

Turning from a Television-Centred View to a Broader Focus on Media

Requirements for a Present-Day Regulation to Secure Plurality of Opinion in the Media

**Summary and Conclusions of the Fifth 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 im Medienbereich, KEK)

1 Summary

Media Concentration and Ensuring Plurality of Opinion

Under the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag* – RStV), the KEK is responsible to exclusively assess issues of securing media plurality in nationwide private television, in order to effectively prevent the risk that one or several companies gain predominant power over public opinion. Besides its role in broadcasting law procedures, the KEK has also the legal mandate to regularly report on the development of media concentrations and on the measures to secure plurality of opinion in the sector of private broadcasting. In this report, the KEK assesses the relevant developments in the media sector and presents the findings from its application practice of media concentration law. A particular focus of this refers to the changes in media usage in the course of digitisation and what conclusions can be drawn from them that might contribute to a reform of media concentration law.

Journalistic and Economic Competition

A constituent element of diversity of opinion is journalistic competition, i.e. competition of media companies in the field of journalistic content. This competition is embedded in an economic environment where companies strive to optimise market shares and returns on investments. This economic target system of media companies enhances a tendency for cost reduction and thereby enhances a tendency towards business concentrations and the production of mainly mass-attractive content of a uniform nature. As a consequence, plurality of opinion is under threat.

The conditions for an independent, sometimes controversial, way of opinion-formation are generally more favourable if media companies are economically independent of each other and suppliers of niche products have chances to gain access to the market. This is not intrinsically guaranteed in an increasingly economised environment. The aim of securing plurality of opinion can only be achieved under the condition that diverse voices have the chance of being heard on an equal basis. The concentration control according to the German Interstate Treaty on Broadcasting aims at securing journalistic competition and refers to audience shares as the most important criterion. In contrast, the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) focuses on the economic competition and requires the assessment on the dominant positions which are created or strengthened. By addressing media-relevant related markets the Interstate Treaty on Broadcasting takes the alignment of journalistic and economic competition into consideration.

The focus of the media concentration control in private television are the broadcasters. With regard to concentration tendencies, media concentration law as well as the law against restraints of competition distinguishes between horizontal, vertical and diagonal concentration. Horizontal concentration takes place when companies within one market, which act on the same level of the value chain, cooperate or merge. Vertical concentration means the integration of upstream and downstream levels of the value chain within a group of companies. In case of diagonal concentration, a company becomes active by a participation or merger in a completely different market and on a quite different level in the value chain (so-called cross-media ownership).

Driven by digitisation, the media sector is undergoing changes. Digitisation pushes the reorganisation of the value chains, accelerates media concentration and creates “integrated” media companies. The most relevant practical consequence of digitisation is

convergence, i.e. the merging of technical communications structures, markets, products and media content, as well as devices. As a result, vertically integrated media groups emerge which have brought together in one group many elements of the value chain, in order to achieve maximum control over the exploitation of the contents. Thereby the broadcasting of programmes is often no more than one aspect of a media company's multimedia strategy.

Constitutional Basis

Article 5 of the German Constitution (*Grundgesetz*) guarantees freedom of the press and freedom of reporting by broadcast and film. The German Constitutional Court (*Bundesverfassungsgericht*) has interpreted this provision in fourteen key rulings, stressing the importance of broadcasting for public opinion-formation as well as its functions within the media landscape. The Court has consistently stressed that freedom of broadcasting, as enshrined in the German Constitution, serves the free, individual and public opinion-formation and is thus a basic condition for a functional democracy. The Court warns of the "possibilities of a concentration of power over opinion", bearing in mind the negative consequences for society if broadcasting, with its wide range of impacts and functions, lies in the hands of a few owners. After all, the obligation to secure freedom of broadcasting which stems from Art. 5 (1) (2) German Constitution aims at an order that ensures that in broadcasting the diversity of existing opinions will be expressed as broadly and as fully as possible. Most recently in its 14th decision on broadcasting of the 25th March 2014, the Court again underlined the crucial role of broadcasting for the formation of opinion and of political will. The Court points out that the potential influence of broadcasting gains even further importance by the fact that new technologies have brought along a widening of choice and a differentiation of the programme offering as well as distribution forms and distribution channels that have made new programme-related services possible. Consequently, according to the Court, the requirements for the broadcasting laws to secure freedom of broadcasting are not outdated by recent developments of communications technologies and media markets.

Media Concentration Control under the Interstate Treaty on Broadcasting

Media concentration control is a legal obligation that directly follows from Article 5 of the German Constitution. This duty obliges the German legislator to provide for a "positive order" for broadcasting. Material, procedural and organisational measures should prevent the creation of predominant power over public opinion. The entire spectrum of existing opinions should be represented in broadcasting as broadly and comprehensively as possible. It must be prevented that one single broadcaster or channel gains a dominant influence on the formation of public opinion. Referring to Article 10 European Convention on Human Rights and its interpretation by the European Court of Human Rights, the German Constitutional Court also stresses that the Convention States are obliged to secure plurality in broadcasting by legislative measures. They must in particular prevent this plurality from being undermined by the circumstance that an important economic or political group or the state can take a dominant position over (or within) a broadcasting corporation that allows them to exert pressure on broadcasters. Media-specific concentration control aims at preventively countering the creation of predominant power over public opinion because adverse developments could be reversed, if at all, only to a certain degree and with great difficulties.

The danger of concentration of power over public opinion arises if opinion holders that own transmission frequencies and financial means are predominantly involved in shaping public opinion. In its most recent decision the Constitutional Court pointedly stresses this danger of multimedial predominance over opinion.

In order to implement these Constitutional Court's requirements, the German States signed the "Interstate Treaty for the Reorganisation of Broadcasting" (*Staatsvertrag zur Neuordnung des Rundfunkwesens*) in 1987. In the meantime 15 Amendment Treaties to this Interstate Treaty have further developed nationwide minimum standards in the areas of youth protection and advertising, programming principles and securing plurality of opinion. A declaration of the German States in the protocols to the Amendment of the Interstate Treaty of 2010 expresses their intention to evaluate the existing rules of the Interstate Treaty on Broadcasting on the securing of plurality of opinion in television and on media concentration. This evaluation shall include the rules which can contribute to a diversity of local and regional broadcasting offerings, particularly in those German states where no regional window programme has been established.

The Relation between Competition Law and Media Concentration Law

Competition law is designed to prevent the creation or strengthening of market-dominant positions in the context of merger control. Only external growth of companies is covered. According to Article 74 (1) No. 16 German Constitution, the Federal State (*Bund*) is responsible for competition legislation. The rules have been laid down in the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*).

The function of media concentration law directly stems from Art. 5 of the German Constitution. Its aim is to secure diversity of opinions and in particular to prevent the creation of predominant power over opinion. It includes both internal and external company growth. The legislative power of the German States is based on Articles 30 and 70 of the German Constitution. Media concentration law is enshrined in the Interstate Treaty on Broadcasting and Telemedia (*Staatsvertrag für Rundfunk und Telemedien, Rundfunkstaatsvertrag – RStV*).

Both competition law and media concentration law aim at hindering uncontrolled scopes of action. However, the purpose of competition law regulation is to maintain economic competition but not to secure plurality of opinion. Therefore the Constitutional Court regards the application of the merger control under competition law to be a permissible but not a sufficient instrument for securing diversity in broadcasting and preventing predominance over public opinion in this area. Thus, besides the merger control under competition law the media-specific anti-concentration regulation is imperative.

In addition, prevailing economic theory points to the necessity of a specific media concentration control in television. The reasons lie within the particular characteristics of television as a public good in the economic sense so that, as a consequence, market failure cannot be healed by categories of competition law alone.

European Law

Community legislation plays an increasingly important role in the field of media law. However, the European Union has only limited powers of regulation in the areas of culture and media.

Therefore presently there is no legal basis for European Union powers to act in this field, despite perhaps the necessity of such power being required. Moreover, there is no

objective need to adjust the European Treaties in such a way as to create such responsibilities. The existing instruments of secondary law, particularly the Audiovisual Media Services Directive and the European competition law, adequately protect fundamental freedoms in the common market.

The Green Paper on Convergence as well as the Commission's and the European Parliament's findings give reason to adjust the existing regulations, in particular with regard to the Audiovisual Media Services Directive. This will be sufficient to meet the requirements of the European single market. The European single market, and above all the European single digital market, can only create the basic conditions for media freedom and plurality. This lies in the double nature of media to be both cultural assets as well as economic assets and, as cultural assets, to depend on the idiosyncrasies of the respective member state from which they originate. This will not change in the foreseeable future, notwithstanding the digitisation of society and of the single market.

Development of Media Usage

The focus of the present media concentration law is on television. For a while, however, this centering on television ("*Fernsehzentriertheit*") has been criticised. Nonetheless it can be observed that television, with an average viewing time of 221 minutes per day, per person in the year 2013 (2000: 190 minutes), still remains by far the most important mass medium with the highest usage time and thereby remains the leading medium. In addition, several studies have stated that people appreciate television as the medium that is by far the most versatile and in terms of quality the most reliable.

In spite of the fact that a change in media usage can be observed, particularly among young people, nevertheless the replacement of television by the Internet, which has been announced for several years now, has not yet taken place. Even the younger age groups presently still spend significantly more time with television use than with being online (limiting the latter to the usage for entertainment and information search, without taking their communications into account). Particularly, when comparing the usage time of different types of media it must be noted that the Internet, due to its heterogeneous nature, differs from the traditional media television, radio and the press. The Internet does not constitute a uniform medium but rather provides the infrastructure for a variety of different types of services which may considerably vary with regard to their structure, objectives, functioning and effects.

