distributed in areas with high population densities. Stakes in local stations in urban areas (“*Ballungsraumsender*”) provide broadcasters of nationwide television with another possibility for exploiting broadcasting rights. The formation of a supra-regional network of local stations in urban areas for the purposes of coordinated marketing and programming

could increase the possibilities for participating shareholders or content providers to exercise an influence comparable to that of nationwide television broadcasting.

Both Axel Springer AG and Burda Group not only have holdings in broadcasters of nationwide television but also in broadcasters of local television in urban areas. Some companies have holdings in several broadcasters of local television in urban areas (e.g., Almond Media GmbH, Burda, Oschmann-Gruppe, and in the future probably Axel Springer AG as well). In addition, Almond Media GmbH also serves as a marketing agent for MÜNCHEN.TV and rheinmaintv via its subsidiary G1 Media Vermarktungs GmbH. Hence, there are the beginnings of a “metropolis channels” network which, according to press reports, is to be expanded further. Irrespective thereof, the broadcasting of local television in urban areas has to be deemed as a contribution toward the plurality of opinion.

2.1.7 Media Services

Media services are offers which, although distributed via the broadcasting infrastructure, differ from broadcasting in their appearance and/or their low impact on public opinion. The broadcasting of teleshopping channels or “interactive” chat, game and betting channels which are based on added-value telephone services gives TV groups the opportunity to generate additional revenue or to counteract losses in TV advertising turnover. With the increase in digitization and in implementing reverse channels which enable interactive applications, such offers are expected to increase. A basic encryption of channels which have been broadcast free-to-air via the Astra satellite platform up to now also aims inter alia at offering additional services beyond receiving broadcast signals which may be directed at particular groups.

With RTL Group and ProSiebenSat.1 Media AG, the two major broadcasting groups in nationwide private television also hold stakes in media service providers.

2.2 Upstream and Downstream TV Broadcasting Markets

2.2.1 Programming Rights

In order to ensure plurality, the vertical ties between broadcasters with production companies and owners of film and sports transmission rights must also be considered.

2.2.1.1 Fictional Programming

Market surveys on the structure of the programming of several different free-to-air general-interest programs show that the share of fiction tends to decrease. Due to the deconcentration caused by the insolvency of the former Kirch Group, the number of the production companies with ties to TV broadcasters decreased towards the year 2004. The companies categorized as “dependent” on TV broadcasters, however, have achieved a production volume which is an average of four times higher than that of independent companies. While the share of companies with ties to broadcasters was only 11.3% of the total number of production companies, their share in the total production volume was 33.8%. This suggests that broadcaster-dependent companies are treated favorably when awarding contracts. In the sector of TV productions, RTL Group appears to be the market leader, but without having achieved market dominance, however.

The market for fictional programs which are for sale (“*Kaufprogramme*”) is largely opaque. TV broadcasters acquire such programs either directly from the production companies or from intermediaries. The number of TV broadcasters which merely serve as channels for broadcasting the content provided by the rights owners of the respective group has increased.

2.2.1.2 Children’s programming

Children are an important target group not only for TV broadcasters but also for the advertising industry. Advertising messages have a greater effect on children since they are more susceptible. Furthermore, the influence they have on their parents’ purchase decisions should not be ignored. Due to the long-term audience loyalty to a broadcaster’s children’s formats, the future television habits of an adult audience may be influenced in favor of certain broadcasters. This type of audience loyalty is supported by respective Internet offers made by the broadcasters.

The largest audience shares were achieved by the channel Super RTL which is able to rely on the extensive content resources of its shareholder Walt Disney Company. RTL Group’s strong position in the children’s programs sector is important with a view to potential long-term audience loyalty to this group’s channels.

Rights trading with children’s programming mainly takes place on an international scale, with a couple of strong market participants. EM.TV AG and Tele München Group which are linked

to broadcasters, operate in this sector in Germany *inter alia*. According to the information available to the KEK, however, these companies do not dominate the market in the sector of children's programming.

2.2.1.3 Sports Rights

In the TV sector, there is still no concentration with regard to sports programming. Despite a decline in audience shares in some respects regarding the coverage of the German Soccer League ("Bundesliga") on free TV due to changes in the time of broadcast under the new television agreements concluded with DFL, overall no "audience movement" towards pay TV has been noted but rather the opposite is the case, the sports coverage of the public broadcasters continues to have a strong position.

The vertical links between rights trading and TV broadcasting loosened even further when RTL withdrew from Sportfive. Thus, at present, there are no private TV broadcasters linked to sports rights traders under corporate law; the only ties in existence between EM.TV (DSF) and Highlight Communications AG are via an option agreement and the exercise of voting rights.

