

# ***SECURING DIVERSITY OF OPINION AGAINST MEDIA CONCENTRATION:***

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

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(Kommission zur Ermittlung der Konzentration im Medienbereich)

## I. Ensuring Diversity of Opinion Against Media Concentration

1. The regulation of media concentration, provided in the German Interstate Treaty on Broadcasting, is part of the rules forming the "positive broadcasting order" required by German Constitutional law. This control ensures that the diversity of existing opinion can be articulated as broadly and thoroughly as possible and that comprehensive information is available to the public. Broadcasting must operate independently of the state and of particular social groups if it is to be a genuine service to the public. In the dual broadcasting system, the internally pluralistic structure of public broadcasters is thought to guarantee this independence, while the supervision of private broadcasters is the task of autonomous state media authorities (*Landesmedienanstalten*). One important supervisory tool is the ability to require a licence for private broadcasting. The main objective of licensing is to prevent any one group from dominating public opinion.
2. Plurality of opinion demands journalistic and economic competition. Its effectiveness depends primarily on the number of independent private broadcasters, conditions of access to broadcasting, and rivalry for viewers by offering competing programmes. Through journalistic competition, public broadcasting is meant to counterbalance private broadcasting. This competition cannot be comprehended in the categories of the general law against restraints of trade (i.e. dominant market share positions in a relevant market) because programmes, financed by either advertising revenues or fees, are an economic public good. Under the Interstate Treaty on Broadcasting, therefore, viewer ratings, which are the crucial factor in journalistic competition, are the main indicators of predomination over public opinion. Moreover, broadcasting cannot be isolated from other media, that is, from other supplies of "opinion". Intermedia competition is both journalistic and economic competition. Of particular importance are the "related" markets that bear relations to the television market due to the different ways television is financed, whether by competition, or by complementing one another.

One risk of economic competition in the media is a tendency towards the concentration of business enterprises. Moreover, economic competition is no guarantee of journalistic diversity. The aim of balanced diversity in the broadcasting sector can only be pursued by creating conditions under which different voices obtain the chance to be heard in an equitable manner. In establishing these conditions, one has to evaluate the peculiar technical, economic, and communicative characteristics of broadcasting as well as its financial requirements.

3. To ensure the free formation of opinion of individuals and the public, constitutional law mandates specific broadcasting-oriented precautions against concentration. Broadcasting cannot be simply left to market forces. Legislative measures against the emergence of a predominant power over public opinion are needed. Thus, the Federal Constitutional Court considers the application of the control of concentrations provided for by competition law to be a permissible but not a sufficient precaution against the accumulation of opinion-formation power in the broadcasting sector. Merger control aims at maintaining economic competition. The specific broadcasting-oriented anti-concentration rules, in contrast, call for consideration of the fundamental purpose of

journalistic competition even if they refer to statutory definitions against restraints of trade.

4. The specific broadcasting-oriented provisions against the emergence of a predominant power over public opinion required by Constitutional law differ in both their wording and their legal consequences from the measures that competition law provides against such concentrations. Of prime importance in interpreting this legislation are the constitutional principles that underlie it. Accordingly, measures against predominance over public opinion must have a preventive effect. Consequently, mergers and acquisitions of holdings may consummate only after they have been examined by the media authorities. The Federal Constitutional Court's case law addresses typical potential dangers. The court refers not only to horizontal concentration in the broadcasting sector and vertical integration, but also to the "multimedia" combination of power over opinion, insofar as it poses a threat to the diversity of opinion in broadcasting. Access to cable networks, technical platforms and programme platforms for the operation of pay-TV is becoming more important.
5. With the intention of bringing together the anti-concentration rules of both competition law and broadcasting law, the Monopolies Commission has proposed that the licensing of a programme fall within the rules regarding concentrations under competition law. However, at the time of a programme's admission, its effects on competition and market dominance are usually unknown. Therefore, the constitutional requirement to prevent predominance over public opinion can only be satisfied if the anti-concentration rules address the broadcasters' internal growth and include the sanction of dissolution of the concentration and other measures to dismantle, end, or quell this predominance over opinion. Apart from this, the fundamental purpose of ensuring journalistic competition cannot be pursued by applying the Act against Restraints of Competition (Competition Act - *Gesetz gegen Wettbewerbsbeschränkungen*) with a view to the objective of plurality of opinion. Because of the separation of responsibilities between the Federal Government and the states (see Art. 74 no. 16 of the German Basic Law), remedies under the Competition Act are admissible only to the extent that they aim at preventing an abuse of economic power. For the purpose of preventing the emergence of predominance over public opinion, a specific media-orientated anti-concentration law is necessary. This applies irrespective of the questionable assertion that the states should delegate their exclusive responsibility for this subject-matter to the federal jurisdiction.
6. European Community Competition law is just as poorly tailored to securing pluralism as domestic competition law is. Nonetheless, the European Commission's decisions, based on maintaining economic competition, contribute indirectly to ensuring pluralistic competition. Applying the EC Merger Regulation, the European Commission has taken a number of important decisions which have curbed economic concentration in the audiovisual markets.

In contrast, the European Commission has failed to harmonize the different national media-specific anti-concentration rules which it considered to be barriers for the free movement of services and the right of establishment. In the end, two drafts for a directive

on media concentration were not adopted because the authority of the European Community in this area as well as parts of the proposed legislation were questionable.

The European Community is currently not supposed to take Europe-wide measures which primarily aim at securing journalistic competition because it lacks the legal authority to do so. The EC-Treaty neither exempts the area of broadcasting nor does it explicitly confer the authority to regulate this area. The competence for cultural affairs established in Art. 3 lit. q and Art. 151 Section 2 of EC-Treaty does not confer powers upon the Community beyond the adoption of incentive measures. As specified by the European Court of Justice, a respective Community competence may not be based on Article 10 of the European Convention on Human Rights.

It is uncertain whether a Europe-wide specific action to limit media concentration is needed at all. As experience has shown, the Member States will only assent to establishing a new Community competence in the Treaty if they retain sufficient scope for the maintainance of their own traditions of securing pluralism.

## II. The Development of Concentration in the Private Broadcasting Sector

### **CONCENTRATION IN TELEVISION**

7. With the media sector in rapid transition, a dynamic market does not guarantee varied television programmes. It rather raises the risk that leading companies will expand their dominating positions on the traditional media markets rather than enlarge their presence in developing media sectors. The concentration in German nationwide TV broadcasting must be regarded as starting point for such strategies in newly developing markets. This development is a main issue in the KEK's report.