From the perspective of securing plurality, however, it must be noted that a major part of the media offerings that are used via the Internet are created by the traditional media companies. These media contents may be transmitted and consumed via the Internet, but the (journalistic) content still comes from traditional press and broadcasting companies. Therefore, when assessing the relevancy of the Internet for public opinion-formation, one cannot simply refer to the overall time of Internet usage as such.

According to the concept of the Interstate Treaty on Broadcasting, the audience share is not the only indicator of predominance over public opinion. Rather, in order to secure plurality of opinion in television, influences on opinion-formation by other media and markets must also be taken into account. Thus a question arises how to weight each different type of media when interplaying with the other types, particularly in the comparison with television. In this respect, not only the KEK's concept but also the "media plurality monitor" ("*MedienVielfaltsMonitor*") developed by the Bavarian State Media Authority as well as the study by Hans-Bredow Institute (HBI) "Information Repertoires of the German Population" ("*Informationsrepertoires der deutschen*

Bevölkerung’) deal with the assessment and weighting of different types of media. Ultimately both the HBI’s analysis and a study of the market research institute TNS Infratest in the context of the MediaPluralityMonitor come to similar conclusions which support the current weighting factors used by the KEK.

Concentration in the Private Broadcasting Sector

Development of the Television Offering

The television offering in Germany is very varied. At the end of the year 2013, television licences were granted for altogether 180 nationwide private television channels. 141 channels were actually broadcast, including 20 so-called full programmes and 121 special-interest channels. Additionally, 22 full or special interest channels of the public broadcasters, 233 statewide, regional or local television channels, various teleshopping channels as well as several German-language and foreign-language channels with foreign licences were on air. At the end of 2013, 75 pay-TV channels with a German licence were on air, with more than 6 million of pay-TV subscribers. Thus, almost every second channel in nationwide private television is a pay-TV channel.

Measured by the viewers’ television use, oligopolistic market conditions can still be observed. In nationally-transmitted television the four broadcasting groups ARD, ZDF, Mediengruppe RTL Deutschland and ProSiebenSat.1 Media AG have established themselves. Measured by the average viewing shares, their programming offerings accounted for about 90 % of television usage. Thus the demand for TV programmes is still covered by a small number of television broadcasters, although the number of nationwide television channels has risen over this period. However, the market entry of new channels, which in most cases are adapted to target groups, has led to a growing fragmentation of the television market. The big channels continue to be market leaders, but their market shares remain static or indeed have decreased. Besides this, linear television loses more and more (particularly young) audiences to the Internet. Therefore the broadcasters increasingly transmit their content via the Internet, in an attempt to compensate their losses of audience reach in the field of linear television.

Development of Groups of Broadcasters

RTL Group remains uncontestedly the largest European entertainment group. During the period under review two new nationwide television channels went on air: the free-TV channel RTL Nitro and the pay-TV channel Geo Television. RTL Group’s growth strategy continued to set one main focus on the expansion of other sources of revenue independent of advertising as a second financial pillar. This is mainly realised by further developing the content production (FremantleMedia) and the diversification businesses (music, DVDs, licensing rights). In the digital area, RTL Group strives to produce a strong cross-platform presence of their brands and content on all end devices. One focus lies on providing non-linear video on demand services. This broadcasting group reaches the highest audience shares in German nationwide television (2013: 24.6 %), followed by ProSiebenSat.1 Media AG (2013: 19.0 %).

The financial investors KKR and Permira which had acquired **ProSiebenSat.1 Media AG** at the beginning of 2007 gradually sold their shares again. In January 2014 they completely divested themselves of their participation. Prior to this, they had already sold the European television group SBS Broadcasting Group, which they acquired in mid-2007. For the first time ProSiebenSat.1 Media AG is not controlled by one or several

shareholders. The group is concentrating once more again on the German-speaking television market. They have changed their channel portfolio by the launches of channels sixx, Sat.1 Gold, ProSieben MAXX and ProSieben FUN, the cessation of 9Live and the sale of N24. On the other hand, with regard to programme production and rights trading, the group has expanded their international business by founding the business branch Red Arrow. Besides this, ProSiebenSat.1 Media AG increasingly relies on complementary business areas, such as investments in start-ups which are granted advertising time in the group's television programmes in return for accruing shares in the start-ups or for sales.

In the period under review, the **Disney Group** took over the broadcaster of the channel "Das Vierte" and in January 2014 relaunched it as a free-to-air children and family channel named Disney Channel. This channel now competes with the channel Super RTL in which the Disney Group holds half of the shares.

Constantin Medien AG has simplified its corporate structure with regard to their television subsidiaries. All channels are now broadcast by Sport1 GmbH, which also operates the online sports portal sport1.de. The distribution of sports content via digital platforms has increasingly gained importance. The production subsidiary PLAZAMEDIA TV & Film Produktion GmbH was due to be taken over by its largest customer Sky Deutschland Fernsehen GmbH & Co. KG. This company also intended to acquire a 25,1% share in Sport1 GmbH. The transaction was approved by the German Federal Cartel Office as well as the KEK, but Sky Deutschland no longer intends to complete this transaction.

In 2013 the **News Corp.** group underwent a restructuring by which it was split into the film and television group Twenty-First Century Fox, Inc., on the one hand, and the print and news services group News Corporation on the other. Twenty-First Century Fox, Inc. holds an indirect interest in Sky Deutschland AG, the holding company of the pay-TV broadcaster and platform operator Sky Deutschland Fernsehen GmbH & Co. KG. It has successively increased its shares to more than 50 % and thus recently sold this participation to British Sky Broadcasting Group plc. (BSkyB), in which it holds 39.14 % of share capital. Twenty-First Century Fox, Inc. now runs three channels under the brand National Geographic for the German market and thereby competes with the Discovery Group.

Discovery Communications, Inc. has started TLC, its second free-TV channel in Germany along with DMAX. TLC is directed towards the target group of women. However, Discovery Group has also shut down the two German pay-TV channels Discovery HD and Discovery Geschichte. By its majority stake in the Eurosport group that in the German market operates the free-TV channel Eurosport as well as the pay-TV channel Eurosport 2, Discovery Group has expanded its position in the European pay-TV market. Besides this, it has acquired the north-European television holdings of SBS Broadcasting Group from ProSiebenSat.1.Media AG.

Time Warner has expanded the pay-TV portfolio of its German subsidiary Turner Broadcasting System Deutschland GmbH. Since 8th May 2012 it broadcasts the pay-TV channel TNT Glitz, which is mainly focused on a female audience, in addition to Boomerang, Cartoon Network, TNT Film and TNT Serie. Unlike the "female channel" TLC of the Discovery group that relies on non-fictional entertainment, TNT Glitz is composed of a programming mixture of television serials, feature films and documentaries. In June 2014 Time Warner split off its print division Time, Inc., which is, in effect, comparable with the restructuring of News Corporation. Since then the shares

of the film and TV group Time Warner, Inc. and those of Time, Inc. that focuses on magazines are being traded separately on the stock exchange.

Since the takeover of the media group **NBC Universal** by the cable and internet group Comcast Corporation from the General Electric Company in 2011 NBC Universal is controlled by Comcast Corporation. After further acquisitions of shares, Comcast Corp. now holds almost all voting rights of NBC Universal. Under its aegis the film and TV activities of NBC Universal have been united with the parent company's distribution network. Comcast Corporation also plans the take-over of the branch Time Warner Cable. This would mean a further increase of the concentration process in the United States.

For **Viacom, Inc.** and their German TV holdings, no relevant changes were to be noted in the review period.

Programming offerings of **platform operators** are at the interface between broadcasting and distribution. Presently only Sky Deutschland Fernsehen GmbH & Co. KG holds its own broadcasting licences. In addition, the KEK attributes third party channels to Sky Deutschland TV in its role as a platform operator. The same applies with regard to the Kabel Deutschland group as well as, to a limited extent, Unitymedia Kabel BW. The attribution of these TV channels is due to provisions in the underlying platform and distribution agreements with the broadcasters that allow the platform operators a journalistic influence on the programming content. In some cases both Sky Deutschland and Kabel Deutschland have signed new platform agreements which do not afford them such capabilities to exert influence, and consequently the attributions of the respective third party TV channels to these platform operators have ceased to apply.

Links between Television Broadcasters and other media-relevant related Markets

When assessing a company's power over public opinion, its position on media-relevant related markets must be taken into account. Interlinkages with other media-submarkets deserve particular attention as they bear the risk of multiplying journalistic influence in the form of multimedia power over opinion. Vertical combinations may be problematic under the aspect of diversity, in the case that the horizontal concentration on the upstream and downstream markets has progressed to the point where the market entry of competing TV channels to the procurement markets or the sales markets is restricted or endangered. In terms of the participating companies in German private TV broadcasters, Bertelsmann Group is the group that is most extensively integrated with other media markets.

Audience Markets

Radio

Audio broadcasting is still one of the most important mass media in Germany. At present, about 57 million people switch on the radio every day, which accounts for 77.3 per cent of the population. Although over the long term, a continuous reduction of radio usage has become apparent, the radio has, all in all, remained at a high level of usage in the year 2014, with an average listening time of 181 minutes per day and an average time of having the radio turned on of 234 minutes per day. Among young audiences, the radio is presently facing fierce competition by other media offerings. However, the

Internet as a possible transmission channel opens up new opportunities. Thus in 2014 already 28 per cent of the online users listened to live radio on the Internet.