2.2.1.4 Information and News Material

Possible sources of information and news material include national and international correspondents' networks, news agencies, program exchange systems and cooperation with third parties. Additionally, there are several sources of additional information, such as databases, libraries, archives, Internet offers, etc. available. The Internet in particular has gained in importance as a news source. One of the more recent developments is the increasing circulation of content generated by Internet users or so-called "user-generated content".

Both RTL Group and ProSiebenSat.1 Media AG have each integrated a news channel into their broadcasting group. The integration of news channels into broadcasting groups may be beneficial or even necessary for economic reasons but under the aspect of plurality of opinion it also adds a number of risks.

2.2.2 Services Required for Accessing Digital Television and Pay TV

Contrary to its analog counterpart, digital TV requires multiplexing and digital-analog conversions as additional technical services. With regard to digital pay TV encryption, access control and subscriber management are also required. Moreover, platform operators usually of-

fer pay-TV channels in packages. Other services provided by digital platforms are navigators and electronic programming guides (EPGs).

The digitization of the respective content and multiplexing are carried out in playout centers. With regard to multiplexing, no concrete access problems have arisen so far. Access problems could be caused by capacity constraints which have so far been of no practical relevance since the awarding of scarce capacities is heavily regulated.

An essential component of the technical platform for digitally broadcasted pay TV is the decoder infrastructure of set-top boxes. Premiere's change in business strategy has provided for an open market for the purchase of decoders.

Regarding the development of EPG offers, the market is remarkably dynamic. From a regulatory perspective it has to be considered if EPGs which are provider neutral and cross-bouquet should be subjected to access control comparable to that in existence for basic navigators.

Program marketing platforms are increasingly taking on a more central role in the digital media landscape. Without their marketing services, smaller pay-TV offers would not be able to access the end user. This does not necessarily present a problem as this process also establishes a division of labor between the content provider and the marketing agent which is customary in economic life and possibly in the interest of both parties. However, platform operators as "gatekeepers" merit special attention with regard to ensuring plurality since they may exercise influence on the make-up of programming packages and on the access content providers have to the end user through their conditions. Of all the current cable platforms, only Kabel Deutschland and PrimaCom can be categorized as provider-neutral. With its channel Arena, Unity Media (ish/iesy) itself offers programs. Due to the Federal Republic's shareholding in T-Online, T-Online cannot itself be a broadcaster but if offers a lot of its own content and cannot be categorized as provider-neutral for this reason.

A development in the direction of broadcasters only being able to access users via platforms is problematic. Broadcasters lose their responsibility with regard to programming and become mere content providers in this way. Such a trend can already be seen in the awarding of DVB-H capacities where the platform providers will primarily be granted licenses which on their part are then to allocate capacities to the broadcasters. Such priority is not provided for by law and should thus be regarded critically under fundamental law.

2.2.3 Means of Transmission

Cable network operators are becoming increasingly important with regard to evaluations made under media concentration law. The development in the satellite sector is also of relevance, as there are indications that satellite operators will increasingly extend their function which has been purely used for transport purposes up to now by also assuming program marketing activities. DVB-T is important for ensuring plurality of opinion but it cannot replace the decisive role cable and satellite operators play, as only restricted program offerings are possible. For the future, there are already indicators that transmission through telephone networks via DSL and mobile radio communications could develop into an alternative to cable and satellite. A lot of changes are expected in the development of transmission technologies to mobile terminal devices, such as DVH-H, DMB and UMTS. Advancements in the possibilities for distribution will not necessarily result in a more diversified offer; it will rather be a case of the same offer being made available by way of different distribution channels.

2.3 TV Advertising

The sale of TV advertising time is still the primary source of income in private television. The TV advertising market is highly concentrated. This not only applies on the part of broadcasters, where the channels of ProSiebenSat.1 Media AG, RTL Group together with ARD and ZDF account for 90% of the gross advertising revenue, but also on part of the media agencies acting as intermediaries. According to the findings of the Federal Cartel Office, ProSiebenSat.1 Media AG and RTL Group form an oligopoly in the advertising market. This also has an impact on ensuring plurality of opinion since financing through the sales of advertising time continues to be the main source of financing in private television despite broadcasters' efforts to become less dependent on the advertising market.

