

# The Results at a Glance

## 1 Media Concentration and Ensuring Plurality of Opinion

### 1.1 Media Concentration

The KEK report on the Development of Media Concentration and Measures to Secure Plurality of Opinion in the private broadcasting sector strives to create transparency and to identify trends in media concentration. Interrelationships have an important influence on television across all media-relevant markets; they can be horizontal, vertical, as well as diagonal. National and international concentration processes must also be considered.

When the currently applicable media concentration law took effect, focusing on private broadcasting was appropriate against the backdrop of the existing market conditions – today, it is outdated. Even though television and radio continue to have a significant influence on opinion-formation – with a relatively high number of viewers and listeners –, the almost incalculable number of offers distributed over the Internet has gained in relevance as well. Convergences in media markets, media offerings, and end devices are of additional importance. These changes are insufficiently considered by current media concentration law. Thus, the power over public opinion on media markets outside of television is not recorded at all, and cross-media power over public opinion is only recorded to a limited extent. Concentration control under broadcasting law in particular is not suitable for effectively countering online developments that pose a threat to plurality.

### 1.2 Forms and Causes of Media Concentration

Regarding concentration tendencies, media concentration law, as well as 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 (for example when various television broadcasters merge to form a chain of broadcasters). The connected increases in market power of one or more companies make it more difficult for new providers to enter the market. The highest degree of horizontal concentration is the monopoly.

Vertical concentration means the integration of upstream and downstream levels of the value chain within a group of companies (for example when television broadcasters buy up production companies or when cable network operators gain a share in television broadcasters). In television, the value chain consists of the production, programme event organisation and distribution levels. Vertical concentration results in market entry increases to enter the television market itself. Successful market entry without access to attractive programme content is very challenging.

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.

In the discussion about media concentration, one speaks of cross-media ownership. Cross-media strategies can also give rise to competitive constellations in which companies compete on one media market only to co-operate on another. However, the possibility to exert power over public opinion through various forms of media also strengthens the journalistic influence of individual providers and poses threats to the plurality of opinion through the homogenisation of media content.

### **1.3 Changes in the Media Value Chain as a Result of Online Audio-Visual Content Distribution**

The classic value chain in the media industry consisted of a linear sequence of phases "content production" – "content packaging" – "content distribution". The established players on the various stages of the value chain were rather large – especially in the audio-visual sector – and competition on the markets was structured in a (narrow) oligopolistic manner. Digitisation has caused this value chain to begin to totter. The linear structure has made way for new and shorter value chains, some of which exist side by side and overlap. The new competitors on the advertising market (as well as on the recipient market) are as such first and foremost the new individual content producers. They in part have considerable reach in target groups that can be clearly demarcated, and position themselves as authentic *influencers*, which is specifically used by companies for advertising purposes. The second group of influential new players on the advertising (and recipient) market are the new players in distribution. This includes platforms through which the content of professional and non-professional content producers can be found and consumed at any time, such as Google, YouTube and Facebook. Compared to the distributors from analogue media, these platforms have built up what appear to be almost unassailable competitive advantages: by now, the distribution platforms realise very high reach and usage figures. Furthermore, the platforms have an enormous volume of personal user data at their disposal. They increasingly determine the "rules of the game" on the online advertising market; other companies must adjust to them.

### **1.4 Legal Framework for Concentration Control and Securing**

The obligation to secure plurality and to control the concentration of the media directly follows from Art. 5 (1) of the German Basic Law (*Grundgesetz*). The German Constitutional Court (*Bundesverfassungsgericht*) interprets this as an obligation to create a "positive order" for broadcasting which serves and does not restrict the freedom of opinion formation. Material plurality of opinion must be guaranteed as a prerequisite for freedom of communication and opinion-forming. Material, procedural and organisational measures should prevent the emergence 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

### **1.5 Interstate Treaty on Broadcasting**

In order to implement the Constitutional Court's requirements, the German States, as the responsible authorities, signed and implemented 21 amendments to the "Interstate Treaty for the Reorganisation of Broadcasting", or the Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag – RStV*) which has been in effect since 1987.

The initially chosen model of limiting participation proved to be inappropriate to contain the developments in media concentration. In 1997, it was replaced by establishing the KEK and introducing an audience share model.

The case law of the Federal Constitutional Court in principle refers to broadcasting when discussing the imperative to safeguard the plurality of opinion, which is indispensable for a properly functioning democracy. The Interstate Treaties on Broadcasting, as they have existed up until now, also essentially regulate the safeguarding of plurality of opinion through television. This seems justified for as long as broadcasting and above all television, as an instrument of individual and public formation of opinion, occupy a prominent position in terms of media offerings and reception. However, the advent of the Internet and associated elimination of spectrum scarcity, of new multimedia services and the associated changes in user behaviour, justify a new perspective in preventing predominant power over opinion. Having said that, the Media State Treaty draft presented for discussion by the Federal States in July/August 2018 does not contain any such attempts.

## 1.6 Media Concentration Control and Competition

Competition law is designed to maintain economic competition. In merger control, only the external growth of companies through acquisitions and mergers is covered. Broadcast-specific concentration control, on the other hand, also covers the internal growth of media providers with relevant power over opinion. If internal growth leads to predominant power of opinion, this is covered by Section 26 RStV. The Federal Constitutional Court thus considers the mere application of merger control measures as insufficient in safeguarding the plurality of opinion in broadcasting and preventing predominant power over opinion. In a convergent media landscape, this also applies to non-linear media.

In principle, participation changes within the media sector might be legally permissible under competition law, but still lead to the emergence of dominant power over opinion, for example through the consideration of cross-media effects. Conversely, cooperation between companies which are permissible from the perspective of securing plurality, or maybe even desirable in terms of media policy, might still be questionable under competition law, for example if a merger of media companies creates or strengthens a dominant market position, but is the only way to secure the journalistic and editorial supply within a region. In order to better align competition and media law, the 9<sup>th</sup> amendment to the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) foresees better collaboration between the antitrust authorities and the Media Authorities; in addition, the establishment of consultation was explicitly extended to include the KEK.

## 1.7 European Union Law

The discussion on safeguarding media pluralism which takes place at the European level is consistently controversial, and discussions have rarely led to concrete legal obligations being imposed on the Member States. In most cases, results were limited to references made in recitals or statements; however, the revision of the Audio-Visual Media Service Directive (AVMD Directive) cautiously indicates a change of direction. The evaluation of the programme "to ensure regulatory fitness and performance" (REFIT) and the impact assessment have provided impulses which can be implemented within the AVMD Directive to ensure greater media plurality. The strengthening of the ERGA (European Regulators Group for Audio-visual Media Services), which – akin to the EPRA (European Platform of Regulatory Authorities) – represents an improvement in the communication between the national regulatory authorities, and which might create a future basis for further harmonisation measures through a lively exchange, signals a positive change.

