



# Background information report

Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of Germany

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## **Project profile**

MEDIADEM is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It will investigate the configuration of media policies in the aforementioned countries and will examine the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, will be thoroughly discussed and analysed.

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## The case of Germany

Sebastian Müller and Christoph Gusy

### 1. Introduction

Three important historical and political developments have influenced the media structures<sup>1</sup> in Germany. At the end of the Second World War, the media landscape had to be constituted completely anew.<sup>2</sup> After the Nazi regime was defeated, the Western Allies - while thinking of new models of regulation systems – were mindful of the total state control of the media and its consequent abuse by the German propaganda system.<sup>3</sup> The new system should constitute of an independent and pluralistic broadcasting system and allow critical discourse.<sup>4</sup> The print media, on the other side, was organised thereafter by private publishers. These quite unique circumstances after the war laid the foundation for the ensuing developments, especially the shaping of public broadcasting in West Germany.<sup>5</sup>

Alongside a liberal economic understanding and the shift in power on the federal level in West Germany, the second phase began when conservative parties and the liberal party took control in 1982.<sup>6</sup> Although private publishers had tried for decades to convince the state and federal lawmakers to establish a regulatory framework for private broadcasting, the broad and comprehensive introduction of new rules for private media operators did not take place until the 1980s.<sup>7</sup> Private broadcasting in Germany was incrementally legally authorised and has been developed since then.<sup>8</sup>

The third phase was initiated with the emergence of new media services and the advent of digitalisation. Although the policy debate on “new” media had begun in the 1970s, especially with regard to satellite and cable television networks,<sup>9</sup> the potential of new media services became apparent with the development of the Internet and digitalised transmission of broadcasting.<sup>10</sup>

As for the current situation, the convergence of the media systems, the influence of liberal economic theories on the notion of media in society, and the

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<sup>1</sup> See as a general introduction: H. J. Kleinsteuber, “Germany”, in M. Kelly, G. Mazzoleni and D. McQuail (eds), *The Media in Europe* (2004) 78.

<sup>2</sup> Dussel speaks of a “(...) sharp break (...)” of the German broadcasting after the end of the war. K. Dussel, *Deutsche Rundfunkgeschichte [German broadcasting history]* (2010) at p. 179.

<sup>3</sup> *Ibid.*, p. 184-185; G. Vowe, “Ordnung durch Medienpolitik und der Beitrag der Wissenschaft – das Beispiel Deutschland” [Structure through media policy and the contribution of science – the example of Germany], in O. Jarren and P. Donges (eds), *Ordnung durch Medienpolitik? [Order through media policy?]*, (2007) 71, at p. 76-77.

<sup>4</sup> R. Steininger, “Rundfunkpolitik im ersten Kabinett Adenauer” [Media policy in the first Adenauer Cabinet], 21 Vierteljahresheft für Zeitgeschichte (1973) 388, at p. 389-390.

<sup>5</sup> Dussel, *Rundfunkgeschichte*, pp. 187-194.

<sup>6</sup> See D. Schwarzkopf, “Die ‘Medienwende’ 1983” [The media turn in 1983], in D. Schwarzkopf (ed.), *Rundfunkpolitik in Deutschland, Band 1 [Broadcasting policy in Germany, volume I]* (1999) 29.

<sup>7</sup> Dussel, *Rundfunkgeschichte*, at p. 268; W. J. Schütz, *Medienpolitik. Dokumentation der Kommunikationspolitik in der Bundesrepublik Deutschland von 1945-1990 [Media policy. Documents of the communication policy in the Federal Republic of Germany 1945-1990]* (1999), pp. 433-435.

<sup>8</sup> See M. Eifert and W. Hoffmann-Riem, “Die Entstehung aus Ausgestaltung des dualen Rundfunksystems” [The development and the arrangement of the dual broadcasting system], in D. Schwarzkopf (ed.), *Rundfunkpolitik in Deutschland [Broadcasting politics in Germany]*, (1999) 50.

<sup>9</sup> Schütz, *Medienpolitik*, pp. 215-309.

<sup>10</sup> Dussel, *Rundfunkgeschichte*, p. 300f.

constrained financial situations of public and private operators pose challenges to the existing system and form the subject of much discussion.<sup>11</sup>

One of the specificities concerning media legislation and media policy throughout the whole last decades is the federal system of Germany and the differentiated system of state power that shaped the process. The Federal Republic of Germany is composed at the federal level of the Federal Government and the German Federal Parliament and the regional state level with different *Bundesländer*, hereafter referred to as states. Germany comprises of 16 states, all of which have their own governments and their own parliaments or representative bodies. The Basic Law stipulates the respective competencies of the federal lawmaker and the state lawmakers. The Federal Constitutional Court has ruled that in most subjects the state lawmakers are vested with the power to adopt legislation concerning broadcasting.<sup>12</sup> This historically developed political situation, together with the Federal Constitutional Court's case law, has led to a highly complex legal framework at both the federal and the state level which has formed the media structure and media law.

This background information report summarises the existing system. Particular attention is paid to those aspects that promote or hinder the free and independent media necessary for democratic processes. It is structured around the following topics: an overview of the existing media landscape, the main actors in media policy and media regulation, the main legal aspects as regards democratic processes and unbiased opinion shaping, and, finally, current issues in media policy and development.

## 2. The media landscape in Germany

Some figures help to depict the broader background of the German media landscape with regard to its recipients. By the end of 2008, Germany had a total population of 82 million residents according to the Federal Office for Statistics.<sup>13</sup> It is estimated that some 15 million people are of foreign origin,<sup>14</sup> taking into account persons naturalised under German immigration law, those born in Germany in the second or third generation after immigration, and foreigners under the German law relating to foreigners.<sup>15</sup> Germany can be deemed a country of immigration and cultural diversity, which is mirrored in media outlets. The official language is German, with some

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<sup>11</sup> See in this respect C.-E. Eberle, "Öffentlich-rechtlicher Rundfunk und Telemedienauftrag" [Public-service broadcasting and telemedia assignment], 04 AfP (2008) 329; C. Möllers, "Pressefreiheit im Internet" [Freedom of press in the Internet], 03 AfP (2008), 241.

<sup>12</sup> BVerfGE 12, 205 (248).

<sup>13</sup> Federal office for Statistics, "Bevölkerungsstand", available at: <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Statistiken/Bevoelkerung/Bevoelkerungsstand/Bevoelkerungsstand.psml;jsessionid=D34BDA09AFD025C40D903548BCD1F3B4.internet>, accessed 29 May 2010. Numbers are only available by December 31, 2008. See also <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=de&pcode=tps00001&tableSelectio n=1&footnotes=yes&labeling=labels&plugin=1> (last visited on 30/06/2010).

<sup>14</sup> Federal office for Statistics, "Migration und Integration", <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Statistiken/Bevoelkerung/MigrationIntegration/MigrationIntegration.psml;jsessionid=61311300015A11BCB49D0EAAECE31221.internet> (last visited on 31/05/2010).

<sup>15</sup> See Die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration, 8. Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland [8th report on the situation of foreigners in Germany] (2010), p. 570f, and p. 575.

exceptions for two minority groups: the Sorbs in the Eastern part of Germany and the Danish minority in the Northern parts. Germany has a very potent market in terms of revenue for the private media companies and in terms of fees for the public service media. Accounting for this is, among other factors, the size of the market. In addition to the population in Germany, the neighbouring countries Austria and Switzerland also have German-speaking populations, which enlarge the German linguistic area to some 90 million persons. Many migrant communities in Germany produce and consume media outlets in their own languages. Moreover, television and radio programmes are received via Internet and satellite from practically all over the world. The German media market can thus be described as a multi-cultural and multi-lingual market, however with a major market position and range of German linguistic outlets.

## 2.1 The German media market

The print media in terms of dailies, weeklies and Sunday editions plays an important role in political information as well as entertainment. Some 22.7 million newspapers (i.e. dailies and Sunday editions) are sold per working day.<sup>16</sup> Statistically, 289 products per 1,000 inhabitants are available<sup>17</sup> and newspapers reach over 71% of the population.<sup>18</sup> The print media is divided into national, regional and, in bigger cities, local daily newspapers, weekly newspapers, and magazines. While the number of national newspapers is relatively low, the number of regional and local newspapers is rather high. In 2009, the German print market contained 10 national dailies, 8 non-subscription dailies, including the most successful tabloids, 333 titles that covered a certain region or city,<sup>19</sup> 27 weeklies and 6 Sunday titles. In the same year, the total number of editions, under the name of the main title, produced was 1,511.<sup>20</sup> The overall number of sold subscription and non-subscription dailies including Sunday editions has declined within the last fifteen years by some 24% (from 30 million to 22.7 million titles).<sup>21</sup> Advertising revenues have also declined. Although net advertising revenues of 3.6 billion Euros in 2009 seem rather high compared to other European countries, the decline from over 6 billion Euros net in 1999 depicts the precarious financial situation of many publishers.<sup>22</sup>

The media landscape for public magazines (as distinguished from periodicals for professionals) comprises a broad range of different titles on almost all subjects of modern life.<sup>23</sup> In March 2010, 1,536 titles were published regularly, among them 136

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<sup>16</sup> H. Röper, "Zeitungen 2010: Rangverschiebung unter den größten Verlagen" [Newspapers 2010: Changes in the market position of the biggest publishers], 5 *Media Perspektiven* (2010) 218, at p. 219.

<sup>17</sup> Bundesverband Deutscher Zeitungsverleger (ed.), *Zeitungen 2009* [Newspapers 2009], (2009), p. 374. Data refer to residents older than fourteen years old.

<sup>18</sup> H.-J. Hippler, "Sieben von zehn – Leistungswerte der Zeitungen und jugendliche Mediennutzung [Proliferation of newspapers and young readership]", in Bundesverband Deutscher Zeitungsverleger (ed.), *Zeitungen 2009* (2009) 126, at p. 129.

<sup>19</sup> Bundesverband Deutscher Zeitungsverleger, *Zeitungen 2009*, p. 364. See on concentration and editorial units of publishers: W. J. Schütz, "Redaktionelle und verlegerische Struktur der deutschen Tagespresse" [Structures of print media editorial departments and of publishers in the Germany], 9 *Media Perspektiven* (2009) 484; W. J. Schütz, "Deutsche Tagespresse 2008" [German daily press 2008], 9 *Media Perspektiven* (2009) 454.

<sup>20</sup> Bundesverband Deutscher Zeitungsverleger, *Zeitungen 2009*, p. 364.

<sup>21</sup> Röper "Zeitungen 2010", p. 219.