Chapter III Application of Sections 26 to 32 of the Interstate Treaty on Broadcasting

1 Procedural Issues

1.1 Overview

The difficulties which commonly occur when enforcing the Interstate Treaty on Broadcasting originate from implementation deficits due to the fact that the KEK is only entitled to exercise procedural rights through the respective competent media authorities. The KEK has suggested that instead of questioning the independence and physical distance of media concentration control and the experience gained thus far in implementing the Interstate Treaty on

Broadcasting through new models suggested by the European Commission, the better approach would be to remove existing procedural deficits in the context of the current model by extending the KEK's procedural rights.

1.2 Implementation Deficits

In summary, the following shortcomings can be observed in current procedural law:

- In the context of evaluation proceedings, the KEK's requests for information via the competent state media authority results in delays.
- The obligation to provide information (*Mitwirkungspflicht*) relevant for concentration issues is being enforced by the state media authorities which, in individual cases, may claim to be solely competent to decide which information or documents are necessary for evaluation under media concentration law.
- The possibilities for imposing sanctions are insufficient and are, to the extent available, not being fully exhausted by the state media authorities.
- The existing duties to provide assistance outside of evaluation proceedings can only be carried out vis-à-vis the competent state media authorities which has proven to be insufficient in practice.

The KEK suggests that the following amendments be made:

1. The KEK is granted (first-hand) information rights and investigative powers of its own. To this end, **Section 36 (1) (3) RStV** is amended as follows:

"The competence to carry out all investigations required in order to fulfill its duties pursuant to Sections 26 to 34 lies with the KEK; it shall in particular be entitled to the procedural rights pursuant to Sections 21 and 22 and to the information rights pursuant to Section 23."

2. A breach of the obligations and duties to provide assistance pursuant to Section 21 (1) to (4) RStV is to be included in the catalogue of administrative offences subject to administrative fines pursuant to Section 49 (1) (2) RStV. **Section 49 (1) sentence 2 RStV** provides as follows:

"(A national private broadcaster also commits an administrative offence if it ...) 1. fails to provide the competent state media authority or the KEK with the necessary data, information or documents in breach of Section 21 (1) to (4)."

3. For proceedings carried out in order to obtain a clearance certificate of a change in the ownership structure, the insertion of a new **sentence 6** in **Section 29 RStV** clarifies as follows:

"Section 21 (1) to (5) RStV shall apply accordingly."

4. **Section 26 (7) RStV** is amended by **sentence 3** as follows:

"The broadcasters shall be obliged to provide the KEK with information on the list of channels for each business year by the end of the third month following the business year, at the latest."

5. **Section 23 (2) RStV** shall read as follows:

"Within the same time limit, the broadcaster shall submit a list of the programming sources for the period under review to the competent state media authority and to the KEK."

1.3 Exchange of information with other institutions

It seems it would be useful to improve the cooperation with foreign supervising authorities competent for media concentration. In addition, the KEK should be integrated into already existing information structures.

1.4 Clearance Proceedings for Changes in the Shareholder Structures

With regard to a change in the shareholder structure of already licensed broadcasters, the KEK carries out the major share of investigating and processing the facts of a case. In addition, the KEK repeatedly looked into changes in the shareholder structure or other influences which the broadcasters had not notified themselves. Instead of following the more time-consuming routine of requesting notification through the competent state media authorities, it would be useful if the KEK itself could initiate evaluation proceedings. This results in the following proposals for amendment: **Section 37 (3) RStV** is supplemented by the following **sentence 2 to 4**:

"Notwithstanding Section 29 (1) sentence 1, changes in the shareholder structure within the meaning of Section 29 RStV are to be notified to the competent state media authority and the KEK. If the KEK becomes aware of a change in shareholder structure within the meaning of

Section 29 RStV, it may directly address the broadcaster with the request to immediately notify the KEK of the change in the shareholder structure. The KEK has to inform the competent state media authority."

1.5 Proceedings for Regional and Independent Third-Party Window Licenses

The sole purpose of independent third-party broadcasting time is to secure and increase plurality of opinion. It therefore undermines the system if the KEK is not granted at least a right of co-decision when examining if plurality of opinion is secured. This decision competence has largely been monopolized by the Interstate Treaty on Broadcasting.

The KEK therefore proposes the following amendment: **Section 36 (2) sentence (3) RStV** is revised as follows:

"Prior to the selection of broadcasters of regional windows (Section 25 (4) sentence 3 RStV) and prior to the selection and licensing of broadcasters of third-party windows (Section 31 (4) and (6) RStV), agreement with the KEK must be reached."