A change of perspective may be called for, given that the predominant view of a European Union that lacks the competence to take concrete action to safeguard the plurality of opinion remains. In addition to a regulatory approach primarily geared towards the size of media companies, focus should also be placed on technical access restrictions. For it is not just the market structure of providers that influences media plurality, but also the access of content providers to networks and platforms. If the task of securing the plurality of media and opinion is also considered to encompass technical access, the EU is more likely to be able to create harmonising European framework conditions to prevent journalistic power over opinion. All the same, these framework conditions should be limited to those elements indispensable to the realisation of the single market, particularly as regards potential barriers to media concentration. At the European level, these only gain in importance when it comes to the cross-border influencing of public opinion formation, in other words: the "European public sphere". Under no circumstances should such framework conditions and harmonised Union law replace the established and proven structures in place within the individual Member States, as these are an expression of national specifics which already ensure a high level of media pluralism.

## 2 Assessment of Concentration in National Private Television

### 2.1 Nationwide Television

The German television landscape is characterised by a very diverse range of programmes. By the end

of the first half of 2018, 21 public and 169 private television channels broadcasted on a nationwide licence. These were joined by teleshopping stations and channels with a foreign licence. More than 200 regional and local programmes complement the TV offerings.

Target group channels and pay-TV offers are particularly gaining in importance. With this, the fragmentation of the television market which has been observed for a long period now continues. This has a particularly detrimental effect on the audience shares of large established broadcasters: Presently, only two public broadcasters (Das Erste and ZDF) reach an average audience share that exceeds 10%; the two large private broadcasters SAT. 1 and RTL Television already fell below the 10% mark a few years ago – and are taking further blows to their audience shares every year. Conversely, target group channels such as ZDFneo, NITRO and SAT. 1 Gold are gaining in audience shares.

In addition to public broadcasting and advertising-financed broadcasting, pay-TV managed to establish itself as the third pillar on the television market. Within ten years, the number of pay-TV subscribers has almost doubled from 4.3 million in 2008 to around 8 million in 2018. Of these, around 5 million currently subscribe to the Sky broadcasting platform. Around 16 million people use pay TV programmes per month. AGF determined an audience share of 4.2% among the overall population and 6.1% among 14 to 49-year-olds in 2017.

## 2.2 Media-Relevant Related Markets

The provisions of the Interstate Treaty on Broadcasting to ensure plurality of opinion stipulate that, when assessing a company's potential dominant power over public opinion, media-relevant related markets must be considered (Section 26 (2) (2) RStV). As such, if the programmes attributable to a company reach an audience share of 25%, dominant power over opinion is presumed if the company additionally occupies a dominant position on a media-relevant related market or if the overall assessment of the television activities and on media-relevant markets results in an influence over opinion corresponding to that of a company with an audience share of 30%. In addition, the media-relevant related markets are considered in the assessment of the fundamental facts of Section 26 (1) RStV.

The concept of a media-relevant related market is not defined in the Interstate Treaty on Broadcasting. The official statement of the 3<sup>rd</sup> amendment to the RStV (RÄndStV), Section 26 (2) from 1996, expressly mentions – but does not limit the selection to – advertising, radio, the press, rights and production as media-relevant related markets. This by now also includes online offers. The media relevance of a market which should be included in assessments depends on whether it is of importance to the process of public opinion formation or if it can potentially increase the power over opinion on television. According to the case law of the Federal Constitutional Court, the potential influence that classic media offerings have over opinion is primarily measured on the basis of suggestive power, broad impact and topicality.

Besides the traditional media-relevant markets, television broadcasters are also quite extensively active on other media markets, especially through online media. Interrelations with other media sectors merit special attention (diagonal concentration) as they bear the risk of multiplying journalistic influence in the form of multimedia power over opinion. The plurality of opinion is jeopardised by vertical interrelations if the horizontal concentration on the upstream and downstream markets has advanced to such an extent that the access of competing television companies to the procurement or sales markets is restricted or at risk.

Of those companies involved in nationwide private television broadcasters, the Bertelsmann Group is most closely intertwined with other submarkets of the media. In addition, the media groups who are primarily active in television broadcasting as well as on the press, radio, and online markets are Heinrich Bauer Verlag KG, Hubert Burda Media Holding KG and Axel Springer SE.

## 2.3 Consumer

### 2.3.1 Radio

Radio ranks among the most important mass media. Three-quarters of the population listen to the radio on a daily basis; on average, people tune in for four hours a day. Market conditions are determined by the predominantly terrestrial transmission through VHF. Nevertheless, both radio broadcasting through the DAB+ digital standard and online radio reception are increasingly growing in importance. The structure of private radio broadcasting reflects the exclusive competence of the states and the differences between them in terms of radio regulation. In this respect, the German radio market essentially follows the federal structure. Against this background, nationwide offerings in both the public and the private subsystem are exceptions rather than the rule; the market is

dominated by the state-wide stations. Local radio is only of importance in Bavaria and North Rhine-Westphalia.

The German radio market is characterised by a plural ownership structure and a large number of local and regional radio stations. The most important owners include regional newspaper publishers and supra-regional media groups. At the nationwide scale, no broadcaster realises a market share relevant to media concentration law. According to the Media Plurality Monitor, the power to influence public opinion through radio is dominated by ARD's public broadcasters with a market share of 55%; the largest private provider is the RTL Group with a market share of 7%, followed by Regiocast with 4% and Müller Medien with 3%.

Nevertheless, the following concentration tendencies can be observed in the radio sector, partly with negative effects on the plurality of opinion:

- Cross-media interrelations: Media groups with strong positions in the television and print sectors also participate in the radio stations with the largest national reach.
- Concentration tendencies in local radio: Local/regional newspaper publishers also participate in the respective radio stations.
- High concentration on the radio marketing market: A duopoly between RMS and AS&S Radio exists, which gives rise to the danger of discriminatory behaviour towards broadcasters (e.g. non-inclusion into advertising combinations).
- High concentration on the media agency market: The three largest agency groups account for a market share of over 70%. New business models, opaque discounts, as well as remuneration practices give rise to the suspicion that there exists a conflict of interest with agencies between providing objective advice to advertising clients and optimising their own profit.
- Influence on programme design: The marketing of radio programmes in programme packages (advertising combinations) often requires adapting the programme to the programme environment.
- Multiple use of content: The supply of programme parts, the combination of programmes into programme frames, and the development of station chains lead to a homogenisation of content.

### 2.3.2 Daily newspapers

In an international comparison, the German daily newspaper market is considered to be diverse with a high newspaper density; however, an isolated market analysis reveals progressing concentration. Although controls on press mergers limit the resulting concentration increases in the newspaper sector, horizontal concentration has once again risen significantly over recent years after a longer period of only slight increases. The areas in which newspaper monopolies exist are steadily growing. Newspaper publishers are coming under increasing economic pressure due to declining circulation and sales figures. This leads to cutbacks in the editorial departments, the formation of central editorial offices, and the purchasing of external content. And with these developments, journalistic plurality dwindles. This not only applies to the publishers' printed products, but also to the online portals and apps associated with them. Only a few publishing groups manage to realise high market shares. The market for street newspapers shows the highest concentration within the newspaper sector, it is covered by only five suppliers. Almost 80% of the total circulation can be attributed to Axel Springer SE. The "Bild" newspaper of Axel Springer SE, which has an enormous reach of 11.32 million readers on nationwide circulation, continues to take up a special position despite heavy circulation losses. Conversely, no considerable negative effects on the plurality of opinion attributable to diagonal interconnections between the daily press and nationwide television can be identified yet. Daily newspapers enjoy a high level of credibility among the population as a whole. Even if this is not yet the case, increases in ePaper sales and the growing establishment of payment models for online activities could gain greater economic relevance for publishers and counteract declining circulation and sales figures.