#### **A. Development of Television Programme Offerings**

8. The variety of television programmes in Germany is more comprehensive than in other countries. The programme offerings can be classified according to the regional range of the programmes and characteristics of the broadcasters. In order to completely describe the palette of available programming, one must include the programmes transmitted by public broadcasters. The overall view of nationally-transmitted programmes shows a wide range of programming offered by public broadcasters.
9. As to nationwide commercial television, programmes with a German licence can be distinguished from those without it. At the beginning of the year 2000, forty-six television programmes with a nationwide licence could be received. In addition, nationally-broadcast programming includes foreign cable programmes transmitted pursuant to the European Council's television convention as well as foreign free-to-air programmes transmitted via satellite. Ever growing is the number of pay-TV

- programmes. At present, almost all of them are transmitted via the Premiere World platform.
10. The emergence of "groups" of broadcasters in German nationwide private broadcasting has long been apparent. Such groups consist of several broadcasters closely tied to a company or to a group of affiliated companies. They are not necessarily groups in the legal sense of the Joint Stock Corporation Act (*Aktiengesetz*) but rather, they are to be understood as spheres of influence.
  11. The legislature has taken this development into account when devising the attribution criteria of programmes under Section 28 of the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag - RStV*). Employing these criteria in the assessment for ensuring plurality of opinion, the following groups of broadcasters in nationwide private broadcasting have been identified. The broadcasting programmes mentioned below have been attributed to certain groups in the course of licencing procedures:
    - CLT-UFA: RTL, RTL II, Super RTL, VOX
    - KirchGruppe: SAT.1, Premiere/Premiere World, K-toon/Junior, Discovery Channel, Goldstar TV, CLASSICA, ProSieben, Kabel 1, N24
    - Tele München: (tm3), RTL II
    - Canal+/Vivendi: Eurosport, MultiThématiques
    - The News Corporation Limited: VOX (until 21-03-00), tm3
    - Time Warner: n-tv, CNN Deutschland
    - Viacom: VH-1, MTV
    - Walt Disney: Eurosport, Super RTL, Disney Channel
    - Seagram: 13<sup>th</sup> Street, Studio Universal
    - Capital Media: ONYX, Groupe AB
  12. All remaining nationwide broadcasters, according to the KEK's most recent examinations, are regarded as unaffiliated because they do not maintain relations of legal relevance to another broadcaster operating on the national level.
  13. Groups of broadcasters are of particular importance for the degree of horizontal integration in nationwide broadcasting (it is especially high in the case of KirchGruppe and CLT-UFA). Moreover, a highly problematic issue is the economic integration of several broadcasters into vertically and diagonally integrated media companies.
  14. On **CLT-UFA**: RTL Television, the leading national TV broadcaster financed by advertising revenues, as well as the operators of the programmes RTL II, Super RTL and VOX are subsidiaries of CLT-UFA S.A., a Luxembourgian joint-stock company. CLT-UFA is the largest European television and radio group.
  15. In April 2000, the proposed merger between CLT-UFA and the television branch of the British media group, Pearson plc., was announced. Pearson is chiefly known in the press sector through the activities of the Financial-Times Group. In the television business,

Pearson Television operates mainly in the field of programming production. The above-mentioned change in the ownership structure will undergo assessment under the provisions for ensuring plurality of opinion.

16. CLT-UFA has a decisive impact in German television not only because of the sheer number of its television holdings but also because of its connection with Bertelsmann AG, the world's fourth biggest media company in terms of turnover. Via its 80% stake in the holding company BW-TV Holding (the remaining 20% share belongs to the German publishing company WAZ Group) Bertelsmann AG holds an economic interest in CLT-UFA S.A. Thus CLT-UFA S.A., Bertelsmann AG and WAZ form a group of companies characterized by multimedia concentration in the fields of television, radio, film and television production, licensing rights trade, books, the press, music, and Internet services.
17. Bertelsmann AG is owned primarily by the Bertelsmann Stiftung. This foundation is actively involved in the development of media law and policy in Germany. It has issued numerous publications regarding all fields of social politics and it organizes regular symposiums and discussions on issues of media policy. The Bertelsmann Stiftung emphasizes that this involvement is not related to the business activities of Bertelsmann AG in the media.
18. Bertelsmann AG's Annual Report for the year ended 1999 shows CLT-UFA with an aggregate turnover of DM 6.0 billion. The Bertelsmann Group's aggregate turnover, including the proportional turnover of CLT-UFA, amounted to about DM 29.0 billion. Approximately 80% of its turnover is achieved in the business lines of the subsidiaries Buch AG, Gruner + Jahr AG, the music companies held by BMG Entertainment, and Arvato AG (the former Bertelsmann Industrie AG).
19. Unlike CLT-UFA S.A. that focuses on the European radio and television markets, Bertelsmann AG is a global enterprise. In the business year ended 1999 (not including CLT-UFA's turnover), it achieved 34.7 % of its turnover (DM 9.036 billion) in the United States. The proceeds from turnover in Europe (excepting Germany) amounted to 29.6 % (DM 7.679 billion) of the group's turnover. The foci of interest in Europe are France, the Benelux countries and Great-Britain. The Eastern neighbouring countries are also of growing importance.
20. At present, the multimedia segment has contributed only 1.8 % to the total turnover. The business report stresses, however, that this area is rapidly gathering momentum. At the same time, Bertelsmann is expanding into the e-commerce sector (i.e. business transactions via the Internet). Its subsidiary, BOL (Bertelsmann OnLine), operates a mail-order book business on the Internet which is intended to be expanded into other lines of business, such as music. Currently Bertelsmann still holds a 50% stake in barnesandnoble.com, the American Internet mail order book business. In addition to its interests in the service providers AOL and CompuServe and the e-commerce platforms BOL and barnesandnoble.com, Bertelsmann AG has shares in several Internet and multimedia production and services companies.

21. In these areas, Bertelsmann AG is striving to create synergies to increase the profitability of its controlled media. This also applies to the TV sector where increasingly close ties within the "channel family" under the roof of CLT-UFA S.A. can be observed.
22. Bertelsmann holds interests in the following TV broadcasters:
  - RTL Television GmbH (89 %),
  - RTL 2 Fernsehen GmbH & Co. KG (34.8 %),
  - RTL DISNEY Fernsehen GmbH & Co. KG (50 %), and
  - VOX Film- und Fernseh-GmbH & Co. KG (99.7 %).
23. CLT-UFA's activities also include other important branches of the production, distribution, and marketing of programmes. CLT-UFA is the sole owner of UFA Film & TV Produktion and maintains 74 % of the shares in Trebitsch Group. Both of these production companies supply not only RTL Television, but also other commercial channels (VOX, ProSieben) as well as the public broadcasters ARD and ZDF with programming. By integrating Pearson's TV branch into its group, CLT-UFA is hoping to further strengthen its in-house supply with programming.
24. Subsidiaries of CLT-UFA are involved in the production of films to be shown both in cinema and on television. UFA Film & TV Produktion, in cooperation with European and American partners (Warner Brothers, CLT-UFA International, Time Warner), is engaged in international feature-film production. In addition, Trebitsch Group is planning to further expand into this market.
25. In the area of programming distribution, Bertelsmann AG indirectly wholly owns the following companies: Cologne Broadcasting Center (CBC), Cologne, CLT-UFA Video Production & Broadcasting, DTS, Luxembourg, and VCF, Saint-Cloud It holds financial interests in MMC, Hürth, (a 28.8% stake), ENEX, Luxembourg, (64.7%), and Infomedia, Luxembourg, (50%). In the licensing rights trade, CLT-UFA's ventures concentrate on the distribution of sporting rights via UFA Sports. According to the findings of the Federal Cartel Office, this wholly-owned subsidiary of CLT-UFA had, at the end of 1996, a market share of 27.9 % in the field of sporting rights distribution.
26. In the marketing sector, IP Deutschland plays a particularly important role. This 100% subsidiary of RTL Television is Europe's largest marketing company with a turnover that most recently amounted to DM 4.6 billion, by marketing, inter alia, special programming segments such as "RTL Skispringen" (ski jumping) and Internet content.
27. The complex structure of Bertelsmann Group and its television subsidiary CLT-UFA is marked by a strong diversification in nearly all important areas of the media sector. More important than vertical integration are diagonal and conglomerate combinations. In the TV sector, as well as in the other journalistically-relevant areas, its striking features seem to be a multiple exploitation of content in different media and a strategy of cross promotion.
28. On **KirchGroup**: The second large group of broadcasters in German TV is KirchGroup. According to the KEK's findings, the following TV programmes are to be attributed to it: Premiere, SAT.1, ProSieben, Kabel 1, N24, DSF, K-toon/Junior, CLASSICA, Discovery