1.6 Relationship between the KEK and the KDLM

Neither the composition nor the mode of voting of the Conference of the Directors of the State Media Authorities (*Konferenz der Direktoren der Landesmedienanstalten – KDLM*) ensures that the decision of the expert commission KEK is examined exclusively under the regulations of media concentration law. Given that decisions by the KEK which are implemented on order of the state media authority may be appealed by taking recourse to the administrative courts, there is therefore no necessity to retain such intra-administrative controlling authority.

This results in the following proposal:

"Deletion of Section 35 (2) sentence 1 no. 2 and (5) as well as Section 37 (1) sentence 7 and (2) RStV. An editorial amendment of Section 35 (2) sentence 2, (6) and (8) sentence 3, section 36 (1) and Section 37 (3) RStV."

1.7 Proposals to reform Media Control

From the KEK's perspective, it has generally proven successful to secure plurality of opinion in private television through an expert committee which is independent in every respect and does not receive outside instructions. In the sector of nationwide television, this has created transparency which is probably unique in Europe; decisions are made efficiently and are thoroughly founded. Instead of questioning the physical independence in the structure of the KEK, it should rather be strengthened by the aforementioned proposals for reforming the rules of procedure.

1.8 Transparency

Up to now, some state media authorities have not forwarded the decisions of the KEK to the respective companies involved. This goes against the principle of transparent administrative procedures and the requirement to indicate reasons in accordance with the rule of law. The KEK therefore suggests revising **Section 37 (1) sentence 6 RStV** as follows:

"They shall form the basis for the authorities' decisions and are to be notified jointly together with them."

2 Focus of the Supervisory Practice and the Necessity of Legislative Reform

2.1 Section 26 RStV: Ensuring Plurality of Opinion in Television

With its decision on Axel Springer AG's proposed takeover of ProSiebenSat.1 Media AG, for the first time the KEK did not clear a notified change in shareholder structure. In the context of this decision, it expressed its fundamental opinion on the interpretation of Section 26 RStV, in particular regarding the element of "dominating public opinion", and clarified the relations between the legal presumptions enshrined in Section 26 (2) RStV on the one hand, and to the general provision of Section 26 (1) RStV on the other. The KEK also gave an opinion on the legal relevance of de-facto existing effects on media-relevant related markets for the legal assessment pursuant to Section 26 (1) RStV.

Section 26 (1) and 2 RStV

Section 26 (1) RStV represents an independent provision. Legislative guidelines such as how to determine if dominance over public opinion exists can be derived from the presumptions outlined above. In order to secure plurality of opinion in television, the influence exercised by other media also has to be taken into consideration.

In the case at hand, the KEK mainly examined the position of Axel Springer AG in the areas of newspapers, TV magazines, popular magazines, online offers and in audio broadcasting; it came to the conclusion that the strong position of the ProSiebenSat.1-Group in nationwide private television would result in a dominance over public opinion, in particularly in view of the outstanding position Axel Springer AG had in the daily press sector. In the relevant reference period, the attributable channels achieved a total audience share of 22.06%. Taking the media activities carried out otherwise into consideration, Axel Springer AG would have been attributed an influence over opinion which would have corresponded to an audience share of more than 42% in nationwide television.

But also with regard to the second major broadcasting group RTL Group/Bertelsmann AG, the KEK examines the provision in Section 26 (1) RStV in an ongoing decision practice by taking the extensive media activities of this group into consideration. In the period under review, this was mainly prompted by RTL Television GmbH's notified takeover of CNN/Time Warner Beteiligungs OHG's 50% holding in n-tv Nachrichtenfernsehen GmbH & Co. KG which thus became the sole shareholder of n-tv. The channels attributable to RTL Group in nationwide television achieved an overall audience share of 25.2% in the relevant reference period; however, due to granting bonus points for the regional window programs broadcast in RTL's programming, the relevant audience share of RTL Group, was, however, below the threshold of 25% at which dominance over public opinion would be presumed. Overall, the influence RTL Group and Bertelsmann AG exercise in nationwide television and on media-relevant related markets corresponds to a benchmark of a nationwide audience share of approximately 27%.

The Bonus Rules of Section 26 (2) sentence 3 RStV

License proceedings for all regional windows of RTL and for the regional windows of Sat.1 in Bavaria, North Rhine-Westphalia and Lower Saxony/Bremen were concluded in the period under review. The main problem lay in legislation providing for the legal independence of the regional window broadcasters as of April 1, 2005 without providing for a transitional arrangement. The main broadcasters RTL and Sat.1 have holdings of more than 25% in the majority of its window broadcasters, however. With regard to the they investments made in these regional windows, the two major broadcasters objected to the legislation on the grounds of the protection of confidence.