### 2.3.3 TV Magazines

Four publishing groups are active on the TV magazine market. The German Federal Cartel Office (*Bundeskartellamt*) considers this a dominant market oligopoly. Two of these publishers – Bauer and Burda – are involved in the organisation of nationwide private television. However, no attempt to exploit the option of influencing the readers' choice of programmes as a result of such an interconnection has yet been determined.

Compared to other types of magazines, printed TV guides continue to realise high circulation figures and reach, which have, however, been declining sharply for years. As a result, printed programme guides have lost much of their importance as a source of information for viewers. This might be attributable to the extensive range of online services, apps and programme guides that are included as a standard on devices, as well as to the increasing use of non-linear video services.

### 2.3.4 Popular Magazines

The largest publishers of popular magazines – Bertelsmann/Gruner + Jahr, Bauer, and Burda – remain involved in the production of nationwide private television. Only Bertelsmann, however, combines strong market positions in both areas. This offers opportunities for the cross-media exploitation of content and cross-promotion. The Media Plurality Monitor published by the Media Authorities ranks the publishing houses Bertelsmann, Springer, Burda, Funke, and Bauer amongst the ten media groups with the greatest influence on opinion formation in Germany. Public publishing houses achieve high reach in both the print and online sectors with their offerings, with the online news sites "Spiegel Online", "Focus Online", and "stern.de" as their cornerstones, ranking among the online offerings with the highest reach. The magazine market is, similar to the print sector at large, affected by declining circulation and drops in advertising revenues. Despite popular press continuing to exert a strong influence on the formation of opinion, its relevance has declined significantly over time, both in economic and journalistic terms. Today, it is hardly conceivable to build a media group with significant importance while solely relying on the magazine business.

## 2.3. Online Media

The concept of "online media" encompasses a wide range of service types provided via IP networks, which can be roughly divided into five areas: (1) Contents: video, audio, text; (2) Search: search engines, web directories, etc.; (3) Commerce: online commerce; (4) Communication: email, messenger, social networks; (5) Access, networks, devices. The individual offers/services are subject to different legal regulations. The Telecommunications Act stipulates the main legal provisions for telemedia services not subject to licensing. When compared to broadcasting services, telemedia services are not considered to be of equal importance to the free and individual formation of opinion; therefore, they are not subject to the stricter provisions of the Interstate Treaty on Broadcasting. KEK is critical of this perspective and demands that all journalistic media be included in the concentration control. This also applies to intermediaries, in particular including search engines and social networks, which are growing increasingly important in the formation of opinion but cannot be covered by current media concentration law.



KEK considers online media's potential influence over opinion when evaluating companies' market positions on media-relevant related markets. The company must, however, realise a high audience share of 25% on the television market to be included in the media concentration assessment. This means that controls are virtually idle; the online offers of companies without television activities cannot be covered at all. Against the background of advancing convergences of media technology and markets, as well as considering the serious changes in media usage behaviour, KEK has therefore repeatedly called for a reform of media concentration law towards an "overall opinion market model".

The Media Plurality Monitor developed by the Media Authorities already provides a suitable instrument for mapping the "overall opinion market". It found that television has the highest opinion-forming weight at 33.7%, ahead of the Internet (25.9%), daily newspapers (19.4%), radio (18.9%), and magazines (2.2%); all the same, the opinion-forming weighting of online media tends to continuously increase, whereas the influence of traditional television is declining. The Internet offerings that are most relevant to opinion formation include online portals as well as the online spin-offs of publishers and broadcasters. In the period under review, Burda realised the largest "online opinion market share" with 10.4%, ahead of Bertelsmann (9.5%), Axel Springer (8.9%), United Internet (7.0%), and the online offerings of ARD (5.9%). The ProSieben Sat. 1 Group held a share of about 3%.

## **2.4 Up- and Downstream Markets**

### **2.4.1 Programme Rights**

From the perspective of television broadcasters, the market for programme content is an important procurement market. The attractiveness of programmes forms a decisive factor in the competition for viewers and advertisers. Competition for moving image rights has particularly intensified in sports rights and fictional content, attributable to the entry of new providers and platforms such as the sports streaming platform DAZN and the series and film streaming services such as Amazon Prime Video and Netflix. For broadcasters, interrelations with production companies and rights management companies can offer, among other things, the advantage of direct and exclusive access to attractive programming. Conversely, production and rights management companies can try to consolidate their market power using their own broadcasting channels.

### **2.4.2 Fiction**

The success of television broadcasters, streaming services, and platform operators in no small part depends on the exclusive access to fictional programming. As platform competition increases, the demand for relevant content increases with it; exclusive content is becoming an important distinguishing feature. As a result, self-produced content ("originals") is gaining in importance. In addition to the Netflix and Amazon Prime Video streaming services, pay-TV providers and network operators are increasingly becoming active in this field. Since they are largely independent of those success criteria relevant to linear television, such as audience shares, they can also offer niche programming which isn't geared towards the mass market. In this respect, VoD platforms can contribute to the plurality of offerings in a quantitative as well as qualitative sense.



In order to finance high-quality content, private and public broadcasters, streaming services, telecommunications groups, and production companies are increasingly collaborating at a national and international level.

German production companies are also benefiting from increases in demand; however, the major TV stations ARD, ZDF, and RTL continue to be the largest clients for commissioned TV productions. According to studies conducted for 2016, the most successful companies in terms of sales and production volumes are primarily media groups that (also) participate in television broadcasters. This first and foremost includes the UFA Group, a subsidiary of the RTL Group. All the same, better long-term opportunities for smaller production companies and newcomers could be created by the demand of these new players and their business models.

A strong trend towards internationalisation and consolidation on the TV production market can be identified. Some of the largest European television production companies were acquired by US media groups in 2014. The German broadcasting groups of RTL and ProSiebenSat.1 have driven internationalisation through numerous acquisitions and have an extensive network of production companies at their disposal.

In addition to international rights management companies such as the major US media groups, the Tele München Group and Kineos GmbH/Beta Film GmbH are particularly active on the German licence trading market. It's difficult to determine market shares as the market is characterised by its opaqueness. Television broadcasters procure some of their licensed programming directly from production companies – the major Hollywood studios – and other programming through intermediaries. The widespread practice of large broadcasting groups to procure attractive programme content through package contracts with large US studios seems to be losing in importance – at least in free-TV.