Channel, and Goldstar TV. KirchGroup's decisive role in German television is one which it had already played prior to the introduction of the dual broadcasting system. The present position of the group can be explained by its traditional role in television rights trading, particularly in the trade of American feature film and TV productions. This position of KirchGroup can be seen as the basis for a strongly vertically integrated media company endeavouring to exploit acquired programming rights and in-house productions as comprehensively as possible, in nationwide pay-TV, free-TV and also increasingly in local television in urban areas, the so-called "*Ballungsraumfernsehen*". It is worth noting that, with regard to pay-TV and digital TV, the subsidiaries of KirchGroup, BetaResearch, and BetaDigital develop and sell the core elements of the necessary transmission and access technologies.

29. Although KirchGroup can be regarded as the most important actor in German television, its position on the media market is clearly subordinate to that of Bertelsmann AG. The group does not publish its total turnover. According to the KirchGroup, KirchMedia had an aggregate turnover of DM 3.96 billion in the 1999 business year, thereby ranking, by its own account, fourth among all German media enterprises and fifth in the European television market. KirchGroup worldwide, holding assets estimated at DM 9.2 billion, is ranked sixteen among the largest media companies. Essential for KirchGroup's economic position is the stock of programming at its disposal. KirchGroup has rights to 85,000 hours of programmes, including 16,600 feature films. The group estimates the market value of their film and TV libraries to be DM 4.5 billion. Finally, the newly-established subsidiary Kirch New Media will soon enter the field of Internet television.
30. KirchGroup holds three principal subsidiaries: KirchMedia, KirchPayTV, and KirchBeteiligung. **KirchMedia** comprises the group's operations in the licensing rights trade, advertising-financed television, programme production, and film processing services. In addition to KirchGroup, which has a 81.14% majority in KirchMedia, three other shareholders participate with 2.76% of the total capital respectively: the Italian company Fininvest S.p.A. (controlled by Silvio Berlusconi); Kingdom 5-KR-98 Ltd., owned by the Saudi-Arabian Prince Al-Waleed bin Talal al Saud, and Lehman Brothers Merchant Banking Partners II L.P., a subsidiary of the US-American investment bank Lehman Brothers Holdings, Inc. Fininvest also cooperates with KirchMedia in the newly established "European television network," Epsilon. Furthermore, in the course of an increase in share capital, the circle of shareholders has been enlarged by a fund of the American investment trust Capital Research and Management Company, which acquired a share of 3.27%. Finally, the son of Dr. Leo Kirch, Thomas Kirch, owns a 7.31% stake in KirchMedia's capital since ProSieben Media AG (which had formerly been controlled by him) was integrated into KirchGroup at the end of 1999.
31. In German nationwide television, KirchMedia owns 58.4% of ProSieben Media AG, wholly owns DSF, and holds a 50% stake in Junior TV GmbH & Co. KG which operates the digital children's and youth channel Junior/K-toon, and, through its subsidiary PKS GmbH, owns 59% of SAT.1 SatellitenFernsehen GmbH. At the beginning of 1999, it transferred 49% of the shares in PKS GmbH to the European television network Epsilon. The remaining 41%

share in SAT.1 belongs to Axel Springer Verlag AG, in which KirchGroup, on its part, holds a financial interest of 40.05%.

32. One particularly important holding of KirchMedia is its 58.4 % stake in ProSieben Media AG (the remaining 41.6 % being held by Rewe-Beteiligungs-Holding National GmbH). Until recently ProSieben, the operator of the nationwide television programme of the same name, was the only publicly listed German broadcaster. Its 100% subsidiary, Kabel 1 K1 Fernsehen GmbH, operates the nationally broadcast TV full programme Kabel 1. Moreover, on January 24, 2000, the nationwide informational channel, N24, of the 100% subsidiary N24 Gesellschaft für Nachrichten und Zeitgeschehen mbH, commenced its broadcasting operations. Of ProSieben's aggregate turnover of DM 1061.0 million in the first half of 1999, DM 1003.6 million was achieved in the television sector. In ProSieben's Interim Report, the market value of its programming stock is estimated at DM 1.4 billion.
33. At the end of June 2000, a proposed restructuring of KirchGroup's holdings in free-to-air television was announced. An essential element of the new structure is ProSiebenSAT.1 Media AG which as a new holding company is to head a "channel family" consisting of the channels ProSieben, SAT.1, Kabel 1 and N24. Shareholders of this newly-incorporated, joint-stock company are to be KirchMedia, with a stake of 88.52% of the voting shares, and the publishing firm Axel Springer Verlag, owning 11.48% of the voting shares. REWE AG, which presently holds 41.6 % of the ordinary shares in ProSieben, will own 6% of KirchMedia. The restructuring has not yet been authorized by the cartel and broadcasting authorities. Nevertheless, it can be considered a further reinforcement of the duopoly structure in German private television.
34. In addition, KirchMedia holds financial interests in the Spanish TV channel Telecinco (a 10.5 % stake remains after a transfer of 14.5 % to ETN/Epsilon through its subsidiary Taurus TV GmbH) as well as in the Italian Mediaset S.p.A. (1.3 %), a subsidiary of Fininvest S.p.A. The company's range of operations also covers the production of feature films and TV movies, and the licensing rights trade including the distribution of sports rights. It owns holdings in the sports rights distribution companies ISPR, Prisma AG, and CWL Telesport & Marketing AG. Through these subsidiaries, KirchGroup markets the comprehensive sports rights at its disposal. Because of its holding of worldwide licensing rights to the soccer World Championship and the complete transmission rights to the German soccer national league, KirchGroup dominates this market. The subsidiary Taurus Lizenz GmbH & Co. KG holds all of KirchGroup's programming rights (with the exception of the library of pay-TV rights for the German-speaking territories). Via TaurusProduktion GmbH several production companies, including CBM GmbH, NDF Group, Glücksrad GmbH, and Filmproduktion Janus, are integrated into KirchMedia. A film processing services center and a storing and archiving system for film are operated by TaurusMedia Technik GmbH.
35. Holding an indirect 95% share, **KirchPayTV** GmbH & Co. KGaA almost completely owns the Pay-TV operator PREMIERE Medien GmbH & Co. KG. In addition, in January 2000, the licence application for the nationwide pay-TV special interest channel GoldStar TV, in whose operator KirchPayTV has a 50% stake, was approved under the media-specific concentration rules. The KEK has been notified of British Sky Broadcasting plc.'s (BSkyB) purchase of 24% of KirchPayTV's capital. In return, KirchPayTV will acquire a 4% share in

BSkyB. The most substantial holding in BskyB, a 39.75% stake, belongs to The News Corporation Ltd. (News Corp.) led by Rupert Murdoch. This change in the composition of the company is still subject to approval under the media-specific concentration rules. On March 21, 2000, the European Commission declared the notified merger compatible with the common market, subject to the condition of the parties' full compliance with a set of commitments. These commitments essentially mandate that competing platforms be offered access opportunities to Kirch's pay-TV services. Also required is that the DVB Multimedia Home Platform be implemented as standardised software into the d-box, and Simulcrypt arrangements with digital conditional access providers be operational as soon as possible. This decision is not final. The ARD has appealed the ruling to the European Court of Justice.