It is difficult to assess the concentration in the private broadcasting market, due to the lack of documentation of ownership structures and the fragmented market situation. Moreover, the various federal broadcasting laws of the German states provide different legal requirements with regard to media concentration and diversity.

From the KEK's perspective, it is mainly the broadcasting holdings of such companies that are engaged in the national TV market or affiliated with nationwide private TV broadcasters which are relevant. In this regard, Mediengruppe RTL Deutschland as well as Hubert Burda Media and Madsack Mediengruppe are playing important roles. Despite each of these companies holding various stakes in radio broadcasters, they have so far not achieved a position on a national level that would be comparable to the degree of concentration which the leading companies possess in the television or newspaper markets. In addition, the regional or local radio markets are still characterised by a plurality of broadcasters. However, there are only a few private regional or local channels that have no large radio holdings as stakeholders.

Newspapers

The daily newspaper market is affected by growing horizontal concentration. Few publishing groups achieve high market shares. Besides, the number of areas with newspaper monopolies is still increasing. The highest concentration can be observed in the market of over-the-counter newspapers which depends on only five providers. In this regard almost four fifths of the whole circulation of sold copies relate to Axel Springer SE. The nationwide "Bild"-Zeitung journal of Axel Springer group still holds an exceptional position, achieving a large reach in readership despite of a strong reduction in circulation.

A further increase in horizontal concentration by mergers, which could also adversely affect the plurality of opinion, is restricted by the control over press mergers. The cross-over ties between the daily press and nationwide television still show no considerable negative effects on the plurality of opinion.

Popular Magazines

The largest publishers of popular magazines continue to hold interests also in nationwide private broadcasters. In particular, Bertelsmann combines strong market positions in both sectors, generating opportunities for the cross-media exploitation of content and for cross-promotion. After the take-over of the channel N24, the publishing house Axel Springer is again active in the nationwide private broadcasting. This publisher has restrained its activities in the market of popular magazines by selling some high-circulation magazines. Axel Springer justified this with its digitisation strategy and a new strategic orientation. In addition, the other publishing groups increasingly have brought digital editions of their magazines onto the market. In the area of online news sites, particularly the services "Spiegel Online" "Focus Online" and "stern.de" are frequently visited.

TV Magazines

In the TV magazines market significant changes have occurred. The publishing house Springer has completely withdrawn from this market. On the other hand, Klambt Media Group has entered the market so that as a result there are still four publishing houses

active in the segment of TV magazines. The Federal Cartel Office has found this to be a market-dominant oligopoly. Two of these publishing companies, Bauer and Burda, hold stakes in nationwide private broadcasters. Generally, the affiliation with a TV magazine publisher opens the possibility to influence the readers' choice of programmes. Therefore holdings in this sector have to be taken into special consideration when making an assessment under media concentration law. At present it cannot be assumed that TV magazines have already lost significantly their relevance as a source of information alongside the Internet and the electronic programming guides. They still achieve high circulations and high readership figures.

Online Media

Television programmes and formats are increasingly distributed as video-on-demand or streaming services via the Internet. The traditional media usage is changing, particularly because of the growing flexibility by non-linear TV services and due to mobile devices. Already 75 per cent of Internet users at least occasionally retrieved moving images online in 2014. This accounts for a 10 per cent growth compared with the year 2010. Nevertheless, this usage is still not regarded as routine. About 14 per cent of the whole population views TV programmes and videos online on a time-delayed basis once a week, and only one per cent does so every day. Altogether, 94 per cent of the usage of moving images is through traditional television and only 6 per cent via online live TV, time-shifted television or online video. In terms of people aged under 30 years this proportion is 85 per cent (television) to 15 per cent (online videos).

The large media companies pursue cross-media strategies on the Internet. In various ways they are present online or associated with other companies there. On the one hand, they transfer their traditional media brands into the Internet (diversification). Thereby online professional journalistic content consists mainly of contents that are also published in traditional media in an identical or similar manner or that have already been published. On the other hand, the companies invest in a broad spectrum of online offerings that no longer have direct connections to their traditional business models, for example in e-commerce services.

Local Television in Urban Areas

In terms of local television in urban areas („Ballungsraumfernsehen“) the opportunities to develop in the market seem to be limited. Even if in almost every urban area, as defined by Nielsen, regional television is presently being broadcasted, nevertheless in the two most recent years five local television broadcasters were threatened by insolvency, of which three indeed had to declare themselves to be insolvent. Two channels had to cease operation with no new channels in the offing. With regard to media concentration, local television in urban areas is presently of minor importance. In fact, local TV in urban areas that focusses on local and regional coverage is to be regarded as a contribution to the plurality of opinion. Corporate links between nationwide television broadcasters and local urban television exist only to a very limited extent.

Teleshopping

Teleshopping is currently one of the fastest-growing divisions of the television business. The market is dominated by QVC, HSE24, sonnenklar.tv, 1-2-3.tv and Channel21. At present neither of the two large television groups RTL Group S.A. and ProSiebenSat.1 Media AG are active in this field. Since the launch of the first teleshopping services in

Germany in 1995 the teleshopping operators have evolved into modern multichannel providers. Their growth is mainly due to the increasing importance of the Internet, social networks and smart TV as well as mobile apps as channels of distribution and communication.

Upstream and downstream markets

Fictional Programming

The duty to secure the plurality of opinion also implies including the vertical integration of broadcasters with production companies and owners of film and sports rights in the assessment of media concentration. From the broadcasters' perspective, the market for programming content is an important procurement market. The attractiveness of the programming is a key factor in the competition for viewers and advertising customers.

Fictional programming still constitutes a major part of the programme offering as well as of the TV usage, in spite of a growing significance of non-fictional entertainment formats such as casting shows and cooking shows. Programme analyses show that the free-TV channels that were examined have expanded their fictional content over the long-term. The broadcasters usually produce their content by way of commissioned production, while the proportion of purchased productions within the whole programming of free-TV channels is mainly on the decrease.

In the market of TV productions a strong tendency towards internationalisation and consolidation can be noted. TV production conglomerates with no ties to TV broadcasters emerge that exploit their rights catalogues internationally and adapt formats for the different local markets. Production companies, rights trading companies as well as television broadcasters all pursue cross-media exploitation strategies that include the licence rights for cinema, video on demand, distribution and sale of DVD/Blu-Ray discs, pay-TV and free-TV as well as computer, video and mobile games, books, sound recordings, etc. In particular, the producers of fictional entertainment can profit from an increased demand from new digital television broadcasters and platform operators. In this regard the operators of video-on-demand platforms, such as Netflix and Amazon, also act as clients for exclusive fictional productions. However, the professional TV producers as well as the broadcasters also face competition by online video platforms such as Youtube and so-called multi-channel networks which push the professionalisation of online video productions.

The TV production market is rather fragmented. However, more than half of the overall turnover in TV and film productions is generated by the ten largest production companies. Among them, the five most profitable companies are all integrated with TV broadcasters. The ten largest companies account for 40 per cent of the volume of all commissioned TV productions. The integrated production companies have achieved a production volume that was on average almost five times as high as that of the independent companies. RTL Group (or UFA Group) is the market leader in terms both of turnover and of production volume. Market surveys have shown that on average the TV producers have generated more than half of their turnover with regard to one single TV broadcaster. Given the great number of producers opposed to a comparably low number of broadcasters, a producer's market position can be secured by durable and stable customer relations. In this regard, companies which have ties to the broadcasters are at a distinct advantage. This can impede the market entry of new independent production companies.

The market for purchased fictional programming continues to be characterised by lack of transparency. As a rule, the prices for licence purchases are not published. In part the television broadcasters achieve such programming directly from production companies, especially from large Hollywood Studios, and in part they achieve them via distributors. The large broadcasting groups acquire attractive programming content by way of package deals with the major US-American studios that secure them long-term access to new feature films, US series and film libraries. ProSiebenSat.1 Media AG and RTL Group have changed places as contractual partners of several major studios. Online platform operators such as Netflix have entered the market so that tougher competition for programming rights and an increase in prices can be expected.

Children's Programming Rights

Children, i.e. viewers aged 3 to 13 years, are an important target group for broadcasters and the advertising industry. This is because commercial messages have a greater impact on children due to their higher suggestibility. Besides this, the television viewing habits can be shaped in early years in favour of certain broadcasters or broadcasting groups.

The channels Super RTL, RTL and RTL II, which are under the aegis of the RTL Group, reach viewer ratings among children of 36.4 %, measured by the overall viewing time from 3:00 AM to 3:00 PM. The channel Super RTL continues to be the market leader, followed by the public service channel Kinderkanal and the channel Nickelodeon. Disney Channel is a new free-to-air television channel competing for the target group of children. RTL Group's strong position in the children's programming segment is important with a view to potential long-term audience loyalty to this group's channels.

In addition to the free-TV channels there is a multitude of digital pay-TV children's special interest channels. Mainly the US-American media groups Disney, Viacom and Time Warner are represented here. In addition, the Belgian Studio 100 N.V. and Your Family Entertainment AG are active in the German market, which both are vertically integrated with production and licensing companies.

Although children increasingly use the internet, this has not yet resulted in television significantly losing its importance. The average viewing time of the 3 to 13 year olds has slightly diminished, nevertheless television remains the undisputed leading medium also among children.

Sports Rights

Sport plays an essential role as an object of opinion-formation, identification and public communication. Rights to broadcast popular sports events are of high strategic importance for the broadcasters, just as the rights to fictional premium content. This particularly applies to the area of pay-TV.