<sup>22</sup> *Ibid.*

<sup>23</sup> The notion of A. Vogel of public magazines [Publikumspresse] is applied in this regard to make a distinction to magazines for specific professional groups. See A. Vogel, "Zeitschriftenmarkt: WAZ-

titles with at least fortnightly publication<sup>24</sup> and a total circulation of some 114.6 million per publication cycle.<sup>25</sup> Concentration among the five biggest publishers is rather high in this field, as they hold 64% of the market share in total and 87% of the market share of magazines published at least fortnightly.<sup>26</sup>

As well as the print media and, increasingly, the Internet, television and radio are regarded as important, if not even, the most important channels for information and entertainment. In 2009, 35.3 million households owned at least one television set and could reach digital and analogue programmes via satellite, cable, antenna, and the Internet.<sup>27</sup> As for radio, the same study counted 43.06 million receivers.<sup>28</sup> It is estimated that each viewer watches over 3 hours of television per day.<sup>29</sup>

Since the 1980s, broadcasting in Germany has been organised into a dual system. Public service broadcasting,<sup>30</sup> financed mainly by fees, and private broadcasting, financed mainly by advertising revenues, co-exist with different television channels and radio station formats as well as Internet platforms. The national public service full coverage television channel [Vollprogramm] “Das Erste” is produced by a working coalition of nine state public service broadcasting corporations called the ARD [Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland]. The same broadcasters produce nine regional television channels, which focus on regional and local issues, and more than 60 radio stations.<sup>31</sup> Additionally, the federal states have established a second national television public service broadcaster with one channel, the Second German Television [Zweites Deutsches Fernsehen, ZDF],<sup>32</sup> and a national radio operator, Deutschlandradio, with three stations. ARD and ZDF cooperate to produce several specialised television channels. In 2009 they enjoyed a 38.7% market share.<sup>33</sup> Public service broadcasters are principally funded by a fee paid by the owners of radio and

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Gruppe schließt zu dominierenden Konzernen auf” [WAZ-Group closes the gap to predominate corporations], *Media Perspektiven* (2010) 296.

<sup>24</sup> Vogel, “Zeitschriftenmarkt”, pp. 296-297.

<sup>25</sup> *Ibid.*, pp. 298-299; Informationsgemeinschaft zur Feststellung der Verbreitung von Werbeträgern (IVW), *Auflagenliste, 1. Quartal 2010 [List of editions. 1st quarter 2010]* (2010), p. 4.

<sup>26</sup> *Ibid.*, p. 298.

<sup>27</sup> *Media Perspektiven, Basisdaten. Daten zur Mediensituation in Deutschland 2009 [Data on media situation in Germany 2009]* (2009), p. 4. An estimated number of 94% of all households in Germany are reached. Adolf-Grimme-Institut et al. (eds), *Jahrbuch Fernsehen. 2010 [Yearbook Television. 2010]* (2010), p. 278.

<sup>28</sup> *Media Perspektiven, Basisdaten*, at p. 6.

<sup>29</sup> *Ibid.*, p. 64.

<sup>30</sup> On public service broadcasting in Germany, see C. Palzer, “Germany”, in S. Nikoltchev (ed.), *Iris special: The public service broadcasting culture* (2007) 39; W. Schulz et al., *Regulation of broadcasting and internet services in Germany* (2002), p. 5-10.

<sup>31</sup> ARD, “Jahrbuch 2009” [Yearbook 2009], available at: <http://www.ard.de/intern/publikationen/-/id=8080/nid=8080/did=1292570/18o9i85/index.html> (last visited on 14/10/2010), at p. 220ff., 239ff.

<sup>32</sup> See the legal act ZDF Interstate Treaty [ZDF-Staatsvertrag, 2009].

<sup>33</sup> Das Erste, ZDF, and the regional programmes [Die Dritten]. Arbeitsgemeinschaft der Landesmedienanstalten (ALM) (ed.), *Jahrbuch 2009/2010 [Yearbook 2009/2010]* (2010), p. 86; Adolf-Grimme-Institut, *Jahrbuch Fernsehen. 2010*, at p. 281.



television sets.<sup>34</sup> From 2013 the system will change and then all households will be charged the fee, irrespective of whether they possess a broadcasting receiver or not.<sup>35</sup>

Turning to private broadcasting, ProSieben.Sat1 and RTL Group (the latter owned by Bertelsmann AG) are the main private broadcasters operating at the national level, next to various local and regional radio and television broadcasters that are partially owned by smaller groups. In 2009, private broadcasters provided 147 national television channels, including full coverage channels (14), thematic channels (37), teleshopping channels (21), paid access channels (75),<sup>36</sup> and 231 regional channels. They also maintained 244 radio stations, 19 of which were broadcast nationwide.<sup>37</sup> However, the market share regarding advertising revenue and viewers - here described only for the television market - displays the predominant position of the RTL-Group and ProSieben.Sat1. With respect to advertising revenue, in 2009 ProSieben.Sat1 and RTL Group enjoyed a market share of over 80%.<sup>38</sup> They also succeeded in drawing an average of 45.2% viewers to their television programmes.<sup>39</sup>

The predominant position of free television is characteristic of the German television market. This applies for both public service broadcasting, due to its mandate, and private broadcasting, due to its advertising revenues. By the end of 2009, some 4.4 million subscribers had contracts with pay television providers.<sup>40</sup> Pay television operators, financed by subscription fees, are generally characterised by low profit.<sup>41</sup>

Today electronic media in Germany means Internet based services. In 2009 between 67.1% and 69.1% used the Internet regularly.<sup>42</sup> In 2010 the percentage has increased to 72%.<sup>43</sup> An online peak between persons younger than thirty years and older than fifty years can be observed. While in the first group, over 90% use the Internet on a regular basis, the proliferation in the second group decreased incrementally in early 2010 from some 70% (users between fifty and fifty-nine) to

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<sup>34</sup> See Art. 12, Art. 13, Art. 14 Interstate Broadcasting Treaty [Staatesvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV), 2010]; Art. 2 Interstate Treaty on Broadcasting Fees [Rundfunkgebührenstaatsvertrag, 2008].

<sup>35</sup> Press Release of 10 June 2010: State Secretary of the State Government of Rhineland-Palatine, “Ministerpräsidenten Beck und Mappus: Einfacheres und gerechteres Rundfunkfinanzierungsmodell beschlossen; Kontrollintensität der GEZ wird reduziert. Staatskanzlei Rheinland-Pfalz”, available at: [http://www.rlp.de/no\\_cache/aktuelles/presse/einzelansicht/archive/2010/june/article/ministerpraesident-en-unterzeichnen-in-berlin-den-14-rundfunkaenderungsstaatsvertrag/](http://www.rlp.de/no_cache/aktuelles/presse/einzelansicht/archive/2010/june/article/ministerpraesident-en-unterzeichnen-in-berlin-den-14-rundfunkaenderungsstaatsvertrag/) (last visited on 14/10/2010).

<sup>36</sup> Numbers of 1 January 2010. ALM, *Jahrbuch 2009/2010*, p. 55.

<sup>37</sup> ALM, *Jahrbuch 2009/2010*, p. 170-171.

<sup>38</sup> *Ibid.*, p. 58-59.

<sup>39</sup> ALM, *Jahrbuch 2009/2010*, at p. 86. See also Media Perspektiven, *Basisdaten*, p. 69. The channels by the two private broadcasters taken into account are: RTL, RTL II, Super RTL, and VOX (all RTL-Group), Sat.1, ProSieben, and kabel eins (all ProSieben.Sat.1 AG).

<sup>40</sup> ALM, *Jahrbuch 2009/2010*, p. 96.

<sup>41</sup> According to State Media Authorities, in 2008 the revenues only covered 87% of total costs for pay-TV. ALM, *Jahrbuch 2009/2010*, at p. 96.

<sup>42</sup> Media Perspektiven, *Basisdaten*, at p. 75; See also the survey published by a private, economical orientated initiative, Initiative D21 (ed.), *(Non)liner Atlas 2010* (2010), available at: <http://www.initiated21.de/category/nonliner-atlas> (last visited on 14/10/2010), at p. 10.

<sup>43</sup> Initiative D21, *Atlas 2010*, at p. 10. Less than 70% are estimated by an online-survey of ARD and ZDF. See B. van Eimeren and B. Frees, “Fast 50 Millionen Deutsche online - Multimedia für alle?” [Almost 50 million people online in Germany– multimedia for everybody?], *Media Perspektiven* (2010) 334, at p. 335.

some 24% (users over seventy years).<sup>44</sup> However, this situation has not yet resulted into a complete change in media consumption practices. Classical media outlets such as newspapers, terrestrial radio and (cable, satellite or terrestrial) television are still the main sources of information, especially as regards politics and journalism, although more than 75% of the classical media outlets are equally presented in the Internet by the same publishers and broadcasters.<sup>45</sup>

Communication has become one of the most important applications in the Internet in Germany.<sup>46</sup> According to a representative survey carried out by the public service broadcaster, 34% of all Internet users are members or visitors of online social networks at least from time to time.<sup>47</sup> It is the younger generation that has especially embraced social network services; 81% of persons younger than twenty years and 67% of persons younger than thirty years have their own account in one of these services.<sup>48</sup> The culture of reading and writing blogs has not yet been fully developed.<sup>49</sup> Blogs, in fact, are not generally considered a main source for (political) information, neither in consumer behaviour nor with regard to its credibility.<sup>50</sup> However, in the election of the state parliament of North Rhine-Westphalia in 2010, it is reported that political blogs discussing the main party candidates did have an impact on the outcome.<sup>51</sup>

Several news agencies operate in Germany and provide broad and differentiated services to newspaper editors and broadcasters.<sup>52</sup> Among them, the most important German news agencies are dpa (Deutsche Presse Agentur [German Press Agency]), ddp (Deutscher Depeschendienst), kna (Katholische Nachrichtenagentur [Catholic Newsagency]) and epd (Evangelischer Pressedienst [Protestant Pressservice]) and some others. News agencies from other countries, such as AFP (Agence France Press) and Reuters, maintain German offices and provide German linguistic services. The German service of the Associated Press (AP) was bought by the German news agency ddp and now operates as the Deutscher Auslands Depeschendienst (dadp). Studies show that competition among news agencies in Germany is one of the most pronounced in the Western European media market.<sup>53</sup> It

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<sup>44</sup> Initiative D21, *Atlas 2010*, at p. 14. Another survey displays similar results. See van Eimeren and Frees, "Deutsche online", at p. 335.

<sup>45</sup> C. Neuberger and F. Lobigs, *Die Bedeutung des Internets im Rahmen der Vielfaltssicherung [The salience of Internet in the case of ensuring pluralism of opinion]* (2010), at p. 37.

<sup>46</sup> Over 80% of Internet users communicate via email on a regular basis. K. Busemann and C. Gscheidle, "Web 2.0: Communitys bei jungen Nutzern beliebt" [Web 2.0. Communities are liked by young users] 7 *Media Perspektiven* (2009) 356.

<sup>47</sup> ARD-ZDF, "Nutzung. Genutzte web 2.0-Angebote 2009" [Accessed web services in web 2.0, 2009], available at: [www.ard-zdf-onlinestudie.de](http://www.ard-zdf-onlinestudie.de) (last visited on 17/07/2010).

<sup>48</sup> Ibid.; Busmann and Gscheidle, "Web 2.0", at p. 360.

<sup>49</sup> It is reported that only 12% of the users younger than 19 years read blogs. See Busmann and Gscheidle, "Web 2.0", at p. 361.

<sup>50</sup> Neuberger and Lobigs, *Die Bedeutung des Internets*, p. 103.

<sup>51</sup> S. Grimberg, "Die stärkste Kraft. Politblogs in NRW" [The strongest force. Political blogs in NRW], *die tageszeitung*, 11/05/2010.

<sup>52</sup> See Hans-Bredow-Institut, *Zur Entwicklung der Medien in Deutschland zwischen 1998 und 2007 [The developments of the media in Germany between 1998 and 2007]* (2008), at p. 193-198.