36. Finally, **KirchBeteiligungs GmbH & Co. KG** is indirectly the sole owner of Unitel Film und Fernsehproduktionsgesellschaft mbH & Co., the operator of the digital special interest channel CLASSICA on the Premiere platform. It also holds shares in the publishing house Axel Springer Verlag AG (40.05 %) as well as Constantin Film AG, a film production and distribution company.
37. On the role of **Tele-München Group**: For some time, many commentators perceived the role of a "third force" in German nationwide television in the partnership of Tele-München Group and News Corp., which jointly controlled the broadcaster TM3. This conclusion was prompted by TM3's surprise acquisition of the German broadcasting rights to the European Champions League in May 1999. This rights acquisition was seen as leverage for a possible entry of News Corp. into the German television market.
38. At present, one must retrospectively state, on balance, that TM3 has not met these expectations. It is true that the channel could increase its audience share by transmitting the Champions League matches, but this was confined to a mere temporary effect.
39. The crucial point is that the cooperation of BskyB (News Corp.'s subsidiary) with KirchGroup as well as the takeover of TM3's shares by News Corp. is a decisive step backwards on the path to establishing a third force in the German television market. Moreover, in the course of the cooperation between Kirch and Murdoch, the television rights to the European Champions League were resold to PREMIERE and RTL Television. This further contributes to the reinforcement of strongly concentrated structures currently existing in German television. The successful market entry of independent third parties in the field of general-interest offerings is extremely difficult without access to the attractive rights to broadcast sports events.
40. Neither did other groups of broadcasters counterbalance CLT-UFA and KirchGroup during the period under review. The latter are by far the predominant forces in German national television. At present the public broadcasters' programme offerings alone can limit the influence of these two private groups, at least with respect to the viewers' response, although not in terms of advertising shares.
41. By assessing predominant power over public opinion primarily with reference to the development of **audience shares**, one emphasizes on the journalistic effect of a programme. In the period between 1996 and 2000, the audience shares of the two major groups of

broadcasters in German nationwide private television took a virtually parallel course. On the whole, the shares were spread in a balanced manner between the public broadcasters and the programmes of KirchGroup and CLT-UFA. In the private market, KirchGroup's programmes usually obtained a larger audience share than those of CLT-UFA. These may not have been great differences, yet in the event of significant structural changes on the market they could easily enlarge. Such a change could occur should a large degree of the soccer transmissions be diverted from free-TV to pay-TV.

42. The examination of the audience shares also reveals the state of competition in free-to-air television. Whenever the public broadcasters' offerings achieved above-average audience shares due to exceptionally attractive sports broadcasts, these increases were reflected in temporary declines for the private groups of broadcasters. None of the two major groups, however, achieved a viewer rating of 30%. Consequently, the legal presumption for predominant power over opinion, set forth in the second sentence of Section 26(2) of the Interstate Treaty on Broadcasting has not gained any relevance until now.
43. One recent development on the German television market is extremely important from the standpoint of media concentration control. At the beginning of 2000, a network-like combination of local broadcasters known as "**Ballungsraumfernsehen**" (i.e. local television in urban areas) was established for the joint sale of advertising time. KirchGroup has a particularly far-reaching influence on this network with respect to marketing, programming supply and financial participations.
44. KirchGroup and Thomas Kirch hold interests in the "Ballungsraum" channels M-1 Fernsehen (40 %), tv.münchen (40%), tv.berlin (100%), Hamburg 1 (about 60%), and NRW 1 (25%). Even though one cannot apply the same legal standards to these participations in "Ballungsraum" television as to those in nationwide television, the accumulation of economic and journalistic influence is nonetheless relevant. Control over a joint marketing company for several cooperating "Ballungsraum" TV operators, in this case over Media.1 Medienvermarktungs GmbH, a joint subsidiary of Axel Springer Verlag and KirchGroup, represents one such influence.
45. Besides the standardized programming bound up with joint marketing, another important aspect is the programme supply. The provision of programming by Media.1 to the "Ballungsraum" channels marketed by it, which has to all appearances been agreed upon, leads to vertical integration that reduces the broadcasters' journalistic independence. Thus KirchGroup is gaining additional influence in a further segment of the market by expanding the value chain. Evidence suggests that KirchGroup, or companies affiliated with it, will increase their business activities in Ballungsraum television in the state of Hesse.

#### **B. Links between Television Broadcasters and Other Media-Relevant Markets**

46. As specified by the Interstate Treaty on Broadcasting, "**media-relevant related markets**" have to be considered when the issue of a broadcaster's predominant power over opinion arises. Particularly under consideration are the markets for acquiring programming rights (especially for feature films and sporting events), news material, TV magazines and advertising.

47. As to the market for **broadcasting rights for films**, the KEK has acknowledged the strong position of KirchGroup in several procedures. The KEK could not establish the dependency of other broadcasters on KirchGroup's supplies. Nonetheless, the objections that were raised in the Kirch/Bertelsmann/Premiere case remain valid. A survey by Arthur Andersen on behalf of the EBU has come to a similar conclusion. It states that programming rights could represent a "bottleneck" on the pay-TV market. In view of these findings, one should continue to keenly observe the market in German television. This particularly applies to the market segment of programmes produced in Germany. Presently, a concentration process is increasing the vertical integration of independent producers into the two big groups of broadcasters.
48. On the market for **sports rights**, neither KirchGroup, nor CLT-UFA, nor the public broadcasters have, in spite of visible concentration tendencies, such a dominating position that independent broadcasters would be barred from access to sports rights. Market dominance cannot be established. Apart from this, rights holders endeavour to distribute sporting events as widely as possible. This has an ambivalent effect. On one hand, the general public and small operators will have access to some, though often less attractive, rights. On the other hand, market leaders are favoured and the oligopolistic structure on the supply side is reinforced, as far as viewer ratings are concerned.
49. Another crucial development will depend upon the centralized marketing of broadcasting rights to the German soccer Premier League (Bundesliga). The German Football Association (DFB) has applied to the European Commission for an individual exemption of this practice. The procedure is still pending. The complete German Soccer Premier League rights for the 2000-2001 season have been sold to one company. Relevant competition in the near future concerning the transmission of these important sporting events is unlikely. All rights to the Premier League were sold to ISPR and thus to KirchGroup. This is proof of the negative consequences of centralized marketing under cartel law. Instead of spreading the rights among various broadcasters, DFB and KirchGroup again reached a bilateral solution. The opportunity to achieve greater variety in sports reporting and in the television sector was relinquished.
50. Against the background of a growing diversification of news programmes and informational programmes, relations between news suppliers and broadcasters are currently characterized by increasing vertical integration. There are strong incentives for broadcasters to exclusive, topical and specialized material via vertical integration. Conversely, vertical integration is also an advantage for the proprietors of news material, which can maximize the number of distribution channels and thus optimize the value chain. Nonetheless, there are no tendencies towards a market closure which would impede the supply of newcomers with news material.
51. On the stage for **TV magazines**, Springer Verlag, in which KirchGroup holds a 40.05 % share, as well as the Bertelsmann subsidiary, Gruner + Jahr AG, play significant parts. However, in terms of the total circulation of all TV magazines and supplements neither the Springer magazines nor those of Bertelsmann have a dominating position compared to other major publishing companies. Bertelsmann and Springer are competing with offerings of other publishing firms with equally strong circulations and comparably large financial resources. Under these conditions, however, the possibility of publishing houses pursuing

their entrepreneurial interest to present more favourably the TV programmes of their affiliated broadcasters cannot be overlooked.