In the course of digitisation the number of special-interest sports channels and services has substantially increased. Besides the football channels of pay-TV provider Sky Deutschland and the free-to-air channels that cover a large variety of sport disciplines (Eurosport, Sport1 and Sportdeutschland.tv) there has been a growing number of TV channels which dedicate themselves to marginal sport or sporting events abroad. In this respect, the Internet as a means of transmission offers the opportunity also for sports associations which suffer from a lack of media attention to present their sports disciplines to a wider audience and to achieve financing by sponsors. From the perspective of diversity this development is basically positive. However, when live

coverage is included in online services one has to ask whether this still constitutes a licence-free so-called telemedium service or is rather to be regarded as a broadcasting channel and thus subject to the requirement of a broadcasting licence. In spite of the fact that the offering of on-demand services in the sports segment is growing, linear television still remains the primary medium for viewers as well as for the clubs and sports associations.

The market for sports rights is marked by very intense competition with regard to the most popular sports disciplines. This particularly applies for the acquisition of football rights. The pay-TV rights to the national football league (Bundesliga) until the season 2016/2017 for the transmission means cable, satellite, terrestrial transmission, iptv, web TV and mobile transmission are owned by Sky Deutschland. This demonstrates that splitting up rights packages must not necessarily lead to a greater diversity of providers, as one provider is not prevented from acquiring all packages.

With regard to the marketing of media rights to sporting events the sports rights agencies are losing importance. Thus the television rights to three of the most significant television sports events, i.e. the German national football league Bundesliga, the FIFA World Championship and the UEFA European Championship are all marketed by the sports associations themselves. Of the sports rights agencies that market media rights in Germany, SportA (ARD, ZDF), the TEAM group (Constantin Medien AG) and UFA Sports (RTL Group) have corporate links with national TV broadcasters. They face strong competition particularly from the agencies Infront, Sportfive and IMG.

Information and News Material

Television is still the main source of information concerning current events in politics and public life and therefore has a strong impact on society. Nevertheless, the importance of the Internet as a source of information is growing, in particular for the young user groups. The services on the Internet include not only news coverage by single media such as newspapers or news channels and news agencies, but also search engines and online portals for journalistic content or for content which has been produced by the users themselves who share them online.

News agencies are affected by the growing competition from online information services as well as by declining circulation numbers affecting their major customers: the daily newspaper publishers. Therefore the agencies try to win the operators of the new digital platforms as customers by offering them adequate multimedia packages. Apparently due to the mobile news consumption, increasingly short news items are being produced. In the market of news agencies, Deutscher Auslands-Depeschendienst (dapd) were an important competitor of the market leader Deutsche Presse-Agentur (dpa) but has now withdrawn from the market.

The large broadcasting groups continue to co-ordinate their production and exploitation of news formats. With respect to the ProSiebenSat.1 channels SAT.1, ProSieben and kabel eins, N24 plays the role of the central information service provider. N24 now belongs to Axel Springer SE. The RTL Group's channels are supplied with news and information formats by the group-owned infoNetwork GmbH.

A centralised supply of news material to TV channels or merely a joint use of the same information sources both bear the risk of a homogenisation of content and thereby endanger diversity. There is a higher chance to communicate pluralistic information if several independent companies are active in this field. The potential negative effects on diversity are smaller as long as the media themselves edit their news items or reports.

Risks for diversity also arise when broadcasters that are not vertically integrated with owners of rights to information and news material have only limited access to these rights or their access is denied by exclusivity agreements. However, presently such tendencies cannot be noted. The broadcasters can avail themselves of a large choice of agency services and a variety of potential information sources. Moreover, the market for the provision of information and news material is particularly shaped by diverse cooperation systems.

Digital Television

Digitisation of the television households is progressing. At present about 80 per cent of the German TV households can watch digital television. Digital TV channels account for more than 70 % of the TV usage. The digitisation of TV transmission entailed a significant expansion of the offering and thereby has resulted in more diversity. Whereas in 2000, 60 private German-speaking channels were nationally licensed, by the year 2013 this number rose to 152 channels. The broadcasters increasingly transmit their programmes via the Internet by making them available either on their own web portals or in online video stores operated by third parties. Online distribution is regarded as a growth market, in addition to HD television and pay-TV activities.

The growing importance of the Internet has led to a convergence development in the field of television end devices. So-called connected TVs (also called smart TVs or hybrid TVs) are television sets which allow a reception via cable, satellite, digital terrestrial TV (DVB-T) or iptv and are also connected to the open Internet. Smart TV allows the usage of linear television but also of non-linear moving image content on demand (media libraries, video on demand) or catch-up TV. Although Internet-capable TV sets can be found in more and more households, only 10 per cent of them have so far actually connected their TV with the Internet. A number of studies show that presently, in spite of the existing technical possibilities, linear television still dominates the viewers' behaviour. The experts explain this by long-standing habits that are difficult to change quickly.

The smart TV market in Germany is only at the beginning of its development. On the TV end devices, the broadcasters' HbbTV portals are in direct competition with the smart TV portals of the end device producers. The providers mainly strive at holding sway over the portals on the TV device which grant the access to the audience. Customer relations are the prerequisite for developing business models and generating revenues. For this, the navigation on the user interface is of vital importance. From the user's point of view, his concern is orientation and navigation within the comprehensive offering. From the providers' point of view it is crucial that their content will be found. In this context, electronic programming guides (EPGs) are of particular importance. They assist the viewers in the selection and finding of programmes and thus influence the usage of programming content. From a broadcasting law perspective, equal opportunities and a non-discriminatory access for all broadcasters must be secured. Therefore the State Media Authorities request a broader platform regulation (sec. 52c Interstate Treaty on Broadcasting) that includes all EPGs on the market as well as online portals.

Means of Transmission

Television transmission is operated via the traditional means of distribution cable, satellite and terrestrial transmission as well as, since 2008, via DSL cable ("*DSL-TV*" or iptv). Cable is the only means of transmission that still remains partly analogue. However, recently, more than half of the cable households are digital. The relation

between the different means of transmission has been relatively stable for years. In mid-2013, cable and satellite were used approximately at the same level: 46.3 per cent of TV households used cable as reception mode whereas 46.2 used satellite. The reach of terrestrial transmission has remained stable for years at around 11 per cent. TV transmission based on iptv has increasingly established itself as a fourth mode of reception. Meanwhile nearly 5 per cent of TV households use DSL-TV.

Satellite households are essentially supplied with TV programmes by subsidiaries of the satellite operators SES S.A. and Eutelsat S.A. In recent years both satellite operators have expanded from mere transportation services towards marketing services. The German cable market is characterised by ownership changes and efforts to consolidate on the part of the cable operators. The large cable operators Kabel Deutschland and Unitymedia KabelBW dominate the market. Within the scope of the KEK's concentration law assessment pursuant to sec. 26 RStV, the KEK includes structures that endanger plurality by vertical or diagonal concentration in the area of broadband cable. The participation of cable operators in broadcasters constitutes a danger for diversity because third-party broadcasters compete with these vertically integrated companies for access to the cable networks. Currently such integration tendencies are not apparent.

TV Advertising

Television is still by far the largest advertising medium. Even though gross advertising revenues continue to be on the rise, at the same time the broadcasters' net revenues have been stagnant for years. The TV advertising market is highly concentrated, both on the part of the marketing agencies as well as on the part of the media agencies. The Federal Cartel Office has found that in the advertising market a market-dominant oligopoly/duopoly of ProSiebenSat.1 Media AG and the media group RTL Deutschland exists. Among the media agencies, six groups account for most of the market. For the plurality of opinion the high concentration in the television advertising market is significant in several respects because advertising is still the main source of financing for private broadcasters. In view of the fact that only few media agencies bundle large purchase volumes there is a risk of editorial influence by these agencies. This powerful position of the media agencies may lead to a problem of depending on some broadcasters.

Development of Crossmedia Regulation in other Countries

Reform Efforts in Australia and Great Britain

In **Australia**, an independent committee of experts assessed whether and how far the media and telecommunications regulation were still efficient or showed deficiencies in achieving its appropriate policy objectives in the convergent era. The whole spectrum of media law regulation was put to the test. The analysis came to the conclusion that several of the existing rules appear superfluous, including the licence obligation for broadcasting services. It was recommended to regulate the following areas in the future: media concentration, media content standards across all platforms as well as the production and distribution of Australian and local content. The report stresses that convergence undoubtedly has increased the range of available information. At the same time it states that in spite of this development news and commentaries, which are used by the Australians across all media, remain in the vast majority of cases delivered by the

traditional media companies. The report also stresses the fundamental significance of a diversity of news and information for a healthy democracy. The committee's assessment led to the conclusion that the rules for combating media concentration remain an important factor for securing plurality.

In **Great Britain** comprehensive and wide-ranging reforms of media and telecommunications law have been introduced over the last years. Almost all restrictions of mono-media or cross-media ownership were abolished and instead a Media Plurality Test (or Public-Interest-Test) was introduced. However, the illegal tapping practices at the newspaper "News of the World" and an envisaged takeover of BSkyB by News Corporation encouraged a discussion on whether the amended regulation was suitable to secure diversity. The regulator OFCOM itself uttered doubts on whether the existing diversity rules were appropriate to achieve the diversity objectives that were been pursued by Parliament.

In line with the recommendations of Lord Justice Leveson's "Report into the culture, practices and ethics of the press", the Government pushed ahead in order to find a new concept for assessing media diversity that should be developed in consultation with industry and lead to the first ever assessment of the current degree of media plurality in the UK.