<sup>53</sup> Hans-Bredow-Institut, *Entwicklung der Medien*, p. 194; M. Segbers, *Die Ware Nachricht. Wie Nachrichtenagenturen ticken [News seen as goods. How news agencies function]* (2007), at p. 39.

has to be mentioned that dpa holds an outstanding position in the German news market with services reaching more than 95% of all newspapers in Germany.<sup>54</sup>

## 2.2 Journalists' background and education

There are no official data available on how many journalists work in Germany and their educational background or training. Information supplied by representative studies, employers' organisations and trade unions varies considerably, as it is exemplified by the number of full-time employees in Germany. It is estimated that between 48,000<sup>55</sup> and 73,500<sup>56</sup> persons work full-time as journalists.<sup>57</sup>

According to the data available, journalists generally work either as employees or as freelancers working on a per-assignment basis, although broadcasters have established a legal position best described as comparable to a employee's position, whilst remaining technically freelance.<sup>58</sup> As well as full-time journalists, an estimated number of some additional 25,000 freelance journalists and some 2,600 persons undergoing vocational training in the media (print media, broadcasting or other media) exist.<sup>59</sup> Publishers appear to employ more journalists than broadcasters. In 2009 they employed more than 14,000 individuals.<sup>60</sup>

It is estimated that over 60% of journalists hold a university degree in journalism or another subject area (usually history, political science, or economics) or a degree from a private journalism school.<sup>61</sup> More than 60% have undergone an additional vocational training programme up to two years.<sup>62</sup> Despite the presumably high quality education and training received, several media actors (unions and scientists alike) request more comprehensive and detailed training, so as to guarantee a high level of quality journalism.<sup>63</sup>

## 2.3 Media literacy and media status in society

The fostering of media literacy, understood as a "(...) individual's capacity to

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<sup>54</sup> Deutsche Presse-Agentur, "Zahlen& Fakten" [Numbers& facts], available at: <http://www.dpa.de/Zahlen-Fakten.53.0.html> (last visited on 18/07/2010).

<sup>55</sup> S. Weischenberg, M. Malik and A. Scholl, *Die Souffleure der Mediengesellschaft* [The prompters in current media society] (2006), at p. 36.

<sup>56</sup> Deutsche Journalisten-Verband, "Arbeitsmarkt und Berufschancen" [Labour market and job opportunities], available at: <http://www.djv.de/Berufschancen.2572.0.html> (last visited on 24/08/2010).

<sup>57</sup> Deutscher Journalisten Verband, "Journalist/in werden?" [Becoming a journalist?] (2008), p. 53. Numbers differ because several areas of journalism are excluded in one statistic, while included in the other.

<sup>58</sup> J. G. Reitzel, *Arbeitsrechtliche Aspekte der Arbeitnehmerähnlichkeit im Rundfunk* [Aspects of labour law tailored for employees in public service broadcasters] (2007), at p. 21ff.; see also Weischenberg, Malik and Scholl, *Mediengesellschaft*, at p. 37-39.

<sup>59</sup> Deutsche Journalisten-Verband, "Arbeitsmarkt und Berufschancen".

<sup>60</sup> Bundesverband Deutscher Zeitungsverleger, *Zeitungen*, at p. 106.

<sup>61</sup> Weischenberg, Malik and Scholl, *Mediengesellschaft*, p. 68-69. Numbers refer to 2005.

<sup>62</sup> *Ibid.*, p. 66-67.

<sup>63</sup> Survey published by the Deutsche Journalisten Union, *Gute Ausbildung dringend notwendig* [The need for a good qualification], available at: [http://mmm.verdi.de/archiv/2008/03/journalismus/gute\\_ausbildung\\_dringend\\_notwendig](http://mmm.verdi.de/archiv/2008/03/journalismus/gute_ausbildung_dringend_notwendig) (last visited on 14/10/2010). See also: Der Beauftragte der Bundesregierung für Kultur und Medien, "Medien- und Kommunikationsbericht der Bundesregierung 2008" [Media and communication report by the Federal Government] (2008), at p. 85-86.

interpret autonomously and critically the flow, substance, value and consequence of media in all its many forms (...)’<sup>64</sup> has been part of the mandate of several public institutions as well as the school syllabus in Germany. The State Media Authorities, established in the 1980s, conduct programmes and activities to promote media literacy. Despite these endeavours, media literacy levels in Germany are not as high as one would have expected. According to an independent study<sup>65</sup> commissioned by the Directorate General Information Society and Media of the European Commission, Germany achieves a medium level of media literacy, not uncommon for highly populated countries in Europe.<sup>66</sup>

According to a “Eurobarometer” survey, published in 2008, around 46% of the German population trusts print media, though perceptions vary considerably in the western and eastern parts of Germany.<sup>67</sup> Where 49% of the western population trusts print media as an information medium, 60% of the eastern German population reported distrust.<sup>68</sup> Radio receives much better results: 67% of the German population trusts the radio with comparable figures in eastern and western Germany. Television reaches lower results and is trusted by 56% of the population overall. As for online media services, despite its gradual uptake, only 29% of the German population, primarily young people, trust the Internet as an information medium.

### **3. Media policy in Germany**

#### **3.1 Actors of media policy and media regulation**

The German media policy scene is characterised by a multiplicity of actors, due, amongst other factors, to the fact that competencies for media legislating are divided between the state and federal legislatures. While press regulations and broadcasting laws, together with the regulation of some content aspects for the online media, fall within the remit of the state legislature, the technical aspects of cable television, telecommunications and to some degree the regulation of the online media are addressed at the federal level.

The most important actors are those at the state level. The states are, as mentioned earlier, assigned with the competence to propose and adopt legislation for public service broadcasting, as well as the licensing and ownership rules in relation to private broadcasters. They can also adopt rules on the content of broadcasts and online content.

The public service broadcasters can also be considered actors. The working coalition ARD, the Second German Television and single state broadcasting corporations all commission scientific research programmes or expert opinions,

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<sup>64</sup> European Commission, Directorate General Information Society and Media, “Study on assessment criteria for media literacy levels”, available at: [http://ec.europa.eu/avpolicy/media\\_literacy/docs/studies/eavi\\_study\\_assess\\_crit\\_media\\_lit\\_levels\\_europe\\_finrep.pdf](http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf) (last visited on 23/7/2010), at p. 4.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., p. 68-69.

<sup>67</sup> This refers to the former inner-state boarder of East- and West Germany.

<sup>68</sup> European Commission, Directorate General Communication, Eurobarometer 69 (2008), at p. 27.

publish on media policy and - mainly the directors of the broadcasters - publish statements on current developments.<sup>69</sup>

When it comes to the organs of the public service broadcaster, the following shall be highlighted. Each of the nine state broadcasting corporations, the national public service radio “Deutschlandradio” and the “ZDF” comprise three organs: the director of the corporation [Intendant], the broadcasting council [Rundfunkrat]<sup>70</sup> and the administrative council [Verwaltungsrat].<sup>71</sup> In accordance with the paradigm of state independence in public service broadcasting, the final decision of the content aired lays with the director.<sup>72</sup> He or she is accountable for the programme and has to ensure that broadcasts adhere to the statutory programme mandate, the basic programme guidelines, the applicable media law and the common laws.<sup>73</sup>

The broadcasting councils are the main supervision and operation organs in the public service system, ideally representing with their members the main groups of the German society and vested with the competence to decide on basic matters.<sup>74</sup> They were established to ensure a state-free, competent body responsible for controlling the activities of the broadcasters in accordance with statutory programme mandates and the applicable media law. However, they cannot adopt legally binding decisions. According to the applicable legislation, their members are nominated and elected by the state parliaments, state governments and also by representatives of different societal groups, who enjoy a legally guaranteed right to delegate single members and who constitute the majority.<sup>75</sup> Administrative councils are responsible for scrutinising the broadcasting corporations’ financial activities and therefore cannot directly influence programming.<sup>76</sup> However, in times of financial constraints, budgetary cuts can impel directors to close down particular aspects of programming and as such diminish broadcasts’ pluralism.

In the field of private broadcasting, currently fourteen State Media Authorities (SMAs) operate under different labelling, though with the same core duties.<sup>77</sup> They maintain a joint body, the Association of State Media Authorities (ALM). The SMAs are established as public bodies based on statutory regulations adopted by state

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<sup>69</sup> Expert opinion commissioned by public service broadcasters see: P. Kirchhoff, “Gutachten über die Finanzierung des öffentlich-rechtlichen Rundfunks” [Expert opinion on the financing of public-service broadcasting] (2010), available at: <http://www.ard.de/intern/kirchhof-gutachten/-/id=1886/nid=1886/did=1456538/1kmjjsr/index.html> (last visited on 14/10/2010).

<sup>70</sup> Called ‘Television Council’ in the case of the Second German Television.

<sup>71</sup> See as legal basis only Art. 13 para. 1 West-German-Broadcasting Act [Gesetz über den »Westdeutschen Rundfunk Köln« (WDR-Gesetz), 2009].

<sup>72</sup> C. Hahn, *Die Aufsicht des öffentlich-rechtlichen Rundfunks* [Supervision of public service broadcasting] (2010), at p. 52 with further remarks.

<sup>73</sup> A. Hesse, *Rundfunkrecht* [Broadcasting law] (2003), at p. 163.

<sup>74</sup> See for further information: Hesse, *Rundfunkrecht*, p. 161-162; Hahn, *Aufsicht*, p. 49-72.

<sup>75</sup> See only Art. 21 Interstate Treaty on ‘Deutschlandradio’ [Staatsvertrag über die Körperschaft des öffentlichen Rechts “Deutschlandradio” (DLR-Staatsvertrag), 2006]; Art. 6 Bavarian Broadcasting Act [Gesetz über die Errichtung und die Aufgaben einer Anstalt des öffentlichen Rechts “Der Bayerische Rundfunk” (Bayerisches Rundfunkgesetz – BayRG), 2009]; Art. 15 West-German-Broadcasting Act.

<sup>76</sup> See as an example Art. 21 West-German-Broadcasting Act; Hahn, *Aufsicht*, p. 75; Hesse, *Rundfunkrecht*, p. 166. The ZDF administrative council is an exception in this regard, as it co-decides on the position of the chief editor. See Art. 27 para 2b) Interstate Treaty on Second German Television [ZDF-Staatsvertrag].

<sup>77</sup> See ALM, *Jahrbuch 2009/2010*, p. 380ff. See also: P. Widlok, “Die Landesanstalt für Medien NRW (LfM NRW) [1987]” [State media authority for North-Rhine Westphalia], in W. R. Langenbacher, H. Pöttker and C. Schicha, *Handbuch Medienselbstkontrolle* [Manual for media self-regulation] (2005), 329.

lawmakers and are deemed to be independent.<sup>78</sup> Two organs within each of the SMA are responsible for supervising and regulating the private broadcasters: the director and the media commission<sup>79</sup> or - as the composition can vary - body of experts.<sup>80</sup> While the body of experts consists of experts elected by state parliaments, commission members are elected and delegated by state parliaments and state governments, as well as representative organisations such as the unions or the church.<sup>81</sup> They reflect Germany's main societal groups.

Complementary to the SMAs, the Regulatory Affairs Commission (ZAK) was established in late 2008 and is now charged with the licensing and supervision duties of national broadcasters.<sup>82</sup> In essence, the SMAs retain responsibility but relinquish discretionary powers to the ZAK, in which all fourteen authorities work together. Those structures became necessary in order to guarantee equal treatment for all private broadcasters in the various states and to prevent operators from deliberately establishing themselves in the state with the lowest legal requirements.