52. The nationwide German advertising market has regularly been the focus of attention in merger procedures concerning nationwide television. The investigations of the Federal Cartel Office in the Bertelsmann/Kirch/Premiere procedure revealed that the three biggest suppliers, RTL, SAT.1, and ProSieben, had a joint market share of about 75%, thereby qualifying for the presumption of market dominance pursuant to Section 19 (3) No. 1 Act against Restraints of Competition (GWB). In former decisions, the cartel authorities regarded the presumption of oligopolistic market dominance as refuted due to substantial intra-brand competition between the members of the oligopoly (i.e. the channel families CLT-UFA and KirchGroup [including ProSieben Group]). The aforementioned decision fails to resolve whether or not this conclusion is still correct and merely states that the power of oligopolists to act independently is not effectively limited by public broadcasters or other competitors.
53. The unchanged market structure of a duopoly on the television advertising market led the Monopolies Commission to assume that "... in the future no substantial intra-brand competition between the oligopolists on the relevant nationwide television advertising markets can be expected. Thus, in case of ties between the oligopolists on related markets, group effects might lead the companies to show consideration for their mutual interests on the television advertising markets."
54. Accordingly, in autumn 1999 the Federal Cartel Office carried out investigations against the advertising marketing companies IP Deutschland (RTL, RTL II, Super RTL), Media1 (SAT.1), and MGM (ProSieben, Kabel 1). These companies were suspected of illegal parallel behaviour, as they had all established a new, disproportional pricing system at about the same time. Although the Cartel Office did not find sufficient proof of concerted practice by the undertakings involved, the companies nonetheless rescinded the disputed price increase.

### **C. Consequences of the Digitalisation of Television for the Diversity of Opinion**

55. With the expected **technical changes in television**, the problem of equal access to the service and transmission systems of digital television technology comes to the forefront. Diversity of opinion is endangered if single companies are able to exert dominant influence on access technologies. In order to avoid such potential dangers, the legislature substantially modified the provision of Section 53 RStV in the Fourth Amendment to the Interstate Treaty on Broadcasting (*Vierter Rundfunkänderungsstaatsvertrag*). Whether or not these precautions are sufficient to curb the threat of unequal access can only be assessed after the necessary investments in transmission technology have been made and new markets have developed in this area.
56. The introduction of the digital transmission technologies, however, must first overcome significant hurdles. It remains to be seen whether the convergence of telephone and broadband cable networks will in the foreseeable future create additional transmission capacities which will defuse the current scarcity of frequencies in the transition from analogue to digital television. Even in this event, the problem of network operators acting in

the strategically important position of gate-keepers remains. This particularly applies to undertakings such as Deutsche Telekom AG, which dominates more than one single transmission medium. For the present, Deutsche Telekom holds market-dominant positions in the broadband cable, the "network level 3" ("*Netzebene 3*", i.e. transmission of signals in local networks), as well as in local telephone networks. One should not underestimate the effects of the vertical position of Deutsche Telekom AG in the television market value chain when considering power over public opinion. Above all, Deutsche Telekom's intention to retain a blocking minority of at least 25% in divesting its regional cable companies as well as the future role of Media Service GmbH as a supplier of cable services justify critical observation of activity in this field.

57. Deutsche Telekom AG has previously attempted to restrict access to the means of digital transmission by merging with KirchGroup's subsidiary BetaResearch. This merger was prohibited by the European Commission in May 1998. However, in 2000, the two companies again announced their intentions to establish a joint venture. In the proposed venture, market leader Deutsche Telekom AG would join forces with BetaResearch. This company is presently market-dominant with its software BetaNova and the BetaCrypt encryption system regarding the decoder software and hardware necessary for the digital transmission of pay-TV programmes. Although the European Commission in its decision on the BskyB-KirchPayTV merger may have imposed obligations on the parties to open the decoder market, presently it is not known whether this will lead to the desired result. Most problematic is the issue of those decoders which have already been placed on the market. The transition of television technology from analogue transmission to digital transmission in general holds considerable risks for an open television market.

#### **D. International Media Conglomerates and Integration**

58. Our survey of **international ownership structures** reveals an increasing internationalization of media concentration. A clear trend can be found towards mutual transnational participation and towards strategies of vertical and diagonal concentration.

59. The market conditions in Germany, a strengthening of oligopolistic structures in commercial television and an increasing internationalization connected with the introduction of digital pay-TV platforms, are typical tendencies towards media concentration which can be observed in other countries. International satellite television still acts as a strong incentive for this process, as does the high demand for investment capital required for the installation of digital terrestrial broadband cable networks.

60. This assessment of selected international media companies raises the question of how media concentration control at the national level can take the relevance of these developments into account. The current stipulations of the Interstate Treaty on Broadcasting already take into consideration that media concentration is not confined to Germany (see for example Sections 21 (3), 28 (3) RStV). A demonstrated international trend towards concentration in the television sector suggests, however, that additional international regulation is necessary to ensure effective control of media concentration. This is particularly evident for the requirement of transparency of international networks and for the German broadcasters' ownership structures. At present, virtually no regulations exist regarding transnational

cooperation. From this follows the danger that a purely national media concentration control might inadequately comprehend reality.

### CONCENTRATION IN THE RADIO SECTOR

61. The market structure in private radio reflects regional differences much more clearly than in private television, due to the diverse state jurisdictions. In terms of economic success and popularity with radio audiences, the private sector has successfully established itself as the second half of the dual broadcasting system. Nonetheless, it is difficult to judge whether the market diversity required by both constitutional and broadcasting law has been satisfied. The decisive criterion in this respect should be the variety of programmes. This remains a difficult issue, however, involving complex questions concerning programming content. It is not for the KEK to analyse them. The KEK can only assess the ownership structures of radio channels. In a case study, one influential undertaking has been analysed. The results of this study can be summarized in the following paragraphs:
62. In some states, competition between private radio broadcasters exists on the regional level. This also applies in part to the local markets, where much more difficult conditions prevail.
63. On the national level, groups of radio broadcasters not nearly come close to a market share of 30%. Only a more detailed survey about powers of influence apart from capital participations might reveal that some single broadcasters wield more influence in nationwide broadcasting, but even in this event it is improbable that a 30% share would exist.
64. On the national level, groups of radio broadcasters do not come close to a market share of 30%. Only a more detailed survey about powers of influence apart from capital participations could possibly reveal that some single broadcasters wield more influence in nationwide broadcasting, but even if this was the case, it is improbable that the above-mentioned threshold would be reached.
65. With regard to programmes at the regional level, diversity is very limited in some states. Here, financial reserves have been taken into account, which has led to single broadcasters being granted double or even multiple licences in the same area of transmission. In view of such market structures, competition can hardly develop. Only partly has it been realised to divide the power of influence by means of spreading the participations in broadcasters on different companies. Holdings of single undertakings in several broadcasters in the same area of transmission do not add to variety.
66. On the local market, diversity is also severely restricted. Local monopolies exist particularly in Bavaria and in North Rhine-Westfalia, in the latter case even exclusively. As for North Rhine-Westfalia, this statement must be qualified insofar as its state law sets forth the internally pluralistic "twin-pillar model" (*Zwei-Säulen-Modell*). In Bavaria, the attempt was made to spread journalistic influence by means of "Anbieterkonsortien", that is, broadcasters composed of different enterprises. In recent years, however, the number of owners has substantially decreased in many areas of transmission. More and more shareholders, especially those with little shares, have left the syndicates by selling their stakes to the big shareholders.