In view of the findings of a broad consultation procedure, the Government gave OFCOM a task to develop the measurement framework to be used to carry out the first market analysis of plurality in the United Kingdom. This assessment shall provide information on the current market situation and indicate where potential problems might be arising and to what degree plurality exists in the UK. Until the 27th November 2014 stakeholders had the opportunity to respond to 12 detailed questions which the regulator had asked.

Main focus of the Application of Sec. 26 et seq. Interstate Treaty on Broadcasting

Sec. 26 Interstate Treaty (RStV): Securing Plurality in Nationwide Television

In its decision on the envisaged take-over of the television group ProSiebenSat.1 Media AG by the publishing house Axel Springer AG of 10 January 2006 in application of sec. 26 (1) Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag* - "RStV"), the KEK did for the first time not approve a notified change of ownership. Based on this decision, the responsible agency Bavarian State Media Authority (BLM) formally issued an administrative act that did not authorise the notified change of ownership. Against this Axel Springer AG brought an action which on 29 January 2014, after several instances, was finally upheld by the Federal Administrative Court.

Key issues of this legal dispute were the interpretation of the notion "predominant power of opinion" according to sec. 26 (1) RStV, the meaning of the legal presumptions set out in sec. 26 (2) RStV for concretising this notion, the bonus rules as well as the KEK's margin of discretion in the procedure of media-law concentration control.

The Federal Administrative Court held that the KEK's finding was not compatible with the statutory requirements and therefore the defendant's decision that relied on it was contrary to law. The court essentially found that the legislator had merely created a concentration control that was limited to television.

For the KEK's decision-making practice this ruling means that the KEK may only include media-relevant markets in its assessment and thus take cross-media effects into consideration, in the case that the relevant viewer rating of all channels attributable to the respective undertaking amounts to at least 20 per cent. Besides, when identifying this viewer rating, the KEK must deduct 5 per cent in advance for regional and third-party window programmes. The Court leaves it open whether in extreme cases there might still be the possibility for an assessment by the KEK if the viewer ratings are slightly below this threshold of a 20 per cent viewer rating. Thereby the scope for applying sec. 26 RStV is considerably restricted.

Sec. 27 RStV: Determining Viewer Ratings

When determining the relevant viewer ratings the KEK still applies the transition rule of sec. 34 (1) RStV and uses the monthly figures on the TV channels' shares of the daily average viewing time (viewers from 3 years on, Monday to Sunday) collected by the institute Gesellschaft für Konsumforschung (GfK) on account of the Arbeitsgemeinschaft Fernsehforschung (AGF). Some shortcomings still remain which impede the determination of the viewer ratings. Thus the KEK has long pointed to the problem of an incomplete data basis, caused by neglecting some reception modes; the TV usage outside of homes in public places and the TV usage of non-EU citizens.

Pursuant to sec. 27 (1) RStV only German-speaking channels must presently be taken into consideration when determining the audience rates that are relevant for the legal presumptions of sec. 26 (2). The legislator has justified this exclusion of foreign-language channels with the argument that their influence on the formation of public opinion in Germany was small. However, in recent years the number of private nationwide foreign-language channels with a German licence has steadily increased. There are now 30 of such channels in Germany. Besides this, a growing number of foreign-language channels that hold a licence in another country can be received via satellite or as part of the offerings of the cable network providers. Thereby the foreign-language channels are gaining in importance. Thus the statement that they are not relevant for public opinion-formation is unsupportable. Therefore foreign-language channels should be included in the determination of viewer ratings and the restriction to German-language channels in sec. 27 RStV should be deleted.

Sec. 28 RStV: Attribution of Channels

In the KEK's decision practice most attributions of TV channels were due to formal corporate shareholdings in the sense of sec. 28 (1) RStV.

In addition, sec. 28 (2) takes account of the fact that influences on TV broadcasters can be exercised not only by means of shareholdings but also by statutory, contractual or other potential influences of one undertaking on another.

In the case concerning the detachment of the broadcaster N24 from ProSiebenSat.1 Media AG, the KEK assessed whether after the separation of the companies N24 must still be attributed to this broadcasting group due to such "comparable influence".

The first alternative to the sec. 28 (2) No. 1 RStV assumes a comparable influence if a significant part of a broadcaster's viewing time is formed by regular supplies of programming parts by another company (idea of heteronomy). This alternative was investigated in the above-mentioned case because the broadcaster N24 and its subsidiaries were contractually obliged to supply commissioned productions (news and magazine formats) to ProSiebenSat.1 channels. However, in the end the complete

control over the productions still remained with the broadcasters of the ProSiebenSat.1 Group and therefore attribution was not an option.

The next alternative of comparable influence (sec. 28 (2) no. 2 RStV) applies if a company, due to contractual provisions or otherwise, has gained a position where essential programming decisions of the broadcaster or his decisions on programme purchases or the production of programming content depend on this company's consent. In the above-mentioned case, such a position of ProSiebenSat.1 could not be established.

The right to reserve approval, however, can also be inferred from factual potentials for influence. For instance, a significant influence on the programming decisions can also be due to the right to appoint important key personnel such as the programming director. In this context the KEK assessed the potential influence of ProSiebenSat.1 Media AG due to a potential economic dependence of N24. However, it must be noted that even if economic dependence is assumed this does not per se justify the attribution but only in the case that this economic position also implies a significant influence on programming decisions. According to the KEK's findings, such influence was not given in the above-mentioned case.

Sec. 29 RStV: Changes of Ownership

Under sec. 29 RStV, changes of ownership or of other influences on the broadcaster or with regard to a participating company must be notified in writing with the responsible State Media Authority before they may be realised. This notification duty applies regardless whether the change concerns the ownership structure as such or an agreement on the execution of voting rights, such as a voting trust agreement or a trustee agreement or other changes of comparable influences, for instance caused by the conclusion of platform and marketing agreements.

In principle, changes of ownership in listed stock corporations must also be notified under sec. 29 RStV. Only with regard to acquisitions or sales of less than 5 % of the capital or the voting rights does a KEK directive provide an exception from this general notification duty and from the initiation of a procedure of media concentration control. The aim is not to interfere with the stock exchange trading of the stock corporations involved. For the same reason the KEK has also applied this exemption rule on investment companies which in most cases are incorporated as a German partnership limited by shares or in a comparable foreign legal form. These have been obliged in practice to inform the KEK about capital shares and voting right shares of only 5 per cent or more and to notify only changes that concern this threshold. Moreover, the KEK has applied this exemption rule by analogy in particular cases where off-exchange transactions of listed stock corporations were concerned. However, a general extension of this rule to minor changes of ownership in other juridical persons or partnerships is not possible, because with regard to them there is no regulatory gap that could justify deviating from the general rule.

Sec. 31 RStV: Broadcasting Time for Independent Third Parties

According to sec. 26 (5) RStV a broadcaster that meets certain qualifications must allocate some of its broadcasting time to an independent party for a so-called third party window programme ("*Drittfensterprogramm*"). Before the responsible State Media Authority selects the licence holder of this independent window programme and grants the licence, it has to involve and consult the KEK. In the time under review the KEK has

dealt with changes in ownership of a third party window programme broadcaster as well as with the rescheduling of a window programme, the finding that SAT.1 is still obliged to allocate such third party window programme and, finally, with the renewed award of licences for third party window programmes within RTL and SAT.1.

In this context a court has confirmed the KEK's view that the relevant time to determine the audience share which triggers the obligation to allocate broadcasting time to a third party according to sec. 27 (1) (2) RStV depends on the start of the respective procedure by the responsible State Media Authority. Thus, those viewer ratings are relevant that have been reached in the last 12 months before that date, even if the audience shares later on decrease to such a degree that they fall below the statutory threshold for the window obligation.

For the future, it would be desirable that the competence to select the independent third party broadcaster of the window programme was conferred away from the relevant State Media Authority to the central Commission on Licensing and Supervision (ZAK).

2 Conclusions

Material Regulatory Concepts

Any regulatory approach for media concentration law must aim at securing plurality in a free and democratic constitutional state. At the same time – what might be called the other side of the same coin – securing plurality also demands safeguarding freedom of information. Plurality is worthless without the opportunity to take note of viewpoints voiced by others. Therefore, as is appropriately expressed in Article 5 (1) (1) of the German Constitution: Freedom of opinion and freedom of information must always be considered as interrelating.

The Targets of Regulation: Providers of Media Content with Relevance for Public Opinion

Media concentration law focusses on securing the delivery and reception of offerings that shape opinions. Therefore material regulatory concepts can only refer to content that is relevant for opinion-formation. However, the notion of relevance for opinion-formation ("*Meinungsbildungsrelevanz*") is not clear-cut. In the context of communication science, this notion is limited by three characteristics: firstly, by professional selection and editorial preparation of issues and content; secondly, by a high degree of organisation and institutionalisation (for instance by communication techniques with specific topicality and periodicity) and a general accessibility and availability of the offerings; and thirdly by asymmetrically fixed roles of speakers and listeners, so that communicators and intermediaries can be distinguished permanently and clearly from the roles the audience may play.¹

The Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag* – "RStV") refers to opinion-relevant content as described above by using the expression "journalistically and editorially arranged offerings" ("*journalistisch-redaktionell gestaltete Angebote*"), for

¹ Criteria based on *Friedhelm Neidhardt's* model of public media, cited in „MedienVielfaltsMonitor der BLM“, speech of *Johannes Kors* at the 5th Hamburger Mediensymposium on 11 June 2014, available at: http://www.hans-bredow-institut.de/webfm_send/1013, ibd. p.17.

instance in section 2 (3) No. 4 and section 54 (2). Basically this term appears to be congruent with the communication science criteria as outlined above.