The Commission on the Concentration in Media (KEK) also fulfils an important duty, as it ascertains operators' market shares in the licensing procedure, so as to avert one media company holding a monopoly of the market and consequently of opinion shaping. In 2006, it dismissed an application of the publisher Axel Springer AG to purchase shares of the private broadcaster ProSieben.Sat1.<sup>83</sup> The KEK was reorganised by the heads of the various states after this decision, presumably in order to mitigate the so far effective and strict implementation of concentration regulations.<sup>84</sup>

Finally, federal actors have to be mentioned. The Federal Government Commissioner for Culture and Media plays an important role at the federal level. The main tool of the Commissioner is to formulate media policies as non-binding recommendations to the legislature. This is done in a regularly published comprehensive report called "Media and Communication Report by the Federal Government". The report was last published in 2008 and is based on a thorough scientific experts' report covering all aspects of media developments and

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<sup>78</sup> According to the relevant law, the State Media Authorities are public legal bodies and have the competence of self-governance. See only Art. 2 and Art. 38 para 1 State Media Law Rhineland-Palatine [Landesmediengesetz Rheinland-Pfalz (LMG), 2010]; ALM, *Jahrbuch 2009/2010*, p. 356.

<sup>79</sup> See only Art. 90, Art. 93, and Art. 94 State Media Law North-Rhine Westphalia [Landesmediengesetz Nordrhein-Westfalen (LMG NRW), 2009].

<sup>80</sup> As it is the case with the Media Council Berlin-Brandenburg. Art. 9 para 1 Interstate Treaty of Berlin and Brandenburg on Broadcasting [Staatsvertrag über die Zusammenarbeit zwischen Berlin und Brandenburg im Bereich des Rundfunks, 2009].

<sup>81</sup> See only Art. 13 Bavarian Media Law [Gesetz über die Entwicklung, Förderung und Veranstaltung privater Rundfunkangebote und anderer Telemedien in Bayern (Bayerisches Mediengesetz BayMG), 2009].

<sup>82</sup> ALM, *Jahrbuch 2009/2010*, p. 365.

<sup>83</sup> Kommission zu Ermittlung der Konzentration im Medienbereich, Beteiligungsveränderung bei Tochtergesellschaften der ProSiebenSAT.1 Media AG, AZ: KEK 293-1 bis 5 decision of 10 January 2006.

<sup>84</sup> See the critical appraisals G. Gounalakis and G. Zagouras, *Medienkonzentrationsrecht. Vielfaltssicherung in den Medien [Law of media concentration, ensuring pluralism in the media]* (2008), at p. 166-167 and p. 212; D. Westphal, "Abschied vom Original. Zur Deformation der KEK durch den 10. Rundfunkänderungsstaatsvertrag" [Parting of an original. About the deformation of KEK], ZUM (2008) 854, at p. 856.

advancements in Germany.<sup>85</sup> Additionally, the mandated Federal Ministry and the Federal Parliament are responsible for the legal framework conditions of the media. These cover technical infrastructure, the protection of minors, data protection, and criminal law. When it comes to the courts as media policy actors, mention should be made of the European Court of Human Rights and the Federal German Constitutional Court. The former addressed the notion of public persons in Germany with practical repercussions for photograph journalism.<sup>86</sup> The latter established the legal space for the broadcasting system in Germany, in which the federal and state lawmakers can adopt their legislation.

As well as the KEK, the Federal Cartel Authority controls whether an intended merger complies with the Act Against Competition Constraints.<sup>87</sup> The Act foresees a specific provision for media enterprises, which aims to preserve the market situation and simultaneously the pluralism of opinions in the media.<sup>88</sup> The Federal Cartel Authority has adopted two negative decisions regarding media enterprises, both of which triggered wide discussion. One concerned the intended purchase of the “Berlin Publisher” (editor of one of the most sold newspapers in Berlin) by the publisher Holtzbrinck-Group<sup>89</sup> (editor of another much sold newspapers) and the other addressed the proposed merging of broadcaster ProSieben.Sat 1 AG with publisher Axel Springer AG.<sup>90</sup>

As for self-regulatory bodies, the “German Press Council” plays an important role. It was established in 1956 as a self-control mechanism which pursues two main objectives: to organise the complaint commission as control organ for press outlets and to foster the freedom of press and unimpeded access to news sources, both through political means. The press council individual complaint procedure ensures, among other things, that print media outlets adhere to basic ethical principles, called the Press Code.<sup>91</sup> As for political means, the Press Council employs different approaches. This includes political lobbying aiming to enhance the legal framework conditions for journalists and the Press Code that can in general ensure the credibility of print media outlets. However, the Press Council was and still is criticised for its complaint procedures, first because it has not changed the journalistic practices of German tabloids overall,<sup>92</sup> and secondly because it does not create legally binding decisions that the publishers concerned must follow.<sup>93</sup>

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<sup>85</sup> Der Beauftragte der Bundesregierung für Kultur und Medien, “Medien- und Kommunikationsbericht der Bundesregierung 2008”.

<sup>86</sup> European Court of Human Rights, judgment of 28 July 2005, *von Hannover v. Germany*, n. 59320/00.

<sup>87</sup> Act Against Competition Constraints [Gesetz gegen Wettbewerbsbeschränkungen (GWB), 2009].

<sup>88</sup> Gounalakis and Zagouras, *Medienkonzentrationsrecht*, p. 198.

<sup>89</sup> Bundeskartellamt, decision of 2 February 2004. No.: B 6 - 22121 - U - 120/03. Bundeskartellamt, decision of 10 December 2002. No.: B 6 22121 - U - 98/02.

<sup>90</sup> Bundeskartellamt, decision of 19 January 2006. No.: B 6 - 92202 - Fa - 103/05.

<sup>91</sup> Deutscher Presserat, *Publizistische Grundsätze (Pressekodex) “Richtlinien für die publizistische Arbeit nach den Empfehlungen des Deutschen Presserats”* [Guidelines for the journalistic work according to recommendations of the German Press Council] (2008).

<sup>92</sup> See the critical appraisal by A. Baum, “Lernprozess und Interessenkonflikt. Die freiwillige Selbstkontrolle der Presse dient der ganzen Gesellschaft” [Independent self-control of print media serves the whole society], in W. R. Langenbacher, H. Pöttker and C. Schicha (eds), *Handbuch Mediensebstkontrolle [Manual for media self-regulation]* (2005) 112, at p. 120-121.

<sup>93</sup> See the critical appraisal by H. Pöttker, “Der Deutsche Presserat und seine Kritiker. Playdoyer für eine transparente Selbstkontrolle des Journalismus” [The German Press Council. For a transparent self-

Two main journalists unions merit attention: the German Journalists Union [Deutsche Journalisten Union, dju] and the German Journalists Association [Deutscher Journalisten Verband, DJV].<sup>94</sup> Both associations are accepted as representative organisations in tariff treaty negotiations. Whilst the dju is affiliated with the union coalition “Ver.di”, one of the largest unions in Germany, the DJV presents itself as a combination of independent unions and professional organisations.<sup>95</sup> The dju aspires, among other things, to foster the professional, social, and economic interests of its members, and contributes to the protection of the basic right of the freedom of press.<sup>96</sup> DJV, with 38,000 members,<sup>97</sup> fosters and pursues very similar political and ethical aims.<sup>98</sup> Both organisations are members of the organisational board of the German Press Council.

The private broadcasters have established the “Association Private Broadcasting and Telemedia” to represent the interests of its members. Currently, some 160 companies stemming from private broadcasting and private electronic media (such as the Internet) are members of the association. The Association is a lobbying actor which addresses all relevant media policies at the national and European (EU) level. It utilises mainly statements, press releases and talks with decision-makers as levers to pursue its members’ interests. Newspaper publishers have created a comparable institution, the Association of German Newspaper Publishers [Bundverband Deutscher Zeitungsverleger]. The association represents more than 300 daily newspapers and fourteen weeklies<sup>99</sup> before governmental bodies and parliaments. It defends their economic interests and serves as a representative organ in tariff treaty negotiations. The Association of German Magazine Publishers serves as an umbrella organisation of more than 400 magazine publishers and is mandated with comparable tasks.<sup>100</sup>

Many non-governmental organisations operate in the field of media policy either as political actors or as members of one of the regulatory bodies, i.e. the broadcasting councils. The list of the organisations represented in the broadcasting council of the West-German-Broadcaster [WDR] is a case in this point. According to Article 15 para. 3 of the West-German-Broadcasting Act, members of the Protestant and Catholic Church, the Jewish community, the German Union Association, the German Civil Servant Association, employers’ associations, the Free Social Association, the Sport Association, the Trade Association, and other individuals from the areas of media, culture, arts, and science shall be delegated and appointed. Two of

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regulation of journalism], in W. R. Langenbuecher, H. Pöttker und C. Schicha (eds), *Handbuch Mediensebstkontrolle*, [Manual for media self-regulation] (2005) 125.

<sup>94</sup> See for the role of unions in media policy: S. Nehls, *Mitbestimmte Medienpolitik. Gewerkschaften, Gremien und Governance in Hörfunk und Fernsehen* [Co-governed media policy. Unions, committees, and governance in broadcasting] (2009).

<sup>95</sup> According to its self presentation: Deutsche Journalisten-Verband, “Der DJV – Porträt” [The portrait of the DJV], available at: <http://www.djv.de/UEber-uns.17.0.html> (last visited on 26/07/2010).

<sup>96</sup> Ver.di, “Aufgaben und Ziele” [Assignments and objectives], available at: [http://dju.verdi.de/ueber\\_die\\_dju/selbstdarstellung/aufgaben\\_und\\_ziele](http://dju.verdi.de/ueber_die_dju/selbstdarstellung/aufgaben_und_ziele) (last visited on 26/07/2010).

<sup>97</sup> Deutsche Journalisten-Verband, “Der DJV – Porträt”.

<sup>98</sup> Deutscher Journalisten-Verband, “Grundsatzprogramm des Deutschen Journalisten-Verbands” [Basic policy programme] (2009).

<sup>99</sup> According to its self-description: Bundverband Deutscher Zeitungsverleger, “Im Auftrag der Zeitung” [On behalf of the newspaper], available at: [http://www.bdzv.de/im\\_auftrag\\_der\\_zeitung.html](http://www.bdzv.de/im_auftrag_der_zeitung.html) (last visited on 27/07/2010).

<sup>100</sup> Verband Deutscher Zeitschriftenverleger, “Aims”, available at: <http://www.vdz.de/keyfacts-keyfacts.html> (last visited on 28/07/2010).



the organisations shall be named here. “Network research” [netzwerk recherche] was founded in 2001 by journalists and editors to foster investigative journalism. Through publications,<sup>101</sup> seminars for journalists, conferences and political lobbying, it pursues its aim of improving investigative journalism, developing educational concepts, and mentoring young journalists.<sup>102</sup> “Reporters Without Borders” [Reporter ohne Grenzen] operates worldwide with its main office in Paris and a network of additional nine sections in other countries. In Germany, it is represented with an own section organised by an own office, which was founded in 1994.<sup>103</sup>

The scientific research landscape regarding the media is broad and diverse. Single researchers from universities, mainly professors in media law, communication science or affiliated fields, are commissioned to probe into specific media related questions and write in depth analysis on the results. Additionally, single institutes were established with the clear mandate to serve as research organisations with a clear inclination towards policy formulation. Other institutes tend to act as mediator between science and politics. Although many of the researchers and institutes deserve to be mentioned, due to the limited space only some shall be described here. The probably most influential research institute is the “Hans-Bredow-Institut for Media Research of the Hamburg University”, which covers a broad scope of media related issues.<sup>104</sup> The “Mainzer Medien Institute”, established by a private association, focuses on legal research activities relevant to current media political developments. Finally, the “Institute for Media and Communication Policies” is positioned on the cusp between scientific research institute and political think tank.