For broadcasters, the integration of production companies and rights management companies can carry with it the advantage of reducing the risks involved with procuring attractive programme content. Conversely, producers try to consolidate their market power through the participation in television stations, creating their own content channels while reducing the distribution risk. From the producers' point of view, higher concentration on the television market leads to greater broadcaster demand markets. New sales opportunities are offered by the large number of platforms and video offerings in Germany, as well as by increased international demand. It remains to be seen whether this will have a lasting positive effect for independent and smaller producers.

### 2.4.3 Sports Rights

The reporting on sports events fulfils an important function as a subject of public communication and identification. This takes place via an array of providers and technical infrastructures. The competition for attractive sports rights has intensified considerably with the increase in sports niche programmes and sports offerings from online platforms. Rising rights prices have led to an increasing share of sports contents shifting towards pay-TV, if these contents are not subject to provisions under the Interstate Treaty on Broadcasting which stipulates that they must be shown on free-to-air television. On the rights market, Sky Deutschland, which dominates the German pay-TV market, suffered losses to the Eurosport network, a subsidiary of the US Discovery Group, and to the new sports streaming service DAZN. It's increasingly growing senseless for organisers without ties to large international groups to participate in the bidding for top-class sports rights. This even applies to the large German broadcasting group ProSiebenSat.1 and RTL, and increasingly also for ARD and ZDF.

The major Internet and telecommunications groups are currently already gaining international experience with the live transmission of sports events. In Germany, Amazon has taken its first steps in this field with the acquisition of audio rights for football events. Deutsche Telekom is continuously expanding the sports offerings through its Entertain platform. These new players strive to differentiate themselves from their competitors, win new customers, collect customer data, and show more targeted advertising. Compared to traditional pay-TV operators such as Sky, the Internet and telecommunications groups enjoy the advantage of enormous capital power to bid for rights; moreover, they can act more flexibly considering the fact that sports activities are not of existential importance to their business model.

The companies are increasingly cooperating with other parties to ensure the efficient exploitation of sports rights across all platforms as they seek to refinance the rights prices, which are growing more and more expensive. However, no significant cooperation on the broadcasting of the Football Bundesliga has taken place so far: Contrary to the expectations of the Federal Cartel Office, Eurosport and Sky Deutschland could not reach an agreement on the distribution of the Eurosport Bundesliga channel through the Sky platform. Customers are therefore forced to subscribe to two pay-TV services if they want access to all Bundesliga matches. The Federal Cartel Office's single buyer's ban for live broadcasts has thus led to greater provider plurality, but also to increased costs and effort for users. The rights distribution process has produced particularly disadvantageous effects for cable customers.

The central medium for viewers, as well as clubs and associations, continues to be linear television. The most important sports television events such as the football World Championships and European Championships, UEFA Champions League matches, and the Olympic Games regularly rank among the programmes with the highest audience shares. Accordingly, reporting on sporting events continues to be of cardinal importance when looking at total television usage.

#### **2.4.4 Rights to News Material**

Television continues to be the main source of information on current events in politics and public life, which gives it great potential to influence the society at large. However, the importance of the Internet is growing continuously, especially among younger users. The Internet offers the particular advantage of topicality and mobility. In addition to the presentation of reports by individual media outlets (online offers from newspapers, news and radio stations, etc.) as well as agencies, search engines and Internet portals also offer relevant journalistic content as well as content that users themselves create and share online. In addition, social media are becoming an important source of information for users, but also for news agencies and media. Microblogging services such as Twitter are used to distribute messages across the globe within mere seconds. They provide, among other things, sound bites of politicians and other persons involved in current affairs and eyewitness accounts of news events; on the other hand, they offer the possibility of manipulation and the dissemination of false news. This makes it all the more important for professional journalists to provide additional review, research, selection, classification, and explanation.

News agency services rank among the most important sources of information. This particularly rings true for media companies that do not have their own extensive networks of correspondents. The news agencies continue to struggle with declining circulation figures and editorial mergers among daily newspapers, their principal customers. In addition, online information offerings are becoming increasingly competitive. One of the important tasks of news agencies lies in the monitoring, filtering, and verification of social media reports.

As before, the major new formats are coordinated, produced, and realised within the large networks. If group broadcasters are supplied centrally with news material, or if sources of information are shared, the risk of homogenisation of content exists. This in turn jeopardises the plurality of opinion. Possible negative effects on the plurality of opinions are contained for as long as the media edit the reports or contributions themselves. All the same, the extent to which private television stations use ready-to-air or ready-to-say messages from agencies or service providers in their news and information programmes without further editorial processing, is not transparent. If broadcasters without interconnections to holders of rights to information and news material have difficulty in accessing these rights or are denied access through exclusivity agreements, this poses a risk to the plurality of opinion. That being said, such trends cannot be recognised at present. Broadcasters can make use of a wide range of agency services and a variety of potential sources of information; moreover, the market for the procurement of information and news material is characterised strongly by various cooperative systems. In competition with major US streaming platforms such as Amazon and Netflix, current news formats can serve as a supporting function in the importance of linear television.

#### **2.4.5 Platforms**

Platform providers play a special role in broadcasting distribution. They bundle broadcasting programmes in packages and transmit these via cable, satellite, terrestrial means (DVB-T2), or the Internet (IPTV, OTT). The platform providers decide whether they grant access to their technical distribution platforms, and to whom they grant access, and thus decide who reaches the customer. With this gatekeeper position, they significantly influence the plurality of offers and opinion. In addition to the traditional infrastructures for TV broadcasting, user interfaces such as electronic programme guides (EPGs), navigators, lists, and applications are growing increasingly important. Besides merely offering the option to find programmes, user interfaces also allow viewers to directly select programmes and thus affect the formation of opinion. Within the framework of platform regulation (Sections 52 et seqq. RStV), the Media Authorities are responsible for safeguarding the plurality of offers through media platforms.

From a media concentration law perspective, ties between content providers and infrastructure providers, media platforms, media intermediaries, or other providers of user guidance systems warrant critical observation, as this bears with it the risk of narrowing plurality.

The traditional media companies are subject to increasing competitive pressure from large platform companies, primarily of an international nature, including in particular Google, Facebook, and Amazon ("Media Platform Revolution", see Chap. III). They invest in the expansion of VoD and streaming offers, the production of exclusive contents, as well as in new forms of offerings in order to stay competitive. The future development of the audio-visual market will be characterised by the progressing digitalisation and automation. Examples of this include investment in fields such as addressable TV, intelligent user interfaces and recommendation systems, voice-controlled platforms, and programmatic advertising.

## 2.4.6 Transmission

There have been substantial structural changes to television means of transmission over recent years. The use of digital technologies has massively improved the capacities of the transmission infrastructure. The borders between telecommunication and classic media markets are becoming blurred; the media convergence which has been observed for years now is forging ahead. The key players on the German telecommunication market are Deutsche Telekom as well as the, yet still separately operating, Vodafone and Unitymedia companies. 1&1 Drillisch, a United Internet Group company, is trying to establish itself as a fourth major player. The telecommunication companies are investing billions in the expansion of the broadband Internet network. Virtually unlimited performance capacities up to gigabit speeds are being realized, above all in glass fibre networks. They represent a significant competitive factor, particularly in the transmission of video content.