In principle, the content of such „journalistically and editorially arranged offerings” does not matter. Particularly, it would be too simplistic to conclude that so-called “pure” entertainment formats had no relevance for opinion-formation; a crime drama that broaches current social issues such as assisted suicide or how to deal with pedophile dispositions under criminal law; the live broadcast of a concert with its song texts or the transmission of recorded, edited conversations from reality shows such as “Dschungelcamp” or “Big Brother”, all of which is targeted to an audience of millions, all contribute significantly to the formation of public opinion. The process of opinion-formation by entertainment formats is “subcutaneous”, subliminal and sometimes emotional. Thus it is occasionally even more effective in transporting messages and reinforcing certain opinions among the audience than pure news formats or political or ‘societal’ magazines.² As early as 25 years ago, the Constitutional Court’s jurisdiction rightly made this point very clear.³

Not only the traditional broadcasting offerings in the sense of sec. 2 (1) RStV, i.e. television and radio, are relevant for public opinion-formation as described before, but also print media offerings such as daily newspapers, journals, advertising journals, etc. as well as telemedia services in the sense of sec. 2 (1) RStV insofar as these are journalistically and editorially arranged. Among the latter there are, in particular, the publishers’ web presences and digital editions (“e-papers”), the video stores of public and private broadcasters, the large online portals of internet service providers (such as T-Online) and video portals such as Clipfish or MyVideo. Also social networks such as Facebook and Google+, Blogs, so-called Microblogs (Twitter) or video portals such as Youtube may be relevant if the offerings that are available there can be regarded as relevant for opinion-formation, according to the criteria described above. At the same time it follows that these platforms, which were originally created for non-professional offerings (“user generated content”) are becoming increasingly professional. In addition, the enumeration illustrates that regulatory approaches of media concentration law must be technology neutral because the means of transmission (Internet, cable, mobile communications, satellite or terrestrial broadcasting) does not matter.

The modern forms of online communication deserve particular attention. The Internet is a technical platform through which all kinds of content and services can be transported or provided, and therefore classifying these contents as relevant for opinion-formation cannot always be carried out according to their classification as traditional media types broadcasting or print. This can be illustrated by the examples of the broadcasters’ video stores or the publishers’ online presences. It is necessary to carry out a case-by-case analysis. Purely private user sites in a social network; or private videos on a video portal; or mere private opinions in microblogs; online fora or online commentaries, cannot usually be qualified as relevant for opinion-formation, as they lack a professional and lasting selection process of issues which are destined for the public consumption. This

² Instructive on the potential influence of TV entertainment *Wolf Bauer*, Die unheimlichen Erzieher, FAZ of 27 January 2011, available at: <http://www.faz.net/aktuell/feuilleton/fernsehen/unterhaltungfernsehen-die-unheimlichen-erzieher-1577387.html>.

³ See Constitutional Court, BVerfGE 73, 118 (152).

latter issue also applies to web-sites of companies or wiki encyclopedias which furthermore lack periodicity and overall editorial responsibility.⁴

Additionally, search engines and news aggregators are likely not to be considered as journalistically and editorially arranged offerings. The search results lists that are generated by search terms and related algorithms may be expressions of opinions of the search engine operators in the sense of Art. 5 (1) (1) German Constitution.⁵ However, the providers lack an own journalistic intention.⁶ This is already reflected in the fact that the search term is determined by the user who, instead of the search engine operator, is primarily responsible for selecting a topic.⁷

Nevertheless, by auto-complete features the search engine can lead the users to topics which they initially had not in mind and thereby make these topics the objects of a public debate. Thus, search engine operators can gain influence in the formation of public opinion. This effect may be reinforced when operators of open search engines have a dominant position concerning the response to search queries. From this it follows that search engine operators cannot be kept outside the scope of an assessment under media concentration law.⁸ Besides this, they can also be the object of other media law measures to ensure plurality, for instance by platform regulation.

Decisive Criterion: Creation of Dominance over Public Opinion in the Opinion Market

In order to secure a diversity of opinions and to keep the access to information open, it must be the aim of regulatory concepts of media concentration law to prevent the creation of a dominant power over public opinion by any provider in the opinion market. In case that such dominance has already been created it must be neutralised by adequate measures and requirements, such as the obligation to divest of participations in opinion-relevant offerings. A provider can obtain predominant power over public opinion either by “internal growth” of its opinion-relevant offerings or by “external growth”, i.e. by ownership changes in corporate participations. Following *Habermas*, “power over opinion” means the intended and successful influence of media content providers on the process of formation of individual and public opinion.⁹ The Constitutional Court applies a similar notion in its “Niedersachsen” decision where the Court describes predominant power over public opinion as a highly disproportionate influence on the private and public opinion-formation.¹⁰ Therefore the legislator is

⁴ On the above see *Wolfgang Lent*, in: Hubertus Gersdorf/Boris P. Paal (ed.), *Informations- und Medienrecht*, Munich 2014, § 54 para. 5.1 with further references.

⁵ See Bundesgerichtshof (Federal Court of Justice), Judgment of 14 May 2013, Az. VI ZR 269/12; OLG Cologne, Judgment of 8 April 2014, Az. 15 U 199/11; Kreile, Johannes/Thalhofer, Thomas: *Suchmaschinen und Pluralitätsanforderungen – Ist ohne gesetzliche Regelung der Suchmaschinen der Pluralismus und die Meinungsvielfalt in Gefahr?*, ZUM 2014, 629 – 638; Stark, Birgit/ Dörr, Dieter/ Aufenanger, Stefan (ed.): *Die Googleisierung der Informationssuche, Suchmaschinen zwischen Nutzung und Regulierung*, Berlin/Boston 2014, p. 81 et seq.

⁶ See again *Lent*, as before.

⁷ Disagreeing *Held*, in: Hahn/Vesting, RStV, § 54 para. 58 potentially for the case of a news search when next to the mere link headlines and parts of the news text are being presented.

⁸ On this see KEK, *Konzentrationsbericht 2015*, Chapter III, 2.1.5.5.

⁹ See *Habermas, Jürgen* (2008): *Hat die Demokratie noch eine epistemische Dimension? Empirische Forschung und normative Theorie*. In: *Habermas, Jürgen: Ach, Europa*. Frankfurt a. M., p. 174 et seq.

¹⁰ Constitutional Court, BVerfGE 73, 118, 172.

constitutionally obliged to measures which are adequate to counteract such a development.¹¹

When implementing this obligation, there may be certain overlaps with the law against unfair competition, particularly with merger control under German and European competition law. However, the function of cartel law regulation is to maintain economic competition. Thereby the obligation of the broadcasting law legislator remains unaffected, that being to prevent predominant power over public opinion including the case where this position is not created by a merger in the sense of the merger control provisions, or it is created by such a merger that does not fall within the scope of the Act Against Restraints of Competition. Therefore the Constitutional Court regards the application of the merger control under competition law to be a permissible but not a sufficient instrument for preventing predominance over public opinion in broadcasting. Thus, besides the merger control under competition law a media-specific anti-concentration regulation is imperative. Hereby the broadcasting legislation may well rely on legal terms that originate from the law against restraints of competition. However, journalistic competition cannot be secured by merely applying the Act against Restraints of Competition in an interpretation that aims at plurality. Such application of competition law for the purpose of securing freedom of broadcasting would be unconstitutional. This is because the measures of the competition authorities are based on federal law and are therefore for reasons of competency (Art. 74 (1) No. 16 German Constitution) only permitted insofar as they aim at preventing the misuse of a predominant market position. As the broadcasting order is exclusively a matter of legislation on the state level, measures by the competition authorities may only produce non-targetable effects in terms of plurality.¹²

The current TV-centered media concentration law of sec. 26 Interstate Treaty on Broadcasting (RStV) which dates back to 1997 does not take sufficiently account of the changes in the media usage which can be observed over the past 20 years. The boost of the Internet has triggered an accelerating convergence process of formerly separate types of media. In addition, new forms of services are developed that are specifically designed for online usage.

Even if television remains particularly relevant for opinion-formation and still retains the function of a „lead medium“,¹³ it does not seem justified to permanently hold on to the television-centred perspective of current media concentration control. This applies all the more so as section 26 RStV has been heavily restricted by the Federal Administrative Court's jurisdiction (as stated above)¹⁴ and therefore can no longer ensure an effective cross-media concentration control. The particular role that the Constitutional Court has attributed to television among the concert of media forms, due to its particular topicality, broad impact and power of suggestion,¹⁵ is no longer a unique feature of this type of medium. Also non-linear online media, such as video libraries, video portals or online portals, are to a large extent characterised by these features. Therefore media concentration control must follow the moving images, because every moving image

¹¹ Constitutional Court, as above.

¹² On this see: KEK, Konzentrationsbericht 2000, p. 49 et seq. with further references; Dörr, Dieter (2010) in: Schiwy/Schütz/Dörr, Medienrecht, Cologne, p. 313 et seq.

¹³ See KEK Konzentrationsbericht 2015, Chapter II, 2.1.3 „Leitmedium Fernsehen“.

¹⁴ See above, 2.