## 3.2 The media regulatory framework

### 3.2.1 Communication rights: Freedom of expression and information, freedom of the press and broadcasting in the German Basic Law

The federal constitution, the German Basic Law,<sup>105</sup> enshrines in its human rights section freedom of expression, the right to receive information and the freedom of press and broadcasting. The text itself, however, provides only very little information on how those rights and freedoms shall be interpreted legally. Article 5 para. 1 of the Basic Law stipulates:

"Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

All those rights can be broadly summarised as the notion of communication

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<sup>101</sup> See T. Leif (ed.), *Trainingshandbuch Recherche [Practical manual. Journalistic research]* (2010).

<sup>102</sup> See the self-description: Netzwerk recherché, “Ziele des Netzwerks Recherche” [Objectives of the network research], available at: <http://www.netzwerkrecherche.de/Verein/Ziele/> (last visited on 27/07/2010).

<sup>103</sup> Reporter Ohne Grenzen, “National und international aktiv” [Active nationally and internationally], available at: <http://www.reporter-ohne-grenzen.de/ueber-uns/rog-in-deutschland.html> (last visited on 16/08/2010).

<sup>104</sup> Hans-Bredow-Institut, “Mitarbeiterinnen und Mitarbeiter” [Staff], available at: <http://www.hans-bredow-institut.de/de/mitarbeiter/mitarbeiterinnen-mitarbeiter> (last visited on 28/07/2010).

<sup>105</sup> Basic Law for the Federal Republic of Germany [Grundgesetz für die Bundesrepublik Deutschland, 2010].

rights.<sup>106</sup> However, the German courts and the legal literature developed a very detailed understanding of the scope of the protections afforded.<sup>107</sup>

The Federal Constitutional Court ("the Court") has shaped the media law in over 190 judgments and decisions, although the key foundations for the media structure in Germany were laid down in just a few judgments.<sup>108</sup>

Important, especially for the evolving understanding of broadcasting in terms of technical developments and the media's role in a democratic society, is the Court's interpretation of Article 5 Basic Law. According to the Court, Article 5 Basic Law should be interpreted in the classical way, that is, as offering protection to the bearer of the right against wrongful interceptions. This interpretation was generally adopted in cases concerning the freedom of press. However, the Court has added another dimension to this notion: that the state is simultaneously obliged to adopt actively organisational, fiscal and procedural regulations to guarantee free and independent *broadcasting*. In the words of the Court: "The legislator has to adopt in particular regulations which make sure broadcasting is not at the mercy of one or single groups, relevant social forces get a chance to speak in the whole programme and freedom of reporting remains untouched."<sup>109</sup> The Court has upheld the opinion and has reiterated in many decisions that the media and namely broadcasting play a crucial role in a democracy by allowing the discursive development of different opinions.<sup>110</sup> Thus, it is not an individual right to protect operators from wrongful interceptions, but an obligation of the lawmakers to establish and ensure a well functioning broadcasting system.<sup>111</sup> As to private broadcasting, the Court has reiterated throughout the years that the pluralistic broadcasting necessary for a democracy would be endangered under the sole regime of market forces.<sup>112</sup> Thus the Court recognises indirectly the failure of the market to guarantee a pluralistic media.<sup>113</sup> It places therefore the public service broadcasters in the position of fulfilling the duty of ensuring public discourse.<sup>114</sup>

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<sup>106</sup> See for instance: Fechner, *Medienrecht [Media law]* (2010), at p. 19.

<sup>107</sup> See: Hoffmann-Riem, "Art. 5 (Kommunikationsfreiheit)" [Freedom of communication], in E. Denninger, et al., (eds) *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland [Commentary on the basic law of the Federal Republic of Germany]* (2001), at para. 24ff. and 123ff. with further remarks also on the discussion among legal scholars.

<sup>108</sup> W. J. Schütz, "BVerfG-Entscheidungen zum Medienrecht" [Decisions of the Constitutional Court on media law], in P. Schiwy, W. J. Schütz and D. Dörr (eds), *Medienrecht [Media law]* (2010) 56. See for the role of the privately organized press: BVerfGE 20, 162 (174-176).

<sup>109</sup> BVerfGE 57, 295 (322), unofficial translation.

<sup>110</sup> Recently: BVerfG, MMR 2007, 770 (771).

<sup>111</sup> Hoffmann-Riem, "Art. 5", para. 40; F. Kübler, *Medien, Menschenrechte und Demokratie [Media, human rights and democracy]* (2008), at p. 89-92. This convincing concept has triggered a broad reception and is still contested. See M. Bullinger, "Freiheit von Presse, Rundfunk, Film" [Freedom of press, broadcasting, film], in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band VII. Freiheitsrechte [Handbook of constitutional law of the Federal Republic of Germany. Volume VII. Liberties]* (2009) 909, at p. 964-965; M. Cornils, "Rundfunk-Grundversorgung durch subventionierten Privatrundfunk?" [Basic provision of broadcasting through subsidised private broadcasting?], *Deutsches Verwaltungsblatt* (2006) 789.

<sup>112</sup> See only BVerfG, MMR 2007, 770 (772).

<sup>113</sup> See for further information on negative economic influence on media: M. L. Kiefer, "Medien und neuer Kapitalismus" [Media and new capitalism], in G. Siegert and F. Lobigs (eds), *Zwischen Marktversagen und Medienvielfalt [Between market failure and media pluralism]* (2004) 169, at p. 181; M. L. Kiefer, "20 Jahre privater Rundfunk in Deutschland" [20 years of private broadcasting in Germany], *12 Media Perspektiven* (2004) 558.

<sup>114</sup> BVerfGE 83, 238 (297); BVerfG, MMR 2007, 770 (771).

Furthermore, the Court referred to the principle of democracy enshrined in the German constitution, which essentially prevents state organs from exerting control on the content that is broadcast. According to the Court,<sup>115</sup> the process of opinion forming should be “bottom-up”, that is, shaped by societal groups and not by the state.

### 3.2.2 Structural and content regulation through federal and state law: some general remarks

The decisions of the Court mentioned above led to the question of structural regulation of the responsible state organs, namely the lawmaker. Although the media outlets converge more and more, it is still helpful to distinguish between different media in order to discuss the structure of German media regulation. In this regard, three different, though interconnected, areas can be ascertained: broadcasting, print media including books, and new media services, especially through the Internet.

Structural regulation is particularly pronounced in the broadcasting area. Here, the state lawmaker adopted rules actually *establishing* the dual broadcasting system. The core legal instrument, the Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty),<sup>116</sup> which was adopted by all sixteen state lawmakers, contains provisions for public service and private broadcasting as well as basic rules for new media activities, mainly through the Internet. Besides this, the state lawmakers have adopted legislation on the nine different public service broadcasters, the Landesrundfunkanstalten,<sup>117</sup> the financial regulation of fees for public service broadcasting,<sup>118</sup> and on advertising time.<sup>119</sup>

In addition, every state has adopted laws applying to private broadcasting.<sup>120</sup> These acts comprise provisions for the licensing of radio and television operators, some content requirements and the supervision of private broadcasters through the creation of independent bodies for that purpose.

In contrast, no provisions were adopted to establish print media. The press was left to the market and is organised privately. However, legislation, adopted solely by the states, does exist to cover print media outlets’ accountability, the right to reply and the right to information.<sup>121</sup>

In the area of electronic media services, limited regulation exists. The provisions concerning public service broadcasters exhibit the most detailed prerequisites.<sup>122</sup> The

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<sup>115</sup> BVerfGE 44, 125 (140).

<sup>116</sup> [Staatesvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV), 2010].

<sup>117</sup> See only for the Northern regional broadcaster NDR-Staatsvertrag adopted by the state parliaments: Interstate Treaty on the Northern-German-Broadcasting [Staatsvertrag über den Norddeutschen Rundfunk (NDR-Staatsvertrag), 2005].

<sup>118</sup> Broadcasting Fees State Treaty and Broadcasting Financing State Treaty [Rundfunkfinanzierungsstaatsvertrag, 2008].

<sup>119</sup> Art. 7, Art. 7 a), Art. 8, Art. 15, Art. 16, Art. 17, Art. 44, Art. 45, and Art. 45 a) Interstate Broadcasting Treaty.

<sup>120</sup> See only State Media Law North-Rhine Westphalia.

<sup>121</sup> See only the Press Law of Baden-Württemberg [Landespressegesetz, Baden-Württemberg, 2009].

<sup>122</sup> See only the Art. 11d) and 11f) Interstate Broadcasting Treaty. See for the implementation further details in: WDR, “Telemedienkonzept für das Internetangebot des WDR gültig ab 1 Juni 2009” [Online concept for the web services of the West-German-Broadcaster], available at: [http://www.wdr.de/unternehmen/senderprofil/pdf/gremien/rundfunkrat/WDR\\_20090513\\_Telemedienkonzept\\_Internet.pdf](http://www.wdr.de/unternehmen/senderprofil/pdf/gremien/rundfunkrat/WDR_20090513_Telemedienkonzept_Internet.pdf) (last visited on 11/10/2010).

regulations for private broadcasters do not have the same depths, and when it comes to online services of newspapers and private persons, only some basic rules, mainly regarding accountability, are in place (for example, one has to publish the name and the address on the website).

As well as these specific regulations concerning broadcasting, press, and new media services, some general provisions apply in variations to all areas. These include the protection of young people, criminal provisions concerning libel, discrimination or hate speech crimes, criminal proceeding provisions such as telephone tapping and online searching, market concentration provisions, intellectual property provisions, and data protection provisions to name the most important of them. Particularly provisions for the protection of young people and intellectual property shape the regime and the practice regarding Internet content.

### **3.2.3 Structural regulation for public service broadcasting: state independence and general public interest**

After the Second World War, the Allied Forces espoused the idea of establishing a broadcasting system that would be independent from the state, although established by it, and controlled by representative groups of society.<sup>123</sup> The different state legislations, accompanied by the rulings of the Federal Constitution Court, created a system of public service broadcasting, in which the broadcasting organisations can operate with internal self-control mechanisms and limited legal supervision by the relevant state government. Accordingly, the lawmakers are responsible for establishing and maintaining the basic framework, without the competence to influence programming. These governing structures are also known as co-regulation or regulated self-regulation.<sup>124</sup>

Two aspects merit attention in this context, in particular as regards operators' independence from undue state influence. These are the composition of the broadcasting councils and the finance regime.

The basic function of the broadcasting councils is exemplified in the Bavarian Broadcasting Act, which stipulates: "The broadcasting council represents the interests of the general public in the field of broadcasting."<sup>125</sup> Comparable provisions can be found in other state broadcasting acts.<sup>126</sup>

The media laws stipulate that besides the members elected by state parliaments, which are party members, delegates of representative groups have to be in the council as well.<sup>127</sup> Representative groups enjoy the right to appoint and delegate

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<sup>123</sup> Steininger, "Rundfunkpolitik", p. 389-390.

<sup>124</sup> I. Stapf, "Mediensebstkontrolle - Eine Einführung" [Introduction to media self-control], in W. R. Langenbacher, H. Pöttker and C. Schicha (eds), *Handbuch Mediensebstkontrolle [Manual for media self-regulation]* (2005) 17, at p. 29-30. For the concept see: W. Schulz and T. Held, *Regulated self-regulation as a form of modern government* (2001), p. 6-7.