Later, in the context of several evaluation proceedings under media concentration law, the KEK granted bonus points in favor of RTL Group for RTL's regional windows and also took

this into consideration in the context of its overall assessment pursuant to Section 26 (1) RStV. On the other hand, the KEK had concerns with regard to the proposed licensing of the Sat.1 regional windows for Bavaria and Lower Saxony/Bremen.

Proposal for Reform

The decisions made by the KEK in application of Section 26 (1) and (2) RStV show that it is possible to work effectively under the current substantive regulations included in the Interstate Treaty on Broadcasting for ensuring plurality of opinion. This does not rule out further clarification of the wording of the existing provisions, however. In addition, the guideline function of Section 26 (2) RStV for determining dominance over public opinion beyond the scope of provisions that require certain conditions to be met should be expressed more clearly. This purpose could be served with the following version of **Section 26 (2) RStV**:

"If the channels attributable to a company achieve an audience share of 30% on average annually, dominance over public opinion has to be presumed. When deciding if dominance over public opinion exists irrespective of sentence 1, the position of the company in television-related sectors relevant for opinion formation, in particular the areas audio broadcasting, newspaper, TV magazines, popular magazines and online offers as well as its position on the downstream and upstream markets of television broadcasting have to be considered together with the audience share. The media offers have to be examined and weighted according to their suggestive power, scope of effect and up-to-dateness. In addition, activities increasing plurality, in particular including regional window programs pursuant to Section 25 (4) and, parallelly, including broadcasting time of third parties according to paragraph 5, have to be considered accordingly. The KEK may provide further provisions on how to apply this provision through the introduction of guidelines."

The legal consequences of the creation of dominance over public opinion caused by external growth are set forth in Section 26 (3) RStV in a confusing manner. The wording may result in the misconception that the *prior* existence of dominance over public opinion must be established for a license or clearance of a change in shareholder structure not to be granted. The following version of **Section 26 (3) RStV** should be taken into account, however:

"A license may not be granted and a change in shareholder structure not be cleared if a company would for this reason with the channels attributable to it gain dominance over public opinion."

Section 26 (5) RStV in connection with Section 31 RStV: Broadcasting Times for Inde-

pendent Third Parties

Pursuant to Section 26 (5) RStV, a broadcaster must grant broadcasting time to independent third parties pursuant to Section 31 RStV if these fulfill certain conditions. Prior to selecting and licensing broadcasters of third-party windows, the competent media authority consults the KEK. In the middle of 2003, the State Media Authority Rhineland-Palatinate (*Landeszentrale für Medien und Kommunikation Rheinland-Pfalz - LMK*) which is competent for Sat.1 and the State Media Authority of Lower Saxony (*Niedersächsische Landesmedienanstalt – NLM*) which is competent for RTL again granted licenses to independent third parties broadcasted on these main channels. In coordination with the main broadcasters respectively, they again chose the current broadcasters of third party broadcasting time News and Pictures GmbH, DCTP and AZ Media TV GmbH. In deviation of the directory provision of Section 31 (6) sentence 4 RStV, the licenses were not restricted to three years but rather to five years instead. The KEK considered this to be sufficiently founded with regard to licensing RTL's third party window programs, with regard to Sat.1, however, it held a different view.

2.2 Section 27 RStV: Determining Audience Shares

Through the sustained application of the transitional provisions of Section 34 sentence 1 RStV, the KEK continues to use the data for audience shares collected by the AGF/GfK-Fernsehforschung. As the KEK is not a member of AGF and is not licensed by AGF to use unpublished data, the data base for the Commission's use is accordingly incomplete.

With regard to viewing habits, the television panel "D+EU" does not include data on non-EU foreigners, e.g. the two largest groups of foreigners living in Germany, people from Turkey and the former Yugoslavia. In addition, AGF/GfK television research does not reflect the viewing habits outside of the home, at public institutions (hotels, hospitals, homes for the elderly, prisons, etc.). Neither is public viewing included in AGF/GfK television research, which reached considerable proportions during the Football World Cup 2006.

As of January 2009, the time-shifted use of programs via DVD recorders or digital hard drive recorders is to be measured when determining the audience shares with the help of new measurement techniques. However, it is only planned to include the viewing habits if a market penetration of 5% via the Internet (IPTV) and mobile terminal equipments (mobile TV) is achieved. Even though the AGF/GfK measurement techniques already reflect the use of all digital programs per channel, the KEK often faces problems when assessing the use of programs which belong to packages offered by platform operators.

Furthermore, the KEK does not have any data on the monthly audience shares for third party window programs and for the DCTP program on VOX. Detailed information on the audience shares of individual programs are measured by the AGF/GfK television research but they are not published at regular intervals.