The Federal Government has set objectives for Germany to establish a nationwide broadband infrastructure with download speeds of at least 50 Mbit/s by 2018. By the end of 2017, 33.2 million German household (of a total of around 39 million) had a broadband Internet connection, of which around 0.8 million (3%) had a glass fibre connection. Around three-fourths of households had a DSL connection and around one-fourth of households had access to broadband Internet through the television cable.

The digitisation of television transmission will be completed at the turn of the year (2018/2019). Only cable is still awaiting complete digitisation. The digitisation report of the Media Authorities states that 45.9% of households used cable as their TV transmission path, 45.7% opted for satellite transmission, 7.4% for terrestrial transmission, and 6.9% for IP networks in 2017. The importance of terrestrial transmission is trending downwards; conversely, IPTV is on the rise. The number of households receiving video through the open Internet (OTT) is growing. With the increasing expansion of broadband Internet, OTT will gain in importance as a transmission path.

## 2.4.7 TV Advertising market

Television continues to be the major classic advertising medium by far, with a share of around 48% of the overall gross advertising revenue. Although the trend towards greater online advertising spending continues, recent online advertising developments have for the most part been on par with developments on the television advertising market. Currently, no significant shift in advertising spending from television to online media can be identified; however, a shift in advertising spending from print media to television, online, and mobile can be determined. Even with gross advertising revenue showing continuous growth, net advertising revenues are largely declining. All the same, continued growth in the range of programming, especially of advertising-financed free-TV programming, is generally an indication of a healthy market environment.

The television advertising market shows strong concentration both on the part of advertising space providers (broadcasters) as well as on the part of media agencies. According to the Federal Cartel Office, ProSiebenSat.1 Media SE and the RTL Deutschland media group form a market-dominant oligopoly/duopoly on the television advertising market. The two large private broadcasting groups together account for around 83% of gross advertising revenues; if the public programming of ARD and ZDF are included, this figure rises to around 87%. The remaining broadcasters, around 100 in total, are forced to finance their activities through the 13% of remaining gross advertising revenues. The six largest media agencies groups amass a total market share of around 86% of the managed budget size/gross revenue.

Great concentration on the television advertising market has various significant effects on the plurality of opinion, considering the fact that television advertising continues to serve as the main source of financing of private television. Higher concentrations among broadcasters represent a serious entrance barrier for potential new providers, as only the sizeable and established broadcasters reach a share among the target audience large enough to be interesting for the advertising industry; moreover, they can offer similarly high discounts. The established broadcasters are faced with considerable bargaining power of the media agencies. They are key players on the television advertising market and can use their booking behaviour to either reward the offerings of attractive advertising environments – in other words, programme content –, while punishing less captivating contents by refraining from booking advertising space. Even if it is forbidden for advertisers to influence programme design (Section 7 (2) (2) RStV in conjunction with Art. 2 (2) Advertising Guideline for Television (*WerbeRL/Fernsehen*)) – which is relevant in relation to competition law regulation –, it is very difficult to prove such influencing in practice. Moreover, the mere dependence these private broadcasters have on being considered in the advertising distribution process, which provides revenue they need to finance their programmes, might lead to an intention to create a relevant advertising environment which is as broad as possible. As a result, this leads to an increasingly comprehensive offer of content which is attractive to the masses. These offers are not exactly characterised by their plurality in terms of content or target groups.

#### 2.4.8 Broadcasting

Broadcasting groups established themselves early on in nationwide television. Within these groups, various broadcasters that are under the influence of one company or groups of companies join forces. The groups can be considered as their own spheres of influence and do not necessarily have to constitute groups in the meaning of company law. Legislators have taken this development into consideration when shaping the attribution criteria contained in Section 28 RStV.

KEK attributes programmes following these criteria and assigns them to these broadcasting groups wherever they exist. In nationwide television, two large private broadcasting groups, the RTL Deutschland and ProSiebenSat.1 media groups, have established themselves next to the public broadcasters (ARD and ZDF). When looking at the total viewing time, these broadcasting groups and the public broadcasters amassed a joint share of 88% in 2017. The Disney group and other national and international broadcasting groups follow with a noticeable gap.

The Media Plurality Monitor of the DLM paints a somewhat different picture. It strives to comprehensively map the existing power relationships that exist as concerns the mass-media influence over public opinion in Germany, in a media-convergent manner. The Media Plurality Monitor takes into consideration the TV market, as well as the radio, Internet, daily newspaper, and popular magazine markets, and uses a representative study to weight these on their potential influence over opinion formation. The determined weightings are multiplied by the reach data of the various categories. This results in the ARD (21.6%) realising the largest market share; ARD and ZDF (7.7%) together amount for a market share of 29.3%. Among private media groups, Bertelsmann takes the top position with a share of 11.6% of the total opinion market, ahead of Springer with 8.0% and ProSiebenSat.1 with 6.6%. The Media Plurality Monitor finds that none of the other media groups manages to reach a share of 5% or more of the overall opinion market; the shares of US media groups do not even manage to reach the 1% mark. This result is considerably influenced by the strong market positions of ARD on the radio market, and Axel Springer SE's dominance on the daily newspaper market, as well as the broad diversification of Bertelsmann. In contrast, the Media Plurality Monitor finds that ProSiebenSat.1 Group's share of the total opinion market is relatively modest, as it, with the exception of the online market, doesn't hold any significant participations on the other markets which are taken into consideration besides television.

The German media groups hold strong positions on the opinion market. In terms of revenue, however, they lag far behind the international media groups. If the stock market values of the listed media groups who are active on the German media market are compared to the Internet groups Apple, Amazon, Alphabet, and Facebook, the latter far outperform the classic US media groups. In comparison, the German media groups only reach margin values.

#### 2.4.9 Major Mergers on the Media Market

The traditional US media groups are attempting to keep up with the growth of platform groups through major mergers: the telecommunications company AT&T, Inc. has acquired the Time Warner, Inc. media group, the Walt Disney Company intends to take over large parts of Twenty-First Century Fox, Inc., the Comcast Corporation managed to claim victory against Twenty-First Century Fox, Inc. in the bidding competition for Sky plc. These mergers have a significant impact on the US media market and on the international procurement market for programme rights.

### 3 The Media Platform Revolution and New Online Power Relations

The substantial increases in revenue and profit realised by traditional German media companies over the last few years might lead to the impression that they managed equal increases in their influence over opinion if they had expanded their digital activities at the same time. KEK commissioned professors Christoph Neuberger and Frank Lobigs to assess the digital strategies of media companies as well as the formation and distribution of online power over opinion. Their survey, titled *"Online power over opinion and the digital strategies of media companies. New power relations in spite of expanding Internet activities of traditional mass media groups"* was published in March 2018 and fundamentally updates the previous survey published in 2010 under the title *"The importance of the Internet in safeguarding plurality"*. Both reports treat the issue at hand from a communication science and media economics perspective.