<sup>125</sup> Art. 6 para. 1 Bavarian Broadcasting Act.

<sup>126</sup> See only Art. 12 para. 2 Broadcasting Interstate Treaty Berlin-Brandenburg [Staatsvertrag über die Errichtung einer gemeinsamen Rundfunkanstalt der Länder Berlin und Brandenburg, 2009]; Art. 15 para. 1 Interstate Treaty on South-West-Broadcasting [Staatsvertrag über den Südwestrundfunk, 2000].

<sup>127</sup> See only Art. 14 Interstate Treaty on South-West-Broadcasting.

representatives, without interference by state organs.<sup>128</sup> Basically, the broadcasting council's composition aims to ensure a plurality of opinion. However, the majority of acts admit, in general, one representative of state governments as member in the broadcasting councils.<sup>129</sup>

Most of the public broadcasting acts also stipulate that no member of the broadcasting council representing a societal group can hold simultaneously a position in a state government or be a member of an electoral body (European, Federal or state Parliament).<sup>130</sup> Furthermore, all public service broadcasting acts include quotas for members of state parliaments and governments, so as to ensure societal groups hold the majority of positions in the councils.<sup>131</sup> Although representatives of societal groups always hold a majority of votes, critics contest the independence of the broadcasting councils referring to the parliaments' and governments' representatives<sup>132</sup> and the alleged affiliation of most of the remaining members to one of the political parties in Germany.<sup>133</sup> Presumably party and state influence played a role, for instance, in the nomination and election of the new director of the broadcasting corporation "Bavarian Broadcasting." The recently elected incumbent had been working for the conservative-liberal Federal Government in the position of Speaker before he was elected by the broadcasting council.<sup>134</sup>

Crucial for the independence of public service broadcasters from the state is also the budget autonomy of operators.<sup>135</sup> The financing regime of German public service broadcasting implies a rather demanding three step procedure with the aim of minimising state influence as much as possible.<sup>136</sup> In the first step, the public broadcasting corporations submit their estimated financial needs. An independent body of sixteen experts (appointed by each state), the Commission to Determine Financial Needs [Kommission zur Ermittlung des Finanzbedarfs, KEF], scrutinises the submission of the public service broadcasters and determines the financial need for a period of generally four years. The Commission then proposes a concrete amount of fees, which need to be adopted by all state parliaments.

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<sup>128</sup> The Second German TV is an exception, as it is the state governments prime minister who appoints the members of the television council. See Art. 21 para. 3 Interstate Treaty on the Second German Television.

<sup>129</sup> See Art. 6 para. 3 no. 2 Bavarian Broadcasting Act; Art. 5 para. 2 no. 1 Hesse Broadcasting Act [Gesetz über den Hessischen Rundfunk, 2007]; Art. 19 para. 1 no. 1 Interstate Treaty on the Middle-German-Broadcasting [Staatsvertrag über den Mitteldeutschen Rundfunk (MDR), 2002]; Art. 9 para. 1 no. 17 and no. 18 Radio Bremen Act [Radio Bremen-Gesetz, 2010]; Art. 27 para. 1 no. 1 Saarland Media Act [Saarländisches Mediengesetz, 2008]; Art. 14 Interstate Treaty on the South-West-Broadcasting; Art. 21 para. 1 a) and b) Interstate Treaty "Deutschlandradio"; Art. 21 para. 1 a) and b) Interstate Treaty on Second German Television. The "Deutschlandradio" treaty as well as the Interstate Treaty on the Second German Television stipulates that three representatives of the Federal level can be delegated by the Federal Government.

<sup>130</sup> Art. 21 para. 5 Interstate Treaty "Deutschlandradio".

<sup>131</sup> See only Art. 14 Interstate Treaty on South-West-Broadcasting.

<sup>132</sup> See the analysis by Hahn, *Aufsicht*, p. 164-190; Hesse, *Rundfunkrecht*, p. 159-160 with further remarks.

<sup>133</sup> Hahn, *Aufsicht*, p. 181-184.

<sup>134</sup> The election is likely to contradict the Resolution 1636 (2008) "Indicators for media in a democracy" of the Parliamentary Assembly of the Council of Europe, stipulating under no. 8.20 that senior management positions should be refused to people with clear party political affiliations.

<sup>135</sup> BVerfG, NJW 1994, 1942 (1946f.); BVerfG, MMR 2007, 770 (773ff.).

<sup>136</sup> See Art. 14 Interstate Broadcasting Treaty and Interstate Treaty on Broadcasting Financing.

### 3.2.4 Structural regulation for private broadcasting: ensuring pluralism of opinion and independence through licensing and supervision proceedings

Safeguards for media pluralism and independence in the field of private broadcasting rest on a differentiated legal system, which essentially relies on external control mechanisms.<sup>137</sup> The supervision authorities can only resort to appointing an additional internal body, should the private broadcaster gain a dominant position.<sup>138</sup> Furthermore, the pluralism of opinions has to be ensured with regard to all private broadcasters, which means the law pursues at first external pluralism of different operators and resorts to a single channel only complementarily (see Article 25 para. 2; Article 26 Interstate Broadcasting Treaty).<sup>139</sup> These basic principles have led to a regime of structural provisions regarding ownership. In essence, these take the form of rules on incompatibility and market dominance adopted to ensure private broadcasting is not controlled or influenced by state interests and that a single company does not gain a market dominant position potentially threatening the process of impartial opinion shaping. The State Media Authorities and, in the case of national private broadcasters, the cooperation bodies implement the rules.

The applicable licensing provisions in the Interstate Broadcasting Treaty (on national private broadcasting) stipulate, among other things, that a licence must not be issued to any legal person established according to public law (for example the Federal Republic of Germany or the states), legal representatives of those legal persons or to political parties.<sup>140</sup> The same applies for foreign public bodies.<sup>141</sup> State media legislation for regional broadcasters<sup>142</sup> contains comparable provisions with occasionally more detailed requirements.<sup>143</sup> Thus, the media law prohibits any public body and any political party from holding or being part of a private broadcaster.

The Federal Constitutional Court discerned, however, that skewed public discourse could be the result of a dominant market position.<sup>144</sup> Consequently, the state lawmakers included in the Interstate Broadcasting Treaty specific regulations on national broadcasting to fulfil the constitutional requirements as stipulated by the Court. The law refers to market shares of viewers to ascertain whether a dominant market position exists and, in doing so, considers all channels of all enterprises of the operator at issue.<sup>145</sup> A dominant position is gained in the market in cases of a 30% or higher annual market share of viewers or a 25% share in cross media conjunctures.<sup>146</sup>

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<sup>137</sup> See ALM, *Jahrbuch 2009/2010*, p. 356ff.; C. Bamberger, “Sicherung der Meinungsvielfalt durch die Landesmedienanstalten” [Ensuring pluralism of opinions through state media authorities], ZUM (2000) 551; Hesse, *Rundfunkrecht*, p. 244f.

<sup>138</sup> See only Art. 32 Interstate Broadcasting Treaty; Art. 33 c) State Media Law North-Rhine Westphalia.

<sup>139</sup> B. Holznagel and A. Grünwald, “§ 25 Rundfunkstaatsvertrag” [Art. 25 Interstate Broadcasting Treaty], in G. Spindler and F. Schuster (eds), *Recht der elektronischen Medien [Law of electronic media]* (2008), marginal no. 5. A more differentiated approach sees M. Kühn, *Meinungsvielfalt im Rundfunk* [Pluralism of opinions in broadcasting] (2003), p. 86-87.

<sup>140</sup> Art. 20 a) para. 3 Interstate Broadcasting Treaty.

<sup>141</sup> *Ibid.*

<sup>142</sup> Art. 20 para. 1; Art. 39 Interstate Broadcasting Treaty.

<sup>143</sup> See only Art. 13 para. 3 and para. 4 State Media Law Baden-Württemberg [Landesmediengesetz Baden-Württemberg (LMedienG), 2010].

<sup>144</sup> BverfGE 57, 259 (323); BVerfG, NJW 1987, 239 (244).

<sup>145</sup> Art. 26 para. 1 and 2 Interstate Broadcasting Treaty.

<sup>146</sup> Art. 26 para. 2 Interstate Broadcasting Treaty. This is the case when a market dominant position in the other media market already exists or the cross-media activities are comparable to a television market share of 30%.

The law covers several measures to address market dominance, including the prohibition to merge, the divestiture of programmes or shareholdings, and finally the adoption of measures to ensure opinion pluralism through an independent Programme Board representing different representative societal groups or airtime concession to an independent third party.<sup>147</sup>

Moreover, according to federal antitrust law, the Federal Cartel Authority is entitled to scrutinise whether an intended merger leads to a market dominant position regarding sole economic aspects and not opinion domination.<sup>148</sup> The same legislation contains a special provision determining when market dominance is achieved, which is only applicable to newspaper publishers and television operators.<sup>149</sup> In essence, it facilitates the application of the prohibition to merger in those cases. This system leads in conclusion to a two level merger and market dominance control, one based on state media law focusing on opinion dominance and one based on federal law focusing on economical market dominance.

### 3.2.5 Structural regulation of print media

As already mentioned, the Basic Law enshrines in Article 5 the freedom of the press. Legal doctrine understands this right as an individual protection right against unlawful state interference, which simultaneously protects the press as an institution constitutive for democracy.<sup>150</sup> Furthermore, the Court has ruled that the state has to intercept in developments threatening the impartial opinion of print media organs and thus the impartial process of opinion building by readers.<sup>151</sup> This legal interpretation obliges the state to avert a publisher monopoly. As this is not the case yet, no legislation exists establishing the press or requiring a licence procedure,<sup>152</sup> because the press is organised privately without state funding or specially tailored state aid. Press outlets must include a legal notice [Impressum] for the person accountable, with further information in the case of a periodical outlet (name and address of chief editor). Additionally, the responsible editor must reside permanently in Germany.<sup>153</sup>

As for cross-media activities of publishers, the Interstate Broadcasting Treaty,<sup>154</sup> the State Media Acts<sup>155</sup> as well as the Act against Competition Constraints<sup>156</sup> contain provisions to impede dominant market positions and thus structure the press market.<sup>157</sup>

Another aspect of structural regulation pertains to the distribution system in Germany. The Federal Constitutional Court has stated that press related activities,

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<sup>147</sup> Art. 26 para. 3 and 4; Art. 30 Interstate Broadcasting Treaty.

<sup>148</sup> Art. 36 para. 1 Act against Competition Constraints.

<sup>149</sup> Art. 38 para. 3 Act against Competition Constraints.

<sup>150</sup> BVerfG, NJW 2007, 1117 (1118).

<sup>151</sup> BVerfGE 20, 162 (175-176).

<sup>152</sup> See for many Art. 2 Hamburg Press Act [Hamburgisches Pressegesetz, 2009].

<sup>153</sup> See Art. 8 and Art. 9 Hamburg Press Act.

<sup>154</sup> Art. 26 para. 2 sentence 2 Interstate Broadcasting Treaty.

<sup>155</sup> See only Art. 24 para. 2 sentence 3 State Media Act Baden-Württemberg.

<sup>156</sup> Art. 38 para. 3 Act against Competition Constraints.