67. Even in transmission territories with existing competition, the cooperation of local broadcasters under the so-called "Broadcasting Centre Model" (*Funkhaus-Modell*) practised in Bavaria can cause problems. It poses the threat that the partners to the cooperation will also coordinate the content of their programmes. Parts of the North Rhine-Westfalian operators are experiencing economic difficulties despite the fact that the legislature has excluded competition on the local radio market. Corrections in this model will be made. Fundamental changes, however, could entail considerable risks for diversity.

### DIAGONAL CONCENTRATIONS

68. **Holdings in radiobroadcasters by press companies** is one phenomenon of diagonal concentration that can regularly be observed. These interests often overlap with the distribution areas of daily newspapers. It is true that the cumulative editorial influence is moderated by maximum figures set by state broadcasting laws for newspaper publishers' capital interests in broadcasters. But the effect of these limitations is lessened by group effects. On account of the impact of the publishing trade on private broadcasting, cross-promotion is widespread, favouring broadcasters in which publishing houses hold interests.

69. In studying the **interlinkages between television and press companies**, it becomes apparent that Bertelsmann AG has far-reaching access to the public audience through print media as well. Moreover, the strategy of Bertelsmann AG aims at developing synergies between its various lines of business. Nonetheless, when the continuing existence of journalistic diversity is considered, the power to influence public opinion conferred by Bertelsmann AG's interests in the publishing trade is not yet critical. In addition, other publishing houses are doing the same. The involvement of Axel Springer Verlag in nationwide television, Holtzbrinck Group's holding in the informational channel n-tv, and the proposed participation of FAZ-Verlag in the informational channel N24 indicate that publishing houses are crossing intermedia borders with a view to maximize profit through multimedia synergies.

Due to rapid economic and technical developments, the **interrelations between television and Internet services** must be appraised with some qualification. For the present, all the signs point to these connections being used to transfer the established television market structures to the new markets of digital audiovisual media, including the Internet. The respective journalistic weight of single offerings can only be estimated. Currently the new medium, to a large extent, adds to the plurality of opinion, considering the various individually accessible possibilities for communication. However, no comprehensive media research on Internet ratings has been conducted to draw additional inferences regarding the journalistic influence and the effects of Internet services.

### III. The Necessity of Revising Sections 26 to 32 of the Interstate Treaty on Broadcasting

The supervisory practice of media concentration control has shown that some of the provisions of the Interstate Treaty on Broadcasting are in need of reform. This holds especially true for procedural issues, but also for the case that a change in ownership is

put into effect before the KEK has given its consent. From this, as well as from other shortcomings, follow subsequent proposals for legislative reforms:

## **PROCEDURAL ISSUES**

### 70. Competence of the state media authorities

The Interstate Treaty on Broadcasting does not provide explicit rules as to which state media authority is responsible for issuing which broadcasting licence. Therefore, the general rules on administrative procedure of the state in which the respective state media authority has its registered office are applicable.

In the past, two state media authorities have jointly submitted the same case to the KEK for examination. In view of the fact that the state media authorities are, except on points of law, not subject to supervision by a single entity, a rule in the RStV delineating territorial responsibility needs to be adopted.

### 71. Powers of fact-finding and decision-making

To carry out its functions, the KEK must decide independently and autonomously on the scope of necessary investigations, on the question of whether a case is ready for a decision, the separation and joinder of procedures, and the appraisal of concentration issues. The Monopolies Commission has accordingly pleaded for a strengthening of the KEK's position. It is important that the state media authorities execute requests for information and documents immediately and completely, according to the KEK's directions. The KEK's fact-finding and decision-making powers are impeded by the different procedural laws of the respective states. This has often caused coordination problems and delays. Therefore the KEK proposes:

- Section 36, clause 1, sentence 3 of the RStV shall be amended and shall read as follows:

“The KEK and the KDLM establish the facts which are relevant for their decisions on their own authority; in particular they are entitled to apply the procedures according to sections 21 and 22.”

The KEK cannot without some qualification accept the suggested amendment of the Interstate Treaty on Broadcasting that a licence or a change of ownership be deemed to have been declared acceptable if the KEK does not make a decision within a certain time limit. This at least applies as long as the KEK lacks its own investigative powers and remains dependent on the flow of information via the state media authorities. But even if the KEK possessed its own powers of investigation, such a period could reasonably begin only after all relevant documents have been received and their completeness has been assured by the applicant's written statement ("Vollständigkeitserklärung"). It should

further be noted that certain findings of the cartel authorities in merger control decisions have a binding effect.

## 72. Duties of public disclosure

Irrespective of the broadcasters' obligations to cooperate under pending procedures and their notification duties in cases of a change in ownership, they are subject to legal duties of public disclosure. The KEK may gather information about changes that concern the rules on participation and attribution from submitted materials. Also of relevance are lists of the broadcasters' programme suppliers which must be presented annually. These can provide information which may be important for the overall assessment of the broadcaster's position on media-relevant related markets. The KEK should have access to such information which the competent state media authority has obtained on the basis of information and public disclosure obligations. It is advisable that the KEK be informed directly. This appears all the more urgent as the state media authorities adopt a very generous approach towards the undertakings concerned and these, on their part, comply with their obligations only sporadically, if at all. Consequently, the following modification is suggested:

- "The duties of the undertakings to declarations under Section 21 Clause 7 and Section 23 Interstate Treaty on Broadcasting shall be extended to a declaration also vis-à-vis the KEK."

## 73. Cooperation with other supervisory bodies; international exchange of information

Foreign media enterprises increasingly participate in national TV enterprises. Some difficulty has been encountered in establishing the corporate structures of these enterprises. Therefore the following is proposed:

- "It seems advisable to intensify and build up cooperation and the mutual exchange of information with other supervisory bodies by amending the European Convention on Transfrontier Television. Furthermore, the Federal Government should conclude with foreign governments administrative agreements modelled on the laws regulating competition which provide the cooperation between the supervisory bodies responsible for media concentration."

## **SUPERVISORY PRACTICE AND THE NECESSITY OF LEGISLATIVE REFORMS**

### 74. Section 26 of the RStV: Ensuring plurality of opinion in television

In several procedures, the KEK has held to the view that the legal presumptions entailed in Section 26(2) of the RStV do not set forth exclusive criteria for the establishment of predominant power over opinion. First of all, the official explanatory memorandum concerning Section 26 speaks against such a narrow construction. According to it, Section 26(1) more generally aims at avoiding the danger of the emergence of

predominant power over opinion. Not only the legislative history of the provision suggests this interpretation but, above all, its character as a mere legal presumption and the binding obligation to interpret it consistently with constitutional law in accordance with the stipulations of the relevant case law. The Constitutional Court has repeatedly stressed that the constitutional directive to ensure diversity of opinion in broadcasting requires the competent legislature to provide effective preventive measures against the emergence of predominant power over public opinion. In interpreting Section 26 of the RStV, these conditions must be borne in mind. Similarly, in other cases legal practice, and in particular the case law of the Federal Constitutional Court, could maintain certain provisions of broadcasting law only by construing them in conformity with the Constitution (see for instance BVerfGE 73, 118, 176). An interpretation in accordance with the Constitution suggests itself and is irrefutable if the legislature expressly makes use of a term coined by the case law of the Federal Constitutional Court as binding specification of the constitutional directive.