The results of this new survey show that this "remapping" of the online sphere proved sensible, as the core statements of the 2010 survey should now be revised or, at least, a strong need to put them into a new perspective exists. For example, the 2010 survey ascribed a prominent and largely exclusive role to traditional media groups in terms of online power over public opinion, and posited that the media companies could significantly strengthen their potential to influence the public opinion by "extending" their contents into the online domain.

Today, however, an **analysis from communications theory** of the formation and distribution of online power over opinion recognises an essential, albeit not yet precisely quantifiable, shift of power over opinion from traditional media companies towards the major intermediaries and non-journalistic actors with political relevance. Traditional media companies are losing relative power over opinion as they lose their monopoly as gatekeepers and shift activities away to non-journalistic and politically irrelevant fields. The opportunities for all actors to participate have expanded through technological advancements, which only leads to a limited levelling and broader distribution of power over opinion.



Particularly worth including in these new assessments is that intermediaries and (at least some) non-journalistic actors with political relevance can also exert considerable power over opinion.

An **analysis from media-economic theory** of media companies' digital strategies again concludes that the media groups have in recent years expanded their online activities, primarily into the realm of digital business, adapting to the so-called "online platform revolution". All the same, these hardly (and if so, primarily negatively) affect corporate influence over opinion, while their power over opinion, which continues to stem from their traditional media offerings, actually dwindles more or less rapidly.

Based on current market and competition analyses, the experts underpin the basic theory that the digital strategies of media companies have been so strongly characterised by the online platform revolution in recent years, that these are in essence strategies for adapting to the competitive power of large platform groups, in particular Google, Facebook, and Amazon. Among both publishers and television companies, the platform revolution manifests itself by subjecting the classic core business of online publishing to increasing substitution competition from large international platform groups, which further restricts the success and growth potential of this core business.

## 4 Intermediaries and Safeguarding Plurality

In democratic societies, intermediaries are of great, or even indispensable, importance for the access to information and associated communication processes; thus, any attempt to "demonise" these systems misses the mark. On the contrary: a sober, objective discussion is needed.

On the one hand, it should be recognised that intermediaries, with their great significance, represent an (abstract) risk and hazard potential to the opinion-forming process and opportunities for equal communication. On the other hand, more-recent studies suggest that the quantitative and qualitative (abstract) risk and hazard potential posed by intermediaries may have been overestimated in the past. Considering their quantitative significance for the access to journalistic content, and taking into account the distortive effects inherent to any recommendation system, it would nevertheless be desirable if the legislator were to, in the short term, implement the results formulated in 2016 by the Federal State Commission on Media Convergence (transparency requirements, prohibition of discrimination, autonomy of users, and the like) in the form of openly formulated norms on the "positive" safeguarding of plurality. This would additionally be helpful in gathering initial experiences with the regulation of "intermediaries". Such "intermediary regulation" could serve as a model for other judicial systems or fields. It is therefore appropriate and important that the draft discussion on a State Media Treaty published online by the Broadcasting Commission in July/August 2018 contains dictates on transparency and the prohibition of discrimination for those intermediaries who have an influence over the opinion-forming process. Nevertheless, KEK also believes that the chosen approach does not go far enough, considering that intermediaries' power over opinion cannot be sufficiently considered in media concentration supervision.

Reforming the media concentration law to provide an instrument of "negative" plurality protection would additionally offer sufficient protection against mergers of intermediaries with content providers. This would be an important complementary element to the "intermediary regulation"; all the same, prohibiting intermediaries to provide journalistic services or events, as is occasionally proposed, would probably be a bridge too far.



## 5 Media Usage and Media Concentration

### 5.1 Media Usage

Media consumption is very important to people; around 97% of people use at least one media offer daily. The ARD/ZDF Study on Mass Communication Trends 2017 shows that the total media usage time (net<sup>1</sup>) among the overall population amounts to 424 minutes, slightly more than 7 hours a day. Audio only slightly outperforms video, with 197 and 194 minutes, respectively. Text content amounts to 44 minutes of the daily usage time. Younger users aged between 14 and 29 use 204 minutes of audio, 151 minutes of video, and 31 minutes of text content every day. For one-quarter of the total population and 59% of 14 to 29-year-olds, the Internet is used to access media content. Classic linear television continues to dominate video usage. In the population at large, linear television accounts for 86% of total video usage; online video usage amounts to 9%. In contrast, live television only accounts for 57% of total video consumption among those younger than 30. In this age group, videos/films are increasingly watched over the Internet: the share of online video use already amounts to 36%.

### 5.2 Internet Usage

The ARD/ZDF Study on Mass Communication Trends 2017 shows that the overall population (14 years and over) uses the Internet for an average of around 2.5 hours every day. Of this, around one hour is spent on individual communication (chatting, email, messenger), 45 minutes on media Internet use (video, audio, text online), and 71 minutes on other types of Internet usage (surfing, shopping, playing games). The 14 to 29-year-olds use the Internet significantly more on a daily basis, for a total of 4.5 hours. This age group spends almost two hours a day using media content and more than 1.5 hours on individual communication and other Internet activities. If mobile devices (smartphones, tablets) are used, people tend to stay online for longer.

## 5. Media Concentration Measurement in a Multimedia Manner

In addition to the classic reach and market media studies by AGF, AGOF, agma, IVW, and Nielsen, the market participants are working on realising cross-media reach measurements, with important projects including the ma Intermedia PLuS of the Working Group Media Analysis (*Arbeitsgemeinschaft Media-Analyse*), the b4p study of the Society for Integrated Communication Research (*Gesellschaft für integrierte Kommunikationsforschung*) and the Media Plurality Monitor of the Media Authorities.

The Media Authorities have been presenting the Media Plurality Monitor twice a year since 2012. It offers an instrument for the convergent measurement of media groups' power over opinion. The five media markets - TV, radio, Internet, daily newspapers, and popular magazines - are not considered by themselves, but rather brought together through an empirically determined weighting of power over opinion formation. This opinion-forming weighting for all types of media is representatively determined by Kantar TNS and is composed of usage to obtain information as

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<sup>1</sup> The use of several media offers within a 15-minute interval is only included in the total duration once, as 15 minutes of usage.

importance this medium has as the users form their opinion.

The weightings of the individual mediums are multiplied by their range. As such, the usage processes of different mediums are weighted and brought in relation to each other for comparison. The five previously isolated media opinion markets now produce an overall opinion market that covers all media. The Media Plurality Monitor thus offers a suitable procedure for depicting the existing power relations in the mass-media exertion of influence over the formation of opinion in Germany, in a media-convergent manner.

## 6 Measures to Safeguard Plurality of Opinion

Pursuant to Section 26 (6) RStV, the concentration report should also comment on the use of Sections 26 to 32 RStV and any necessary amendments to these provisions. KEK's obligation to report thus also includes a statement on legal policy.