<sup>157</sup> See for further information: Bretschneider, *Bewertung crossmedialer Verflechtungen im Medienkonzentrationsrecht* [Assessment of cross-media mergers in the view of law on media concentration] (2010), p. 71-81; W. Schulz and T. Held, *Die Zukunft der Kontrolle der Meinungsmacht* (2006) [The future of control of opinion domination], p. 13-36.

including press distribution, are protected by the Basic Law.<sup>158</sup> The press distribution system is thus based on the principle that every print media outlet must be disclosed by the distributor who is obliged to act in a neutral manner. Several large-scale distributors have organised the German market in such a way that every publisher can reach every retailer offering print media products to customers. As such, every publisher can more or less access the whole press market via the distributor and have the same chance to be purchased.<sup>159</sup>

### 3.2.6 Structural regulation of new media services

The legal framework for new media services is still developing in Germany,<sup>160</sup> though federal<sup>161</sup> and state legislation,<sup>162</sup> influenced by European law already apply.

In general, online-activities (as part of the German legal notion “telemedia”)<sup>163</sup> are not subject to any licensing procedure.<sup>164</sup> As such, every private person, private enterprise or public body can place and receive content online, provided that generally applicable legislation (i.e. rules for the protection of young people, Penal Code provisions, etc.) is respected. The existing legal framework for media outlets likewise shapes online activities. As a result, the Interstate Broadcasting Treaty obliges private broadcasters transmitting television programmes on the Internet to submit an application for a licence, with the exemption of Internet radio that can be broadcast without a licence.<sup>165</sup> On the other hand, public service broadcasters are explicitly entitled to provide their programmes online,<sup>166</sup> though strict content requirements exist, as will be shown in the next passage. Private publishers are similarly entitled to offer an online version of their papers. No licensing procedures apply, and content requirements are comparable to those applicable in the case of paper publications.

Other rules relevant to new media services are those contained in the contested<sup>167</sup> legislation on block lists that impede access to websites with incriminated content, mostly child pornography,<sup>168</sup> and those imposing data retention obligations, as laid down in the Directive 2006/24/EC.<sup>169</sup> The latter obliges the German lawmaker to adopt rules for data retention stipulating that Internet providers must store all

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<sup>158</sup> BVerfG, NJW 1988, 1833 (1833-1834).

<sup>159</sup> Presse-Grosso, “Grosso-Vertriebssystem [Press distribution system], available at: <http://www.presse-grosso.de/bereiche/recht/grosso-vertriebssystem.html> (last visited on 3/08/2010).

<sup>160</sup> See only W. Hoffmann-Riem, “Gesetzliche Gewährleistungen der Freiheit der Kommunikation im Internet?” [Legally ensured freedom of communication in the Internet?], in W. Hoffmann-Riem (ed.), *Wandel der Medienordnung [Change of the media order]* (2009), 237; Fechner, *Medienrecht*, p. 339.

<sup>161</sup> Act on the Usage of Telemedia [Gesetz über die Nutzung von Telemedien, 2009]. See T. Hoeren, “Das Telemediengesetz” [Act on telemedia], *Neue Juristische Wochenschrift* (2007) 801. Telecommunication Act [Telekommunikationsgesetz, 2010].

<sup>162</sup> Art. 54–Art. 61 Interstate Broadcasting Treaty.

<sup>163</sup> According to the legal definition in Art. 1 para. 1 Act on the Usage of Telemedia, the term telemedia refers to all information and communication services, as long as they cannot be considered as broadcasting or sole one-to-one telecommunication. Fechner, *Medienrecht*, p. 346ff.

<sup>164</sup> Art. 4 Act on the Usage of Telemedia.

<sup>165</sup> Art. 20b) Interstate Broadcasting Treaty.

<sup>166</sup> See Art. 11d) Interstate Broadcasting Treaty.

<sup>167</sup> A. Marberth-Kubicki, “Der Beginn der Internet-Zensur. Zugangssperren durch Access-Provider” [The advent of Internet censorship. Access barrier of providers], *Neue Juristische Wochenschrift* (2009) 1792.

<sup>168</sup> Act to Fight Child Pornography in Communication Networks [Gesetz zur Bekämpfung der Kinderpornographie in Kommunikationsnetzen, 2010].

<sup>169</sup> OJ L 105 of 13 April 2006, p. 54.



communication data and IP-addresses for six months and submit them on request to state prosecutors, intelligence services, and other law enforcement authorities.<sup>170</sup> Journalists' organisations argued that potential information sources would retreat if the German legislation were to be implemented and supported a constitutional complaint.<sup>171</sup> Although the Federal Constitutional Court quashed the provisions and required the federal lawmaker, the German Parliament, to amend the law,<sup>172</sup> it is not clear whether journalists will benefit from it.

### 3.3 Content regulation

Different content regulations apply, depending on the medium used. The legislature has adopted tailored content regulations to shape basic programme principles for broadcasters and has also laid down rules for the online activities of public service operators. Publishers are required to respect basic journalistic principles and private websites are not bound to comply with specific content requirements.

Besides these specific rules, general rules apply stemming from different areas of law regarding personal rights, libel, protection of young people and others.

#### 3.3.1 Content regulation for public service broadcasting

According to the Federal Constitutional Court case law, the basic provision of broadcasting services [Grundversorgung] lays with the public service broadcasters.<sup>173</sup> This implies a duty of impartiality and the provision of unskewed information necessary for democratic decisions. The state lawmakers adopted content regulation in response to the case law. Articles 3, 10, and 11 of the Interstate Broadcasting Treaty stipulate important basic rules for the programmes. These are complemented and specified by the state Acts on the state broadcasting corporations<sup>174</sup> and self-regulatory guidelines.<sup>175</sup> The Interstate Treaty for "Deutschlandradio" and the Second German Television contain comparable provisions.<sup>176</sup>

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<sup>170</sup> Art. 113a; Art. 113b Telecommunication Act. Art. 100g para. 1 Criminal Code of Procedure [Strafprozessordnung, 2009].

<sup>171</sup> Joint expert opinion for the public hearing at the German Federal Parliament on telecommunication surveillance, B. H. Pöppelann, German Journalists' Association, 19/07/2007, available at: <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1251&id=1134> (last visited on 30/8/2010), at p. 4.

<sup>172</sup> BVerfG, NJW 2010, 833 (843; 849); critical appraisal by N. Forgó and T. Krügel, "Vorschriften zur Vorratsdatenspeicherung verfassungswidrig: Nach der Entscheidung ist vor der Entscheidung" [Provisions on data retention unconstitutional], 4 Kommunikation & Recht (2010) 217.

<sup>173</sup> BVerfG, NJW 1987, 239 (241); BVerfG, NJW 1987, 2987 (2988); for further information Hesse, *Rundfunkrecht*, p. 120-130; M. Stock, "Duales System: funktionsgerecht ausgestaltet?" [Dual system: effectively working?], in C.-M. Ridder, et al. (eds), *Bausteine einer Theorie des öffentlich-rechtlichen Rundfunks* [Components of a theory on public service broadcasting] (2005) 54, at p. 64ff.

<sup>174</sup> See only Art. 4, Art. 5, Art. 6, Art. 7, and Art. 8 Interstate Treaty on Northern-German-Broadcasting.

<sup>175</sup> See only Art. 15 para 3.4 Interstate Treaty on the South-West-Broadcasting. See as example the self regulatory guidelines of the public service operator's working coalition ARD: ARD, *Bericht 07/08. Leitlinien 09/10* [Report 07/08. Guidelines 09/10], available at: <http://www.daserste.de/service/allround.asp?uid=106t3n7ad1lm6l8x&name=leitlinien> (last visited on 14/10/2010), at p. 72ff.

<sup>176</sup> Art. 5 Interstate Treaty on Second German Television; Art. 6 and Art. 7 Interstate Treaty on "Deutschlandradio".

The legislation clarifies the mandate of public service broadcasting. According to Article 11 Interstate Broadcasting Treaty, the public service broadcasters are required to serve through their programming as a medium for free and independent public opinion shaping and thus meet the democratic, social and cultural needs of the society. Furthermore, public service broadcasters must provide comprehensive information on international, European, national, and regional events on all relevant aspects of life. When fulfilling these duties they are obliged to adhere to the principles of objectivity and impartiality of reporting and take pluralism of opinions and a balanced approach into account. They must also include in their programmes educational, informational, counselling and entertainment content.<sup>177</sup>

As well as these requirements, public service broadcasters must respect the dignity of human beings and all other rules protecting the esteem of persons, such as libel.<sup>178</sup> When transmitting information programmes, the applicable law stipulates they must be produced in accordance with commonly accepted journalistic principles, especially regarding independent and objective reporting.<sup>179</sup> Specific regulations for advertising and protection of young people also apply.

The broadcasting councils monitor whether the state broadcasting corporations adhere to the content regulations or they act on the basis of complaints received.

Online activities complementing traditional broadcasting are subject to more detailed rules. Public service broadcasters can also provide websites with additional information and can transmit their programmes online. However, these activities can only take place within the framework stipulated in Article 11d) Interstate Broadcasting Treaty as well as the detailed self-regulatory concepts of each of the state broadcasting corporations. This is the result of a state aid procedure with the European Commission on public service broadcasters.<sup>180</sup> Private publishers and broadcasters have a strong interest in public services broadcasters being circumscribed, due to market share considerations, and as such submitted a complaint with the European Commission. This influenced the core legal provisions on online activities, as public service broadcasters are only entitled to provide online content that refers to their traditionally broadcast, journalistic initiated<sup>181</sup> programmes produced by them. Furthermore, several online services are prohibited, such as broad regional news coverage, video-on-demand of purchased films or series as well as a list of other services laid down in law.<sup>182</sup> The legal situation, especially the legal notion of journalistic or editorially initiated programmes, seems rather vague and unsatisfactory. It will be interesting to follow the forthcoming legal developments in this regard.

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<sup>177</sup> Art. 11 para. 1 sentence 4 Interstate Broadcasting Treaty.

<sup>178</sup> Art. 3 para. 1 Interstate Broadcasting Treaty.

<sup>179</sup> Art. 10 para. 1 Interstate Broadcasting Treaty.

<sup>180</sup> So called "Three-Step-Test" and Telemedia concepts. See only B. Peters, "Der 'Drei-Stufen-Test': Die Zukunft der öffentlich-rechtlichen Onlineangebote" [The three-step-test: The future of public service online offers], 1 *Kommunikation & Recht* (2009) 26; W. Schulz, *The public service broadcasting mandate seen as the process of its justification. Some suggestions on the implementation of the three-step test to make the remit of public service broadcasters in Germany more precise* (2008), p. 13ff. For a very general account of the online offers by public service broadcasters see: H. F. Schäfer, *Neue Betätigungsfelder des öffentlich-rechtlichen Rundfunks* (2004) [New areas of action for the public service broadcasting], p. 110-137.

<sup>181</sup> See Art. 11d) para. 1 Interstate Broadcasting Treaty.

<sup>182</sup> According to Appendix 4 of Art. 11d) para. 5 sentence 4 Interstate Broadcasting Treaty those services are prohibited which mainly can be commercialised in the Internet.