The requirement to ensure diversity of opinion in television established in Section 26 of the RStV requires the overall evaluation of the issue whether the licensing of a further programme attributed to a certain broadcaster may pose a threat to diversity of opinion. The KEK cannot fulfill this task without taking into account all factors that determine the power of influence on the nationwide public formation of opinion including the potential influence conferred upon the broadcaster by the new licence.

The state media authorities take the view that the legal presumption of Section 26(2) of the RStV is refuted for such full programmes where the broadcaster has allocated broadcasting time to a window programme of an independent third party according to Section 26(5) of RStV. The Interstate Treaty on Broadcasting, it is argued, recognizes window programmes as an instrument to refute the presumption of predominant power over opinion.

The Interstate Treaty on Broadcasting deals with window programmes in two different contexts. Pursuant to Section 26(5) of the RStV, the broadcaster of a full programme or an informational special interest programme must provide programme windows if this programme achieves a viewer rating of 10 per cent. Besides this, window programmes are one of the measures that may be adopted as remedy in the event that a company achieves predominant power over opinion. However, it does not follow from that, from the standpoint of anti-concentration law, programme windows neutralize those full programmes within which they are established. Such an understanding would have the consequence that the other measures of remedy provided in Section 26(4) of the RStV would become meaningless.

#### 75. Broadcasting time for independent third parties (Sections 26(5) and 31 of the RStV)

Section 36(2) of the RStV states that *"the KEK shall be consulted prior to the selection and licensing of broadcasters of window programmes"*. It is an important issue at which

procedural stage the competent state media authority must consult the KEK. The KEK has made it clear that the requirement of consultation also applies to the finding whether an applicant qualifies for a licence in the sense of Section 31(4) of the RStV. If, contrary to this, the KEK is consulted only after the respective decision of the state media authority the latter will be forced to make an explicit reservation as to possible future new considerations on this point (as a consequence of future objections by the KEK). Therefore the law should be amended insofar as

- “the KEK must already be involved at the stage of the finding whether an applicant qualifies for the licence. This is necessary in order to orient the licensing procedure for broadcasters of window programmes to the purpose of the law and to assure its reasonable application.”

In the respective procedures it has further been remarkable that, according to broadcasting times scheduled in the public tender documents and later arranged by the state media authorities, the “independent thirds” are largely relegated to late night-times. This seems to be justified as the state media authorities include periods of regional window programmes in calculating the minimum duration of a window programme prescribed by Section 31(2) of the RStV. The KEK could not without further inquiries ascertain whether the conditions for such inclusions - e.g. journalistic independence of the regional window programmes - were actually satisfied. It is for the responsible state media authority to carry out the public tender (see Section 31(4), sentence 1, of the RStV); thus the following revision seems worth considering:

- The KEK shall already participate in the procedure of public tender. This is important because the emphasis regarding the prevention of predominant power over public opinion is shifted from the independent thirds to regional window programmes.

#### 76. Section 27 of the RStV: Ascertaining Viewer Ratings

Viewer ratings, which are relevant for the legal presumption of predominant power over opinion, are often subject to considerable variation. That is why the KEK has repeatedly, in particular in case of lengthy procedures, taken into account decreases in viewer ratings that occurred after the expiration of the period of reference. This is in accordance with the object of preventive media concentration control. Conversely, increases in audience shares up to the time of the decision-making must also be taken into consideration. This applies in particular where these increases indicate an acute danger to the diversity of opinion and therefore precautionary measures are required.

Experience so far has shown that there is no need for a fundamental reform of the current model of ownership limitations based on audience shares (the so-called “Zuschaueranteilsmodell”) altogether. The practical difficulty in establishing the viewer ratings as accurately and representatively as possible seems tolerable in view of the fact

that it is the provision of section 26 (1) RStV rather than the audience share alone that represents the central criterion for determining predominance over opinion.

#### 77. Section 28 of the RStV: Attribution of programmes

"Comparable influence"

According to section 28(2) of the RStV, influence comparable to that of a participation in a broadcaster pursuant to Section 28(1) of the RStV shall be taken to exist where an undertaking *"regularly fills a significant proportion of the broadcasting time of a broadcaster with programme parts provided by it"*. In no case has the Commission found these conditions to be satisfied. One reason for this might be the difficulty the KEK encounters in investigating the relevant facts of the case. Usually the influence that is conferred by capital shares or voting rights will be gathered from the articles of association and possibly from other agreements between the parties involved. In contrast, the particular circumstances of the programme supplies cannot easily be assessed if only because they can vary considerably.

However, on the whole, the cases which have been decided by the Commission show that in the supervisory practice the provision of section 28 RStV has proven to be practicable. Critics had feared that the regulative bodies could be induced to conduct investigations into all business relations of the undertakings involved, as section 28 (2) allows them to take contractual relations into consideration. This fear has not proven to be well-founded. Also in this respect, section 28 (1) RStV provides sufficiently clear interpretational assistance for the specification of the legal term "comparable influence".

#### 78. Section 29 of the RStV: Changes in the ownership structure

Ownership changes put into effect prior to their clearance by the KEK

Section 29 sentence 1 RStV sets forth that any proposed change in the ownership structure of a broadcaster or an undertaking to which a programme is attributed shall be *"notified in writing prior to being put into effect"*. One cannot clearly infer from this wording whether it is permitted to put the change into effect immediately after having notified the competent state media authority or whether the undertakings must wait until the ownership change has been cleared. Under section 49 (1) no. 29 RStV, it is a regulatory offence not to notify a proposed change in ownership, for which the RStV stipulates that a penalty payment of up to DM 1 million may be imposed. The Commission has knowledge of no case, however, in which a fine was imposed. Much more severe are the legal consequences if a change has been put into effect which later is declared to be not acceptable: In this case section 29 sentence 4 RStV prescribes the compulsory revocation of the broadcaster licence, without the possibility of an exception.

How dubious this rule is can be demonstrated by the - for the present, purely hypothetical - case that a broadcaster achieves predominant power over opinion on account of an ownership change which has been put into effect promptly after the notification while, at the same time, deliberately delaying the procedure, for instance by not submitting certain relevant documents. This state of affairs is contrary to substantive Constitutional law and incompatible with the likewise constitutional requirement of an effective preventive concentration control. In view of this situation, the state media authorities and the Commission prove to be largely powerless. Therefore the Interstate Treaty on Broadcasting should, on the model of the preventive merger control under the Act against Restraints of Competition (GWB), make it clear that any proposed and notified change must not be put into effect prior to the declaration that the change has been found acceptable; furthermore, it should sanction this prohibition with the legal consequence of being provisionally invalid.