¹⁵ Constitutional Court, BVerfGE 31, 314 [325]; 90, 60 [87]; 97, 228 [256]; 103, 44 [74]; 114, 371 [387]; see also ECHR, Judgment of 5 November 2002 -- Complaint-No. 38743/97 -- Demuth against Switzerland, EuGRZ 2003, p. 488 [491], § 43; Judgment of 10 July 2003 -- Complaint No. 44179/98 -- Murphy against Ireland, § 69; settled case law.

offering has, independently of its linear form, a high degree of suggestive power. Therefore, only an assessment that to a larger extent takes all services into consideration which have an influence on opinion-formation will allow for a realistic assessment of plurality and of the existing power structures in the media market. Only such an assessment can secure an effective cross-media concentration control.

It is primarily a political question whether this new regulatory approach of media concentration law should completely deviate from the broadcasting of nationwide television channels – as does the BLM’s Media Plurality Monitor – and instead refer to a comprehensive opinion market when assessing media concentration, or whether the nationwide television should rather remain at least the point of reference for the media concentration assessment. The answer depends on how media usage will develop. After all, a television-based concept with a cross-media concentration assessment that is subject to the condition of the participation of a nationwide broadcaster with a certain audience share is supported by the fact that television is (still) the lead medium, as stated above. This could be the basis for moderately developing the legal status quo while the established rules of concentration control in other media sectors, particularly in the press and in local broadcasting, could be maintained for the time being. This would at the same time ensure legal certainty and planning security for the relevant players, as constitutionally required, and nevertheless could still allow a more effective media concentration control.

Determining Predominant Power over Public Opinion in a Market of Opinions

The disposal of the strictly television-centred approach inevitably implies that the “currency” for predominance over public opinion can no longer merely be measured in viewer ratings but that other parameters must be added. As media concentration law aims at the prevention of predominant power over public opinion, this “currency” cannot primarily be expressed by the market shares in the media markets that are relevant under competition law. This is because, firstly, such market shares sometimes simply do not exist, for instance in the case of free-TV, due to the lack of economic exchange relations between the service providers and the recipients, and, secondly, they do not always allow reliable conclusions to be drawn as regards the power over opinion of a certain provider of content that is relevant for opinion-formation, for instance in the case of the market shares in the television advertising market.

The relevant „currency“ for determining power over public opinion must rather be the reach of a medium in the overall opinion market.¹⁶ As for television, this reach can continue to be measured in terms of audience shares. As for the radio broadcasting, the audience shares are decisive, for telemedia services it is the frequency of their demand, and for print media, it is the number of readers per edition. Moreover, the determination of predominance over public opinion, as provided by the parameter of the medium’s reach, has also the advantage that a conversion of radio audience shares, the number of retrievals or the readers per edition into television viewer ratings, as is presently required by sec. 26 (2) (2) 2nd Alt. RStV, will no longer be necessary.

However, it must be noted that journalistically and editorially arranged offerings vary in their journalistic relevance and therefore must be marked by a different “plurality factor”. The reach of a medium on the whole opinion market must be weighted according to this plurality factor in order to be able to determine the relative share that a company

¹⁶ By the notion “overall opinion market” we mean the entirety of all journalistically and editorially arranged offerings directed to the German public.

holds in this market. This plurality factor must be determined in a normative way, according to the Constitutional Court's criteria "topicality, broad impact and power of suggestion". Thereby the relevance of the offerings for opinion-formation has to be set against the fact of television being the most influential medium.¹⁷ At the same time, its determination should also follow scientific empirical findings, for instance by continuous consultations of users as to how *they* estimate the relevance of media on their opinion-formation. This is the basis of the BLM's "MediaPluralityMonitor".¹⁸ Such an approach takes account of the fact that the limitations between traditional broadcasting and online media are blurring. Therefore presently the criteria which the Constitutional Court has applied in order to justify its special interpretation principles for broadcasting law also apply to other media formats.¹⁹

Moreover, it is also a political task to decide at which point a company has predominant power over public opinion as described above. On the one hand, this issue is to be determined by the fact how many independent content providers should be at least active on the overall opinion market in order to secure a business diversity and thereby also a journalistic one. On the other hand, the legislator must also take account of aspects of media economics in order to ensure the existence of several competing and competitive companies in the media markets.

Since according to the model described above no provider can dominate the opinion market alone, it is thus not necessary to fix a minimum number of providers for certain media contents. Rather, with the overall market concept this effect will spontaneously arise. Moreover, it will not be necessary under this approach to limit the number of offerings of one media company. This model therefore will prove to be – as sec. 26 (1) RStV already is in its present form – a highly flexible instrument for the companies.

In any case, a minimum number of providers as such is no guarantee for a diverse media offering. On the contrary, as is proven by public broadcasters, even a few providers may secure a maximum of plurality. Here, quality is the decisive factor and not the quantity of media services even though a connection between both factors cannot be denied. However, plurality may not only be achieved by a variety of media providers but also by securing professional expertise which may positively affect the quality of the offerings.

The obligation of plurality as a structural maxim of broadcasting²⁰ is more than mere repressive control aimed at preventing predominant power over public opinion. It requires that broadcasting must convey opinions as broadly and comprehensively as possible.²¹ Broadcasting must fulfil this task in its entirety.²² From this follows the constitutional duty of the legislator to design a functioning system to secure plurality by material, organisational and procedural rules, for the private as well as for the public broadcasters, and to continue to scrutinise and improve this system.²³ This constitutes a continuing process against tendencies which reduce plurality that may arise from the political sphere or from the economic sector. This "positive" securing of plurality is the essential core of the plurality obligation which entails not merely a minimum standard but

¹⁷ See on this KEK, Konzentrationsbericht 2015, Chapter II, 2.2.1, "KEK Ansatz" („KEK approach“).

¹⁸ As before, chapter II, 2.2.2 "*Medienvielfaltsmonitor der BLM*".

¹⁹ See on this above 2.

²⁰ See on this most recently Constitutional Court, BVerfG, ZUM 2014, 501 [506].

²¹ Constitutional Court, BVerfGE 59, 231 [257, 258]; 73, 118 [152].

²² See below on how to divide up this task within the existing "dual" broadcasting system.

²³ Constitutional Court, BVerfGE 57, 295 [320]; 83, 238 [296].

rather a duty of optimisation.²⁴ In this context the legislator has always to consider that deficits of plurality, once they have occurred, are very difficult to reverse.²⁵ Although in the present “dual” broadcasting system the responsibility for a positive securing of plurality mainly lies on the shoulders of the public broadcasters, it is the private broadcasting as an institution that is obliged to compensate existing plurality deficits. In this context it is of essential significance that public broadcasting fails to reach – or only to a very limited extent reaches – certain parts of the society. This has been called “fragmenting of viewing habits” („*Fragmentierung des Sehverhaltens*“).²⁶ The audience numbers prove that the viewing habits of the 14-to-49-years-olds and even more of the 14-to-29-years-olds increasingly differ strongly from those of the overall population. Several private broadcasting channels achieve a higher viewer rating than the public broadcasters’ channels in the age group 14-49 and even more in the age group 14-29, and this partly by a clear distance. Thereby broadcasting has already differentiated groups within the public, in the shape of the groups of 14-to-49-aged and 14-to-29-aged. Meanwhile in this context some even speak of a generation gap („*Generationenabriss*“) in public broadcasting. Basically this has little effect as long as the respective parts of the public are still being supplied with varied broadcasting contents. However, if this is not the case then broadcasting as a whole does not fulfil its task of being an information intermediary.

The discussions around the window programmes must be seen in this context.²⁷ This is because regional window programs and third party window programmes are regulatory instruments of a positive approach to secure plurality since they preventively aim at strengthening plurality *before* predominant power over public opinion is created.²⁸ Thus their preservation und extension becomes all the more important the less the varied offering of public broadcasters reaches certain groups within society. Therefore, it is recommendable to strengthen the offering of regional windows that particularly enhances plurality.

Legal Presumptions for the Existence of Predominant Power over Public Opinion

One can circumscribe the notion of predominant power over public opinion („*vorherrschende Meinungsmacht*“) based on the Constitutional Court as a highly imbalanced influence on private and public opinion-formation. This description, however, remains abstract and hardly operationable. It is therefore necessary that it is further concretised by legal provisions.

With a view to this, it has proved helpful to concretise the notion of predominant power over public opinion by legal presumptions. Thus one can presume, as does sec. 26 (2) RStV, that a nationwide television broadcaster with a certain share of the whole opinion market possesses predominant power over public opinion. Furthermore, for cross-media mergers the law could provide that a company achieves predominant power

²⁴ See on this Constitutional Court, BVerfGE 12, 205 [262 ff.]; 119, 181 [214]; 121, 30 [50]; BVerfG ZUM 2014, 501 [506].

²⁵ Constitutional Court, BVerfGE 57, 295 [323]; 73, 118 [160]; 95, 163 [173]; 119, 181 [217].

²⁶ See on this Dörr, Die Sicherung der Meinungsvielfalt und die Rolle des privaten Rundfunks, in: Sachs (ed.), Der grundrechtsgeprägte Verfassungsstaat, Festschrift Stern, Berlin 2012, p. 1349 ff.

²⁷ See on the current discussion Müller, Programmfenster vor Gericht, Horizont 2014/32, p. 12.

²⁸ See on this Ebsen, Fensterprogramme im Privatrundfunk als Mittel zur Sicherung von Meinungsvielfalt, Frankfurt am Main 2003, p. 68 et seq.

over public opinion if the overall assessment of its activities on the television market as well as on other (horizontal) media markets reaches a certain share of the overall opinion market. Activities on upstream and downstream (vertical) markets could serve as a confirmation of this presumption.