In the period under review, a large number of foreign-language (mainly Turkish, but also, for example, Russian or Persian-language) channels were licensed in Germany. In addition, an increasing number of foreign-language television channels licensed in other countries may be received in Germany via satellite or in the context of offers made by cable network operators. The foreign-language programs are gaining in importance for opinion formation; they should therefore be included when determining the audience share. The KEK therefore proposes the following amendment:

Deletion of the words “German language” in Section 27 (2) sentence 1 RStV.

2.3 § 28 RStV: Attribution of Channels

A decision if the concept “broadcaster” within the meaning of Section 28 (1) sentence 1 RStV is to be interpreted exclusively in accordance with the letter of law or if the KEK has to undertake an additional examination of the capacity as “broadcaster” of its own in accordance with substantive law in the context of attributing channels, has not been necessary up to now.

When examining if the third-party window broadcaster DCTP was legally independent from the main broadcaster RTL Television GmbH pursuant to Sections 31 in connection with 28 RStV, the co-competitor Focus TV GmbH argued that the “real” third-party window broadcaster on RTL would be Spiegel TV instead of DCTP. This issue did not have to be resolved for the evaluation under media concentration law since in such event there would have been no relation between RTL Group and DCTP with regard to attribution. However, the KEK made its doubts known with regard to the broadcaster capacity of Premiere Fernsehen GmbH & Co. KG regarding the program “Bundesliga auf Premiere powered by T-Com” broadcasted via “T-Home”, the IPTV platform of Deutsche Telekom AG.

Pursuant to the reference made in Section 28 (1) sentence 2 RStV, the provisions of Sections 15 ff. Stock Corporation Act (*Aktiengesetz – AktG*) which refer to the facts of affiliation (*Verbundtatbestände*) under corporate law apply to the second and all subsequent degrees of shareholdings. Not infrequently, an affiliated company is jointly controlled by two or more parent companies. For example, joint control was affirmed for A & E Television Networks

(“AETN”) by its shareholders Hearst Communications, Inc., Disney/ABC International Television, Inc. and NBC – AE Holding, Inc. as well as for Sport Media Holding GmbH by its two shareholders EM-Sport Sportmarketing GmbH and KarstadtQuelle New Media AG.

From Section 28 (1) sentence 3 RStV, it can be established that a mutual attribution of channels is made within a group of broadcasters and companies having a holding in them pursuant to Section 28 RStV, which especially results in all audience shares of the group being attributed to the individual broadcaster. This could not be ascertained for the groups RTL Group on the one hand and Walt Disney on the other which are each affiliated with RTL Disney GmbH & Co. KG, the broadcaster of Super RTL.

Furthermore, on the basis of Section 28 (1) sentence 3 RStV no reciprocal attribution of channels is made which are attributed to one company respectively due to similar influences within the meaning of Section 28 (2) RStV. However, the attribution of the VOX programming share to the co-broadcaster DCTP was not affirmed. DCTP and VOX are not companies which are affiliated via shareholdings. Neither is this the case for the channel ProSiebenSat.1 Mobile (formerly: DMB 2), for example, which is not attributed to the broadcaster N24 belonging to the ProSiebenSat.1 group, but instead attributed to its parent company ProSiebenSat.1 Media AG due to programming delivery of a significant portion of the broadcasting time from a broadcaster pursuant to Section 28 (2) sentence 2 no. 1 RStV.

Pursuant to Section 28 (2) sentence 1 RStV, a channel can also be attributed to a company in the case where this company is able to exercise a “comparable” influence on a broadcaster which corresponds to its legal or economic importance after taking a dissenting minority from the broadcaster into account. In this way, the television channel K1010 was attributed to RTL interactive GmbH, which has a holding of 19.87% in K1010 Entertainment GmbH, and therefore also to RTL Group.

A minority shareholding of higher level shareholdings may also exercise a comparable influence on the broadcaster under special circumstances. Thus, the Premiere programs continued to be attributed to the Permira investment companies which had an indirect holding in the parent company Premiere AG, at a time when their holding was only 33.8%.

A similar influence may be exercised if a company regularly provides programming for a significant portion of the broadcasting time of a broadcaster (Section 28 (2) sentence 2 no. 1 RStV). This was affirmed by the KEK in the respective cases.