### 6.1 Focus Areas of the Application

#### Section 26 RStV: Securing Plurality in Nationwide Television

According to the judgement of the Federal Administrative Court dated 29/01/2014, the audit pursuant to Section 26 (2) RStV calls for the deduction of bonus points for regional and third-party window programmes from the audience share reached by a company through the programmes attributable to it *before* determining the existence of a share that calls for further investigation.

For the RTL Germany and ProSiebenSat.1 Media SE media groups, after deduction of bonus points, the annual average audience share in 2017 remains below 20%. No further investigation into a dominant share pursuant to Section 26 (2) (2) RStV is possible as it falls short of the necessary audience share threshold of 25%. Although a recourse to the fundamental facts of Section 26 (1) RStV is generally permissible, also under the threshold value set out in Section 26 (2) RStV, the KEK must observe the assessment made by the legislator in the case law that an audience share of less than 25% can generally be classified as harmless. If the share falls short of the threshold, recourse to Section 26 (1) RStV is only permissible if the individual peculiarities of an individual case cause it to differ so significantly from the normal case that adherence to the legal consequences provided for, in other words that no intervention against any dominant power over opinion is required, appears inappropriate.

Thus, hardly any application of an in-depth examination of media concentration law under inclusion of media-relevant related markets is conceivable. The audience shares currently amassed by even the large corporate groups are far removed from the intervention thresholds laid out in Section 26 RStV. In view of constant developments in reception behaviour towards non-linear use, it's hard to envision that this trend will be reversed. The core provision of current media concentration law is thus largely a paper tiger; the only actually conceivable in-depth examination under concentration law pursuant to Section 26 of the Interstate Treaty on Broadcasting (RStV) would be in the event of a merger of Bertelsmann and ProSiebenSat.1. All the same, if any of these companies would be taken over by Google or another intermediary, no comprehensive investigation would be

#### Section 27: Determining Viewer Ratings

Under current law, the audience share is the sole factor and decisive yardstick to warrant an examination under media concentration law. This requires an appropriately valid data basis; however, shortcomings in the determination of audience share continue to exist, attributable to

an incomplete data basis, streaming use which is unaccounted for, a failure to record use outside of the home, and foreign-language programmes not considered under the legislation. As long as the legislator cannot decide on a different model to safeguard plurality, it is proposed that at least a change is made to the phrasing in Section 27 (1) (1) RStV from “German-speaking” to “programmes aimed at viewers living in Germany”.

### **Section 29 RStV: Changes of Ownership**

In the interest of safeguarding the plurality of opinion, notification must be given in writing to the competent state media authority prior to every planned change to ownership structures or other influences following Section 29 RStV. Such changes in ownership relationships play an important role in KEK's decision-making practice. In the past, problems of interpretation and application were mainly the result of uncertainties regarding the scope of this obligation, whether or not notice must be given in indirect participations, intra-group restructurings, and dealings with stock corporations.

### **Revision of the KEK Guideline Pursuant to Section 29 Sentence 5 RStV**

In accordance with Section 29 sentence 5 RStV, KEK may make exceptions to the notification requirements for minor participations in stock corporations through guidelines. KEK made use of this, issuing a corresponding directive on 14 July 1997, which was amended on 10 January 2017. With the amendment, KEK aims to, on the one hand, clarify that in addition to the existing notification obligation of participation changes that exceed a volume of 5%, an obligation to notify exists if a participation threshold of 5% is reached or exceeded.

At the same time, any “oscillations” around this 5% threshold – repeatedly exceeding and falling below this threshold within a short period –, shall be exempted from the obligation to notify. Only the first exceedance within a 12-month period remains subject to notification. In addition – following the German Securities Trading Act – short-term changes in participation are exempted from the notification requirement for a maximum period of three (3) trading days.

### **Intra-Group Changes to Participations**

In principle, the obligation to notify covers any planned changes to ownership relationships or other influences (e.g. through voting right agreements, regulations in platform agreements that grant programme-related influence, extensive programme supply agreements). Exempt are minor changes in participations in listed stock corporations within the meaning of the KEK guideline pursuant to Section 29 sentence 5 RStV.

A distinction must be made between the obligation to notify under Section 29 sentence 1 of the Interstate Treaty on Broadcasting, and whether a change in participation requires authorisation under media concentration law. Accordingly, following the established practice of the KEK, purely intra-group changes in participation which do not lead to any material change in influence relationships are subject to the obligation to notify, but not subject to approval.

A regulatory *de minimis* provision might create clarity and reduce the procedural effort that companies, media institutions, and KEK are faced with. It would be conceivable to only include media companies with a certain minimum influence over the formation of opinion into an audit, for example through the definition of usage-related inclusion thresholds or by only including the strongest service providers within a certain media as related to the usage attributable to their media offerings, for example. A distinction should be made between a TV approach and an overall market approach: in television, this minimum inclusion threshold could equate to an audience share of around 1%.

### Section 31 RStV: Broadcasting Time for Independent Third Parties

In principle, the regulation on the assignment of programming windows to third parties proves to be a suitable instrument to safeguard positive plurality. Particularly crucial and apt mechanisms are the prohibition on the legal dependence of the programming window broadcaster from the main broadcaster under Section 31 (3) RStV as well as the determination of areas in need of plurality pursuant to Section 31 (1) (1) RStV. Additionally, it is important that the window programme organisers and their programmes are financed by the respective main broadcaster with guaranteed editorial independence. This ensures the independence of the window programme organisers and thus their right to exist, which lies in the safeguarding of plurality. This is the only way in which the window programmes are not pressured to achieve certain quotas, which is usually the case in private radio.

Nevertheless, the practical efficacy of these third-party broadcast window regulations leaves something to be desired. The current regulation is complicated and procedurally overburdened, which is illustrated by the current disputes in administrative court concerning which audience share at which point in time forms the basis for the application of Section 26 (5) RStV. This depends not least on the legislative decision to set absolute audience share thresholds of 10% for television broadcasters and 20% for companies. If they surpass this threshold, they are subject to an obligation to allocate third-parties broadcasting time.

In addition, the third-party programmes have very low audience ratings, since broadcasters tend to allocate the time slots during the night to the extent permitted by law. This means that bonuses granted under Section 26 (2) (3) RStV to the amount of 3% seem rather unjustified.

It therefore makes sense to introduce a relative rather than absolute audience share threshold, as is the case for regional programming windows; in other words, to extend the third-party broadcasting time obligation to the two most-widely broadcast nationwide general interest channels. This rule would bring with it the advantage of immunity to proportional changes in audience shares. It would only be affected if the balance of power between the programmes shifted. This would make it easier to apply the standard, as it introduces clarity that two programmes are obliged to broadcast third-party programme windows. It would also make it easy to identify the two programmes in question. The regulation would ultimately ensure that additional

## 6.2 Other Application Practice

### Extensions of Regional Programming Window Approvals

In the period under review, KEK carried out several procedures to establish consultation for the approval of regional window programme broadcasters. In the majority of cases, this concerned renewing existing licences without offering a prior invitation to tender for the slots. These procedures were therefore solely aimed at the licence holders. There was no selection procedure that included KEK. The extension, particularly the repeat extension, of regional window broadcasting licences might leave other applicants barred from accessing regional window broadcasting spaces.