➤ **Proposed amendment**

“The Interstate Treaty on Broadcasting, while it has introduced a preventive control of changes in the ownership structure, does not provide a prohibition to put changes which have to be notified into effect. The KEK recommends the adoption of a prohibition of putting the change into effect prior to its acceptance which is patterned on the preventive merger control under the Act against Restraints of Competition. The Commission has therefore no objections against a rule providing that the decision on the acceptability must be made within a period of three months from receipt of the necessary information and submission of the applicant’s written statement (*"Vollständigkeitserklärung"*).”

#### **IV. Media Concentration Control in an International Comparative Study**

##### **ON THE PURPOSE OF COMPARATIVE OBSERVATIONS**

79. While media and transmission technologies are developing, the limits of the exclusive application of competition law for ensuring diversity of opinion become apparent: Radio, television and the press continue to operate in separate markets; nevertheless, the combination of businesses, particularly the multiple exploitation of digital content, threatens the diversity of opinion. This raises legal and constitutional policy issues whose emphasis is shifted - and which may be aggravated - by current developments. Under these conditions and owing to the convergence of communications systems, new corporate formations are emerging which increasingly disregard state borders and national borders and thus become active in the territories of various systems of law. Therefore it seems imperative to examine the supervisory instruments and regulations by which our most important neighbouring and partner states act against similar problems. The comparison has been confined to Great-Britain, France, Italy and the United States.

## THE RESULTS OF THE COMPARATIVE STUDY

80. In comparing the anti-concentration laws of the selected countries, one is prima facie confronted with a considerable host of regulatory concepts. This is the case for the issue of horizontal media concentration. In order to combat it some laws provide limitations on multiple ownership of licences or programmes (France, Italy), while others place restrictions on multiple participations (France), on the number of television households that may be reached (USA), the audience share (Great Britain) or the achieved proceeds from turnover (Italy). French law requires the holder of a national licence to be a pluralistic organisation in which different persons or enterprises hold shares and thereby makes use of the regulatory instrument of internally pluralistic "*Anbietergemeinschaften*" which in Germany has proved to be of rather questionable value. With regard to vertical integration, no consistent approach of the different legal systems can be found, either. Only in Italy quantitative restrictions on interests exist, regarding advertising agencies and programme suppliers. In the other countries, connections between the links of the production and distribution chain only become pertinent if they amount to the control of a broadcaster and thus meet the conditions of an attribution rule. Marked differences can also be observed with respect to the implications of constitutional law. In Great Britain alone, rules superior to legislation have hardly been of significance so far. In the US, the Supreme Court has ruled on the constitutionality of many elements of broadcasting regulation in general and anti-concentration provisions in particular and, as a rule, held them to be consistent with the fundamental rights of freedom of communication. In France and Italy - similar to Germany - anti-concentration rules are based on the binding directives for the legislature which the Constitutional Courts' case law has derived from the basic human rights to freedom of opinion and freedom of broadcasting. In the European countries, unlike the US, a system of Public Broadcasting Service (PBS) or "*öffentlich-rechtlicher Rundfunk*" survives which is committed to the professional standards of broadcasting journalism; it continues to meet with a very good response with viewer ratings ranging from a third to a half. All the same, this is nowhere being considered as a reason to relax or even rescind the anti-concentration rules regulating commercial broadcasters.

81. More striking, however, are the legal tools that the various legislation has in common. All of them include transparency requirements and attribution rules which are intended to prevent the substantive rules being circumvented by interlocking strategies or by involving nominee shareholders. More important, though, are the common grounds upon fundamental issues. Here the essential finding is that all selected legal systems have introduced a specific anti-concentration law that applies to broadcasting in general and is mainly concerned with television. Therefore the call for abolishing the media-specific anti-concentration law and replacing it with a general law against restraints of competition, which regularly comes from, above all, the big media companies is not confirmed in our legal comparison. On the contrary, all countries studied here have adopted provisions to curb predominant power over opinion by cross ownership, particularly by ties between broadcasting and the press. The purpose of these rules - maintaining diversity of opinion - cannot be achieved by the current instruments of cartel

and merger control law, since broadcasters and the press usually operate on different markets. The provisions to check horizontal concentration and multimedia interlocking can by now be considered generally accepted principles not only of European, but of all highly developed broadcasting orders.

82. The comparison does not confirm the complaint that German media enterprises are being substantially hindered by anticoncentration rules, whereas their foreign competitors increasingly gain freedom of action due to deregulation of their domestic broadcasting laws. It is true that in the United States and in Great-Britain former restrictions have partly been removed. But in both countries this has occurred starting from a much higher standard of regulation. In Great-Britain, from the outset the division of the broadcasting market into regions has led to considerable restrictions; it has been feared that these might impede the establishment of internationally competitive enterprises. In the US, as well, the tradition of granting licences strictly at the local level has brought about a widespread fragmentation of the markets which is only partly bridged by networks and conglomerate concentrations. The point at issue there is to level out inconsistencies in the statutory standards depending on which type of transmission is regulated. To that end, deregulation of terrestrial broadcasting is required, as well as some regulation of satellite transmission and, above all, cable transmission - as has been the case with the introduction of the must-carry rules.
83. On the contrary, it can be stated that Germany, together with Italy, not only shows an exceptionally high level of media concentration, but also has set the lowest barriers against the further expansion of the big media companies. The following aspects are particularly remarkable:
- 1.) The maximum viewer rating of below 30 % is a very high threshold compared with that of other legal systems. In Great Britain, holdings are restricted to 15 % of audience share. The United States is taking another path: There no broadcaster may obtain a licence enabling him to reach more than 35 % of TV households in its area of transmission; the nationwide transmission of television programmes is generally inadmissible.
  - 2.) The Interstate Treaty on Broadcasting further differs insofar from the other sets of rules studied here as it does not explicitly provide for a limitation of conglomerate or diagonal concentration, i.e. cross-ownership restrictions. Section 26 (2) RStV may require to take into account media-relevant related markets, but it does so primarily in the limited context of the issue whether the presumption of predominant power over opinion applies in case the viewer rating is slightly below 30 %. However, the substantive rule of section 26 (1) RStV for the specification of predominant power over opinion also leaves scope for the consideration of cross-ownership relations.
  - 3.) In Germany, fact-finding in the course of anticoncentration procedures is impeded not only by the circumstance that the KEK is integrated in the organisation of the respective competent state media authority, but also by the current impossibility to exchange information with the Federal Cartel Office;

obstacles to this are the confidentiality requirements under section 203 (2) no. 1 of the Criminal Code and section 24 RStV. French law prescribes such exchange of information. In the US, the Antitrust Civil Process Act allows the Department of Justice to communicate the content of documents obtained in the course of its investigations to other authorities; they may use them in their pending procedures. A recent court decision confirms that this also applies to the FCC. Following this example, the German cartel and broadcasting authorities should be enabled to exchange such information that is relevant for pending procedures.

84. In view of the problems that vertical integration and the new types of communication and transmission techniques, in particular digital television, entail, so far the comparison does not reveal any concepts which would appear mature and consistent enough to be recommended for consideration in the necessary reform of German law. This also applies for the regulative approach towards digital television in Great-Britain: It is interesting and impressive, but it does not suggest itself as a model for Germany if only because in these parts, the point at issue is not so much digital terrestrial transmission, but rather the expansion of the digital cable networks. Finally, it is worth noting that up until now no country has succeeded in working out a regulatory concept treating with the development of convergence. In the light of the legal comparison, it is not plausible for the present to demand relaxation of the anticoncentration rules on account of the convergence of technologies and services.