Such legal presumptions above all constitute rules on burden of proof in case certain issues – as the indications of the creation of predominance over public opinion-formation – cannot fully be proven.²⁹ Such rules apply in both directions, i. e. they are disputable both in favour as well as to the disadvantage of the relevant company, and they are therefore a flexible and well-proven instrument for the assessment of predominant power over public opinion.

Nevertheless these rules at the same time give the companies legal certainty and planning security. The Federal Administrative Court has ruled in two leading decisions concerning sec. 26 (2) RStV that the legal presumptions are not only rules on burden of proof but also serve as guiding principles for the legal interpretation. The KEK may only deviate from them based on particular circumstances which have not been inserted into the legal presumptions.³⁰ Besides this, the Federal Administrative Court has also made it clear that it would not be compatible with Art. 5 (1) (1) German Constitution to interpret these legal presumptions as exhaustive rules. Such interpretation would define the constitutional task of securing plurality too narrowly.³¹ Therefore there must be room for considering new facts which the legislator has not or could not anticipate. Additionally this jurisdiction could be made more fruitful in the framework of a new regulatory approach oriented towards an overall opinion market that is based on legal presumptions.

Indicators for Plurality (Shares in the Opinion Market)

Content-Related Indicators

As stated above,³² a content-related indicator has to be rejected. Moreover, it would not be feasible. Relevance for opinion-formation can principally be measured only by being based on whether the respective offerings are journalistically and editorially arranged or not. Therefore, for measuring a company's shares in the opinion market, the content cannot matter, i.e. the issue whether the offering is to be categorised as being informative or purely entertaining. Content-related aspects can, if at all, only be of importance when it comes to confirming or rebutting a legal presumption.

Share-Related

Therefore, power over public opinion is to be assessed based on the shares of a company in the overall opinion market. The relevant parameter for this is – as has already been stressed – the reach and range. For most of the services that are relevant for public opinion-formation this parameter is established and can more or less easily be determined. With respect to this aspect, presently the following data sources are relied

²⁹ See on this for instance: Prütting, Die Vermutung vorherrschender Meinungsmacht, in Stern/Prütting (ed.), *Marktmacht und Konzentrationskontrolle auf dem Fernsehmarkt*, München 2000, 115 et seq., 121 et seq.

³⁰ See KEK Konzentrationsbericht 2015, Chapter V, 2.1 and Federal Administrative Court, BVerwG, 24.11.2010 – 6 C 16/09, BVerwGE 138, 186 [198 ff.].

³¹ Federal Administrative Court, as above.

³² See above, 3.

on, though they show deficits for single types of media as regards the collection of the relevant data:

Type of medium	Source of data	Frequency of publication	Parameter	Basic population
Television	AGF/GfK television research	daily	share in viewer ratings	Persons aged 3 years or above in private households with at least one TV set in Germany, of which the main income recipient is either a German citizen or a citizen of another EU member state.
Radio	„ma Radio“ of agma	twice yearly	share in listening time	German-speaking population in Germany in private households at the place of the main residence (aged 10 years or older)
Daily Newspapers	„ma Tageszeitungen“ of agma	twice yearly	market share of readers per edition	German-speaking population in Germany in private households at the place of the main residence (aged 14 or older)
Journals	„ma Pressemedien“ of agma	twice yearly	market share of readers per edition	German-speaking population in Germany in private households at the place of the main residence (aged 14 or older)
Online Services	comScore/Nielsen	monthly	market share in Unique Audience	German whole population (comScore: from the age of 6 years)
	IVW	monthly	market share in Visits and Page Impressions	only advertising-financed services, based on free participation
	AGOF	monthly	market share of Unique Users	only advertising-financed services, based on free participation

Source: Own presentation KEK

Weighting when Assessing Plurality

The KEK's Decision Practice on Weighting

In the procedure ProSiebenSat.1/Springer (Decision of 10th January 2006, case no. KEK 293) the KEK has dealt with the weighting of different media. Based on the three criteria 'wide-spread impact, topicality and suggestive power', the KEK assumed the following ranking of relevance to public opinion-formation of the different media:

Table: Weighting of the relevance of media according to the KEK (in percent)

	Weighting Factor case no. KEK 293
Television	100,0
Radio	50,0
Daily Newspapers	66,6
Journals	24,3
Internet	50,0

Source: Beschluss der KEK vom 10.01.2006, Az.: KEK 293.

The observed online sector changes since this decision may make it necessary to adjust the weighting factors. Particularly with respect to the online sector, the weighting factors that were developed in the procedure ProSiebenSat.1/Springer have been further developed.³³

Infratest Study, “MediaPluralityMonitor” (“*Medienvielfaltsmonitor*”)

The Bavarian State Media Authority (BLM) has developed a model to measure potential power over public opinion based on empirical data. This model’s focus lies in the assessment of quantitative figures of reach in the respective media markets as well how they can be offset with the audience shares. It consists of a five-step approach. Firstly, the types of media that are relevant for opinion-formation, such as television, radio, newspapers, magazines and Internet are agreed upon. Thereafter the audience reach of these relevant media are calculated, based on accepted and regular audience reach surveys, and thereafter the comparable indicators for the different media are determined. In a fourth step, the weighting of the relevant media types is specified, on the basis of a representative survey. Finally the limits for the presumption of predominance over public opinion are determined. The relevance of the single types of media for public opinion-formation was determined in the study „Relevance of the media for public opinion-formation“, which was carried out by the institute TNS Infratest commissioned on behalf of the BLM.

Although the MediaPluralityMonitor gives an overview concerning the weight of the various media groups for public opinion-formation, for the KEK’s work this monitor is not adequate for various reasons. Firstly, unlike the KEK’s own approach, the BLM model neglects the suggestive power of each medium when determining the weight for opinion-formation of the single media types. Instead this model only represents the criteria „widespread impact“ (via the factor „market share of users which were informed yesterday“) and – when interpreting it favourably – additionally the criterion topicality (via the factor “most important medium for the opinion-formation“). However, in terms of intensity of reception the issue of how the content is made conscious (text, sound, moving or still images) is important. Whereby, it must be criticised how, in using this concept, the effectiveness of media is established. It is merely deduced from the users’ (subjective) statements as well as from the audience reach. Hereby, it does, for example, not take into account how intensively each medium is used qualitatively (intensive reading versus incidental media usage). Due to such differences, the usage as such is not sufficient to prove an identical effect of all media. All in all, with respect to

³³ See KEK decision of 13 November 2012 case reg. RTL, case no. KEK 711, as well as KEK Konzentrationsbericht 2015, Chapter II, 2.2.1 - „*KEK approach*“.

the model, the weighting of each type of medium is also severely limited in its significance by the fact that it is restricted to information services, whereas entertainment formats have also influence on the formation of public opinion. In this situation, it cannot be overlooked that the share of fictional or non-fictional programming makes up a considerable part within the large TV channels. Therefore, ultimately, this model has a bias towards the private TV broadcasters with their principally entertaining programme offerings.³⁴

Thresholds

Minimum Thresholds

In order to support the media concentration assessment, a minimum threshold for the KEK, initiating a media concentration control procedure should be taken into consideration.

Nevertheless the obligation to notify all ownership changes should remain unchanged.

Limits

As stated before,³⁵ it is a political issue what limits for media concentration should be set out. Defining these limits will decide how many providers are in the market, and thus, in the end, upon the degree of plurality. Moreover, also economic aspects such as the vitality and competitiveness of the media markets are to be considered.

Margin of Discretion for the Commission

The KEK as a commission is acting through independent experts as well as directors of State Media Authorities. Both groups have particular expertise. Therefore the Federal Administrative Court has noted correctly that the KEK has a margin of discretion.³⁶ This discretion particularly relates to the issue of including certain offerings in the media concentration control assessment, to the weighting of the relevance of these offerings for private and public opinion-formation and to determining the parameters for establishing the reach of these offerings. If in future scientific empirical surveys would be included into the determination of the factor for opinion-formation, the margin of discretion would also relate to the definition and evaluation of the survey design.³⁷

Assessment by a true KEK = „...in the media“ („*im Medienbereich*“)

The further development of the media concentration law which is presently centered on television towards a television-based model that would particularly allow an effective control of cross-media connections would be an important step on the way towards securing plurality in a comprehensive (cross-)media approach. This would mean entrusting the KEK with a task which is already inherent in the KEK's name but so far only insufficiently implemented by the current law: to establish and to prevent “concentration in the media” (“*Konzentration im Medienbereich*”).

³⁴ See on this with further references KEK Konzentrationsbericht 2015 Chapter II, 2.2.2 „Vielfaltsmonitor der BLM“.

³⁵ See above, 3.

³⁶ See Federal Administrative Court, BVerwG, 24.11.2010 – 6 C 16/09, BVerwGE 138, 186 [194]; for this see also Hain, Vielfaltsicherung am Ende?, in: K&R 7/8/2014, 492 et seq.

³⁷ See above 3.

Enabling Power for Procedural Rules – Guidelines/Directives

In order to make the KEK's actions more transparent, legally grounded and predictable, the legislator should enable the commission to issue and publish directives. In these directives, which would be legally classified as (non-binding) procedural provisions, the KEK could, for instance, specify the details of defining the factors for plurality of opinion, or the inclusions of offerings, or the determination of audience reach.

Although the KEK is allowed to issue such directives even without such statutory authorisation, an express legal mandate would contribute to transparency and legal certainty for the media companies. Moreover, this would have a clarifying effect in the legally complex relationship between the KEK and the State Media Authorities.