In the meantime, the KEK attributes a large number of third-party programming broadcasted on the pay-TV platforms of Premiere and Kabel Deutschland to these platform operators pursuant to Section 28 (2) sentence 2 no. 2 RStV; the same holds true for individual programs broadcasted on the PrimaCom/Decimus and ish/iesy platforms. Such attribution is made in particular if the respective platform agreement prohibits the broadcaster from allowing its program to deviate considerably from the contractually agreed broadcasting concept without the platform operator's approval.

2.4 **Section 29 RStV: Change in Shareholder Structure**

This provision has entailed the difficulties up to now in clearing a change in shareholder structure prior to its execution. For example, DSF, Junior.TV and TM-TV notified proposed changes in their shareholder structure which, *inter alia*, were precipitated when several creditors of convertible bonds were able to participate due to having converted their bonds. However, the identity of all future shareholders and the exact shareholding of each of them was only determined in detail after completion of the conversion. The KEK therefore based its decision on the probable future shareholdings which were estimated by taking several indications into consideration. Likewise, the exact changes in the shareholder structure of Premiere AG could not entirely be foreseen in advance in the context of its initial public offering. In this case, the clearance certificate was only granted after execution had been completed.

But the intra-group restructurings of involved media groups also result in changes in the shareholder structure; alone for this reason they require notification as a "change in shareholder structure". This does not apply to restructurings which neither entail changes in the material shareholder structure nor affect other ways of exerting influence by the parties involved. To the extent restructurings trigger changes in the legal entity of the broadcaster, these do not represent purely intra-group processes: The new broadcaster requires the granting of a license under broadcasting law. After sporadic disputes regarding the duty to notify such processes, they are, in the meantime, submitted to the KEK for evaluation, by all state media authorities, even if only in part for "informational purposes" and "without prejudice".

Changes in the shareholder structure of German stock corporations (*Aktiengesellschaften*) listed on the stock exchange which have a holding in TV broadcasters also require notification pursuant to Section 29 RStV. However, according to the KEK guideline provided for in Section 29 sentence 5 RStV, there are exceptions hereto. The notification duties apply to both shareholdings private equity investment companies have in broadcasters or in affiliated

companies alike.

Pursuant to Section 29 sentences 1 and 2 RStV, any intended change in shareholder structure in broadcasters of nationwide TV programs and of companies which have holdings in them within the meaning of Section 28 RStV must be notified to the competent state media authority *prior* to execution. In addition, pursuant to Section 29 sentence 4 RStV, a change in shareholder structure is illegal if it is made *prior* to clearance. The Interstate Treaty on Broadcasting, however, does not contain any explicit prohibition on effecting changes in shareholder structures which are subject to notification until they are cleared. This results in some broadcasters and involved parties only notifying changes in their shareholder structure after the fact, sometimes even a long time afterwards and only upon inquiry of the KEK. The failure to notify proposed changes in shareholder structure constitutes an administrative offence, however, the competence to initiate proceedings lies with the state media authorities. Despite indications of such brought forth by the KEK, proceedings have been initiated by a state media authority only one time to date. If notification is not made at the time of changes to participations, the de facto shareholdings sometimes deviate for an even longer period of time from the shareholder structure approved under broadcasting law. This entails the risk that dominance over public opinion exists de facto in the time period between execution of the change in shareholder structure and the refusal to clear it; such a de facto effect could not be made undone by revoking the license later on. Due to its lack of providing for effective sanctions, Section 29 RStV does not comply with the constitutional necessity to secure the effective prevention of concentration control. Therefore, the KEK has repeated its request to introduce a statutory prohibition to effect changes for the period prior to its clearance on the model of antitrust proceedings (Section 41 (1) sentence 1 German Cartel Act (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) and Article 7 (1) of the European Merger Control Regulation. In order to do so, **Section 29 RStV** could be supplemented by the following **paragraphs 2 and 3**:

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| “(2) <i>Changes in shareholder structure requiring notification shall not be implemented until the KEK has reached a decision whether to clear them or not, or until the period pursuant to para. 3 has expired. Legal transactions carried out in breach of this prohibition shall be rendered ineffective.</i> |
| (3) <i>The KEK shall take its decision regarding changes in shareholder structures within a set period of four months. Such period shall commence upon KEK's receipt of the complete notification. The period shall be suspended for as long as required information is not provided. This period may be extended in agreement with the broadcaster. Should the KEK not reach a decision within the period stipulated above, the change in</i> |

shareholder structure or other influences shall be deemed to be cleared."