The competent bodies of the Media Authorities might, in accordance with state legislation, be in the position to make decisions on the extension of window programmes without a call for tenders and without a new selection of regional window programme broadcasters: however, in these cases

This will give the Commission the opportunity to deliver its opinion within the spirit of a transparent procedure.

### Inter-State Regional Window Programmes

Regional window programmes are sometimes organised across states. As a result, the broadcasters of joint regional window programmes hold two licences (one for each state). KEK has pointed out that the respective competent media authorities must strive to ensure that the licence terms for inter-state regional window programmes run in parallel. If the licences end at the same time, a tendering process becomes possible which can lead to a selection procedure including various bidders.

### Exchange of Advertising Windows

KEK approves programmes after examining their influence over the formation of opinions. In principle, KEK does not differentiate contents according to their potential influence over the formation of opinions. Thus, advertising blocks and their audience shares are included in the assessment under media concentration law, similar to all other programme content.

The question of whether KEK should be included in procedures to extend licensing authorisations that solely relate to the exchange of advertising spots, is a different one. In this respect, KEK has stated that such an exchange has no discernible effects on the plurality of opinion; as such, KEK's inclusion seems unnecessary. The only decisive factor in media concentration control lies in recording the audience share of a programme across all platforms (even if this is not yet the case in practice). KEK has therefore decided that broadcasting advertising in blocks which vary among different means of transmission within the framework of the programme is irrelevant under media concentration law. It is therefore not necessary for KEK to be involved with such issues in future.

## 6.3 Media Concentration Law Reform

### KEK Proposals to the Broadcasting Commission

Following the decision of the Federal Administrative Court dated 29/01/2014, and the resulting negative consequences for media concentration law, KEK already presented its ideas for a reform of Sections 25 et seqq. RStV during the early stages of the discussion with the Federal State Broadcasting Commission. This encompassed a holistic approach to securing the plurality of opinion and included a cross-media approach and proposals to amend Section 26 RStV. In its Concentration Report of 2015, the Commission made proposals for efficient media concentration law. In a position paper addressed to the Federal-State Commission (*Bund-Länder-Kommission*), this approach was developed further striving to create an overall opinion market model.

It recalled the constitutional mandate to create a "positive broadcasting order" and addressed the shortcomings of current media concentration control. The television-based safeguarding of the plurality of opinion was illustrated and suggestions were made to the states to revise existing media concentration law and the associated questions on safeguarding plurality (intermediaries, regional windows, third-party broadcasting times). In statements made during the reporting period, most recently to the Media Concentration Working Group (*Arbeitsgemeinschaft Medienkonzentration*)

further concrete proposals toward a television-independent system to safeguard plurality were drafted and proposed to the Broadcasting Commission. The most recent meeting between the Media Concentration Working Group and KEK took place in Berlin on 20/09/2017. A comprehensive set of questions of broadcasting experts was used to discuss the basic principles of the Media Plurality Monitor, which potentials these instruments within amended media concentration law, of which limits the model should have and whether it can be designed in such a way that allows for its use as a tool to make legally valid decisions within a general opinion market model.

Despite critical statements made about media concentration control in the past, the Monopolies Commission (*Monopolkommission*) also draws nearer to the proposals of the KEK in its most recent main report. The Commission states that an overall opinion market model would not limit media concentration control to linear television, but would rather extend this to all media offers relevant to opinion formation – that is, editorially designed media offerings. This would facilitate the future examination of inter-media mergers on their impact on the plurality of opinion. Any such further development of media concentration law would also cater for the fact that the formation or reinforcement of influence over opinion lies precisely in the combination of different media.

### Constitutional Duty of the Legislator

Unfortunately, the proposals of KEK and the relevant recommendation made by the Monopolies Commission itself have not motivated the legislator to act.

When the Broadcasting Commission shared its working draft for a media treaty over the Internet on 24/07/2018, it merely contained proposals to regulate the concept of broadcasting, platform regulation, and intermediaries, and no changes to media concentration law were proposed. Apparently, the interests of individual states lie in demanding the highest possible intervention thresholds, which cements the status quo and persistently prevents legislators from tackling reforms which have been overdue for years.

In contrast, in its most recent decision dated 18/07/2018, the Federal Constitutional Court points out that the legislator must take appropriate measures intended to achieve and secure the highest degree of equal plurality possible in private broadcasting. This is substantiated by the requirement that the broadcasting system at large must comply with the constitutional requirements to the greatest possible extent.

Under reference to its settled case law, the court emphasises that precautions must be taken to protect journalistic plurality in light of considerable concentration pressures in private broadcasting and the associated risks of unilateral influence on public opinion formation. Digitisation in the media, and particularly the online network and platform economy, including social networks, favour concentration and monopolisation tendencies among content providers, distributors, and intermediaries.

## 7 Conclusions

### After 20 Years, a Need for Change

Far-reaching changes have taken place in the media over more than two decades. These changes call into question the continued suitability of television-based regulatory precautions to protect the fundamental plurality of opinion in a democratic constitutional order. There is a need for adaptation.

These changes, that must be considered, exist both on the part of providers of journalistic content and in the behaviour of media recipients and users.

### Outdated Concentration Control only Considering Television

The provisions and regulatory approaches to ensuring plurality of opinion have not kept pace with these media upheavals. Legal media concentration control regulations are limited to the defensive negative safeguarding of plurality. The granting of broadcasting windows to independent third parties and the inclusion of regional window programmes are part of the necessary and constitutionally required positive assurance of plurality. Convergent media offerings have for a long time no longer complied with these regulations.

### Protection Needed against the Imminent Impairment of the Overall Media Market

These findings illustrate the urgency of adapting the regulations to ensure active and positive freedom of information and thus safeguard the plurality of opinion, as is constitutionally required. The classic regulatory objectives of media concentration control and the assurance of plurality have not become obsolete against the background of recent developments.

### KEK's Thought-Provoking Suggestions to Further Develop Media Concentration Law

KEK proposes and suggests the following as the further development of media concentration law is discussed:

- The effective design of plurality protection should in equal parts include negative defensive and positive aspects, while aligning it to the constitutional requirements set out in Art. 5 (1) of the German Basic Law.
- A sufficiently defined legal framework to safeguard plurality through preventative protection against threats to journalistic diversity and the guaranteeing of equal opportunities to communicate is indispensable.
- The new concept for securing plurality must be designed with an overall market model, independent of television, under the inclusion of all media markets relevant to the formation of opinion. The threats of considerable impairments to the plurality of opinion must already be averted.
- The Media Plurality Monitor, which was created to attribute shares to the overall media market with a weighting of journalistic broadcasts, must be developed further and requires regulatory recognition and protection.
- With a view to the overall market, the examination and intervention thresholds must be significantly lowered from the thresholds stipulated in Section 26 (2) RStV and may no longer be television-centred.