Chapter IV Foreign Media Regulations on Cross-Media Activities

The proposed merger of ProSiebenSat.1 Media AG and Axel Springer AG also triggered discussion regarding the reform of the law preventing dominance over public opinion. The way in which other countries handle this problem may provide an important illustration for subsequent reforms. The increasing number of cross-media relations between business activities are not restricted to Germany but rather represent an international trend. A study commissioned by the Hans-Bredow-Institut on behalf of the KEK provides an initial general overview of the specific regulations on cross-media relations in the Member States of the European Union and in larger non-European media markets. Countries which have passed interesting regulation models or are currently engaged in advanced discussions on media regulation reform, such as Italy, France, the Netherlands, Great Britain, Austria and the USA are described in detail. These countries have created regulations which prevent a combination of different media from gaining excessive influence over the formation of public opinion. There are currently discussions taking place in some of the countries surveyed which aim to reform the model for media concentration control while taking cross-media activities into consideration.

Chapter V Conclusions

The decisions of the KEK set forth herein, in particular its decision in the media-concentration proceedings on the proposed merger of Axel Springer AG and ProSiebenSat.1 Media AG, show that the current regulations under substantive law included in the Interstate Treaty on Broadcasting on ensuring plurality of opinion may also serve to cope with new problems, such as the change in the platform operators' role. The call for constantly new, more detailed regulations fails to recognize the function a law may and must fulfill. If statutory provisions require forecasts and assessments, it is the obvious choice to entrust the interpretation and decision to a commission of independent experts. This applies even more so with regard to sectors which are extremely sensitive in terms of fundamental rights, such as broadcasting, which is additionally characterized by the imperative to be beyond the control of the state (*staatsfern*). These observations, however, do not exclude mere clarifications of existing provisions. The KEK provides detailed proposals in this respect.

As foreign-language programs gain in importance for the formation of opinion against the background of an increasing number of citizens with a migration background and EU citizens

from other Member States living in Germany, they should be included when determining the audience shares.

Platform operators may exercise an influence on program contents through their distribution, packaging, marketing and arrangement of the programs. In addition, when determining the relationship between platform operators and broadcasting license holders, the question of who the broadcaster actually is must be answered. In view of an increase in the importance of the platform operators in the television sector, it seems appropriate to include a definition of the term “broadcaster” in the Interstate Treaty on Broadcasting. In light of the question of whether institutions with public authority, state-owned stock corporations or limited liability companies (“Eigengesellschaften”), and state-controlled public-private partnerships may broadcast television programs, it is recommended that explicit criteria for “beyond the control of the state” be included when determining the broadcaster.

The KEK, in contrast, objects to the request to introduce a restriction of shareholding in nationwide TV broadcasters for foreign companies. Despite the fact that such regulation would be in breach of principles of EU law regarding the right of establishment and the prohibition of discriminatory practices for companies from EU Member States other than Germany and thus is generally excluded with regard to EU foreigners, furthermore, the restriction would not contribute to plurality of opinion. In this regard, the origin of broadcasters and involved parties is irrelevant but rather it is necessary to achieve a variety of providers and programming content which is as large as possible.

An improvement in procedural law is possible and welcome. The Interstate Treaty on Broadcasting already provides for extensive information and cooperation obligations for the broadcasters which, if applied correctly, provide sufficient regulatory instruments. However, the main principles of ensuring plurality of opinion which are precautionary and location-independent are, however, not implemented in a consistent manner and are only insufficiently secured under procedural law. This results in delays in proceedings, loss of information with regard to individual state media authorities, disadvantages for the broadcasters and difficulties in ensuring that the obligation to cooperate is complied with by the parties involved in the proceedings should conflict arise. The KEK provides detailed proposals for amendments to address these shortcomings.

KDLM’s authority to revoke a decision made by the KEK with a three-quarter majority of its members represents an alien element in the system of media concentration control regardless of location. Neither the composition of KDLM nor its mode of voting ensure that the de-

cisions rendered by the KEK are assessed pursuant to the criteria of media concentration law whatsoever. Against the background of the KEK's decisions being judicially reviewable by administrative courts, there is no need for this type of intra-administrative controlling. The KEK suggests dispensing with the KDLM in the future.

The proceedings on the proposed merger between Axel Springer AG and ProSiebenSat.1 Media AG and the pending administrative court action, however, give reason to consider if in cases where several state media authorities are parallelly competent for a single project, one authority should be determined as the executive authority. One criteria for determination of such could be the channel's registered office with the largest audience share.

With regard to the composition of the KEK, it is essential that all of the members are experts in their respective fields and that they are independent. Therefore, the proposal to appoint directors of state media authorities as KEK members according to the model of the KJM has to be rejected. Such appointment could contribute to shifting interests with regard to location or other considerations which are irrelevant to the consultation of the KEK.