### 3.3.2 Content regulation for private broadcasting

Contrary to public service broadcasting, private broadcasting exhibits a clear inclination towards economic interests. While the Federal Constitutional Court espouses the concept that private broadcasting must also fulfil public duties it recognises that due to market forces private broadcasters do not have to fulfil all programme principles to the same degree of public service broadcasters.<sup>183</sup> While, for instance, public service broadcasters must abide by the content regulations concerning information and culture, private operators *shall* contribute broadcasts with informational, cultural and educational content in order to present the diversity in Europe and in Germany.<sup>184</sup> Furthermore, private broadcasters are bound by the constitutional order, including the Human Rights chapter of the Basic Law, and general rules on issues such as personal rights, human dignity and criminal law.<sup>185</sup> Article 3 (respect of dignity) and Article 10 (journalistic requirements) of the Interstate Broadcasting Treaty are also applicable for private broadcasters. Furthermore, all state Media Acts have comparable and complementing provisions for regional television and radio broadcasting.<sup>186</sup>

Like public service broadcasters, private operators must apply all general rules on protection of personal rights, discriminatory behaviour and other criminalised forms of content. The state Media Authorities and their cooperation bodies scrutinise whether the private broadcaster adhere to the programme basic principles.

### 3.3.3 Content regulation of press outlets

The legal enactments of the federal states regarding print media established the legal framework for print media outlets, accompanied by a self-regulating Press Code and general provisions which also apply to print media providers. Accordingly, print media organs are obliged to verify for all news that they want to publish whether the sources are credible and the facts correct.<sup>187</sup> The same applies for journalistic publications online.<sup>188</sup> Furthermore, no published content is permitted to violate Penal Code provisions. The legislature has not adopted any further content regulations to complement these basic principles.

However, the Press Code entails a detailed set of rules applicable for print media journalists. Those rules require, among other things, the recognition of truth and the dignity of human beings, journalistic accuracy when publishing facts, the respect for private life and the intimate sphere and protection of honour. Furthermore, in the Code the print media relinquishes inadequate sensational presentation of

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<sup>183</sup> BVerfG, NJW 1987, 239 (240); BVerfG, NJW 1994, 1942 (1944); B. Holznagel and D. Krone, “§ 41 Rundfunkstaatsvertrag” [Interstate Broadcasting Treaty] in G. Spindler and F. Schuster (eds), *Recht der elektronischen Medien* [Law of electronic media] marginal no. 13.

<sup>184</sup> Art. 41 para. 2 Interstate Broadcasting Treaty. See for the programme principles: H. Gersdorf, *Grundzüge des Rundfunkrechts. Nationaler und europäischer Regulierungsrahmen* [Basic structures of broadcasting law. National and European regulation framework] (2003), p. 183-186; Hesse, *Rundfunkrecht*, p. 234-239.

<sup>185</sup> Art. 41 para. 1 Interstate Broadcasting Treaty.

<sup>186</sup> See only Art. 31 State Media Law North-Rhine Westphalia; Art. 4 and Art. 5 Bavarian Media Act; Art. 47 Interstate Treaty on Berlin-Brandenburg Broadcasting.

<sup>187</sup> See for further information: J. Soehring, *Presserecht* [Print media law], (2010) p. 10-23.

<sup>188</sup> Art. 54 para. 2 Interstate Broadcasting Treaty.

violence and suffering.<sup>189</sup> However, being self-regulating provisions, it is contested they are implemented sufficiently, especially with regard to the tabloids.<sup>190</sup>

### **3.3.4 Content regulation of new media services, especially the Internet**

In short, no specific content regulation exists for Internet publications in cases of individual private websites. In cases of websites offering a service, a basic legal notice with details of the accountable person or legal entity is required.<sup>191</sup> The applicable Act on Telemedia does not stipulate further requirements. However, the general rules applying in all other outlets must also be considered in online publications, especially as regards fraud and hate speech.

Additionally, the Interstate Broadcasting Treaty stipulates basic requirements in cases of online journalistic services, namely the requirements of accuracy in journalistic reporting.<sup>192</sup>

## **3.4 Other media policy tools**

### **3.4.1 Protection of information sources**

In practice, journalists are dependent on information sources working in the particular area of interest.<sup>193</sup> These may be in a ministry or in the parliament. The law respects the special position of journalists and their relationship to sources and gives journalists a right to refuse to give evidence in a criminal court proceeding.<sup>194</sup> It also expands the protection of journalists relating to data storage by prohibiting the police from confiscating material.<sup>195</sup> However, journalists can commit a crime, namely betrayal of state secrets, when publishing certain information. As journalists are not secret bearers in the sense of the law, this is only possible if the journalist acts in consent with an informant (who is, for example, someone working in a ministry). Under such circumstance, the journalist loses the legal protection and the material can be confiscated.

This construction may undermine journalists' work, as informants cannot be sure whether such confiscation may lead to them facing criminal charges.<sup>196</sup> The Federal Constitutional Court has recognised this conflict of interests and ruled that protection of sources must be ensured for editors and journalists.<sup>197</sup> The sole publication of classified material does not alone mean state prosecutors can assume a criminal act and justify confiscation. However, if specific evidence shows the secret bearer intended a publication of the classified information, state prosecutors are entitled to carry out a search to confiscate evidence and thus reveal the identity of the

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<sup>189</sup> See: Presserat, *Publizistische Grundsätze (Pressekodex)*, 2008.

<sup>190</sup> See the differentiated appraisal made by Pöttker, "Der Deutsche Presserat", at p. 127ff.

<sup>191</sup> Art. 5 Act on the Usage of Telemedia.

<sup>192</sup> Art. 54 para. 2 Interstate Broadcasting Treaty.

<sup>193</sup> BVerfG, NJW 2007, 1117 (1118).

<sup>194</sup> Art. 53 para. 1 no. 5 Criminal Code of Procedure.

<sup>195</sup> Art. 97 para. 5 Criminal Code of Procedure.

<sup>196</sup> T. Starke, "Informantenschutz zwischen Pressefreiheit und staatlichem Strafverfolgungsinteresse" [Protection of informants between freedom of press and state interests of effective criminal prosecution], 02 AfP (2007) 91, at p. 92.

<sup>197</sup> BVerfG, NJW 2000, 55.

informant.<sup>198</sup> The legal situation remains somewhat uncertain and leaves journalists in a limbo situation. It will be interesting to see in the future whether the relatively vague requirements avert searching of editors' and journalists' offices and private premises. Critics have pointed out the problems with the legal circumstances and have advocated excluding journalists from criminalisation in such cases.<sup>199</sup>

### 3.4.2 Libel and other forms of violation of personal rights and freedom of the press

While it is true that a free and independent media landscape is important for democratic discourse, it is equally true that despite safeguarding in content regulations, media outlets do on occasion disregard individuals' personal rights and must be held accountable for this. The German legal system contains several criminal and civil legal provisions in this regard. The civil law provides a very differentiated legal regime of claims against the media based on the protection of individual personal rights [Persönlichkeitsrecht], which is regarded a human right under German law.<sup>200</sup> Furthermore, the Penal Code criminalises libel, defamation, certain forms of publication and distribution of pornography as well as certain forms of disregard towards state representatives and institutions. Due to Germany's history, the Penal Code also criminalises certain allegations concerning the Nazi regime, such as denying the Holocaust.<sup>201</sup>

### 3.4.3 Right to reply

The right to reply is applicable to broadcasting, print media and journalistic publications in the Internet. It is recognised in various acts, such as the State Press Acts, the State Broadcasting Acts, the State Media Acts, and the Interstate Broadcasting Treaty.<sup>202</sup> This right can only be resorted to in cases of factual assertion, when the person or the body concerned has a justified interest. In general, the scope of this right is rather broad.<sup>203</sup> The right is only excluded in cases of factual assertions that are publicly known, in trivial cases, or if the factual assertion implies itself a criminal act.<sup>204</sup> To facilitate reporting about lawmakers and parliamentary organs, the right to reply is also excluded for factual true reporting about those organs.<sup>205</sup>

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<sup>198</sup> BVerfG, NJW 2007, 1117 (1120).

<sup>199</sup> See only K. Kühn, *Strafgesetzbuch. Kommentar [Penal Code. Commentary]* (2007), Art. 353b Penal Code, marginal no. 13a; D. Dunkhase, *Das Pressegeheimnis. Wandel und Perspektiven gesetzlicher Sicherungen der Pressefreiheit gegen strafprozessuale Zwangsmaßnahmen [Protection of the print media secret. Change and perspectives of ensuring freedom of press]* (1998), p. 174-183.

<sup>200</sup> See only Fechner, *Medienrecht*, p. 63ff.; Soehring, *Presserecht*, p. 257ff.

<sup>201</sup> See Art. 130 para. 3 Penal Code [Strafgesetzbuch, 2009]; Soehring, *Presserecht*, p. 254.

<sup>202</sup> See only Art. 11 Hamburg Press Act; Art. 11 State Media Act Rhineland-Palatine; Art. 9 West-German-Broadcasting Act; Art. 56 Interstate Broadcasting Treaty.

<sup>203</sup> Fechner, *Medienrecht*, p. 110; Soehring, *Presserecht*, p. 630.

<sup>204</sup> Soehring, *Presserecht*, p. 632-636.

<sup>205</sup> See only Art. 56 para. 4 Interstate Broadcasting Treaty; Art. 44 para. 6 State Media Law North-Rhine Westphalia.

## 4. Media policy and democratic politics: an assessment

### 4.1 General remarks

Thus far, the description of the media landscape in Germany, the regimes and the actors has focused on a summary of single aspects. Not much has been said on the principal features and characteristics of media policy in Germany. The first topic shall be termed here as cognitive sovereignty of interpretation. Television, radio, print media, and Internet are used by persons to entertain themselves, but also to form a picture of the world we live in, to shape an opinion and to gain an understanding of the ongoing regional, national and global developments. This aspect correlates with the fight for attention in the media. The underlying currents of several conflicts in media policies are to an extent influenced by the ongoing tensions between the commercialisation of the media and contrariwise the idea of a space free of sole market forces but shaped by the diversity of cultures and pluralism of opinions. Finally, technical developments very much shape media policies and debates regarding how they are to be used. The Internet and its repercussions for traditional media pose new political and legal challenges. Admittedly, these topics may sound rather vague and abstract. Essentially, the question is: what characteristic media policy developments can be ascertained?

### 4.2 The dual broadcasting system

The most far-reaching political decision regarding the media field was to establish private service broadcasting.<sup>206</sup> The whole media system was changed with this decision for a dual broadcasting order and the actors are still fighting today to expand their influence or market share or to protect their position. This was apparent as early as the 1950s, when private publishers tried to get a hold in broadcasting.<sup>207</sup> Mainly due to technical reasons, they did not succeed. However, it was not only the private publishers who contested public service broadcasting's position. The circumstances changed, politically and technically, during the 1980s.<sup>208</sup> The liberal-conservative federal government came into power and supported private broadcasting. And on state level, several governments planned to conduct cable projects to investigate the technical advancements of cable networks.<sup>209</sup> The first German private television channel was transmitted via cable in 1984<sup>210</sup> and state parliaments began, rather hastily in some cases,<sup>211</sup> to adopt media legislation to regulate private broadcasting.<sup>212</sup> The reasons for this development may be manifold. However, two basic points can be made. Politically, mostly conservative politicians asserted that the public service

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<sup>206</sup> See the description of the dual system by M. Stock, "Noch einmal zum Reformbedarf im 'dualen Rundfunksystem': Public-Service-Rundfunk und kommerzieller Rundfunk - wie können sie koexistieren?" [As for the need of reforms in the dual system: how can public service broadcasting and commercial broadcasting co-exist?], Heft 244, Arbeitspapiere des Instituts für Rundfunkökonomie an der Universität zu Köln (2008).

<sup>207</sup> Eifert and Hoffmann-Riem, "Entstehung", at p. 51; R. Steinmetz, "Initiativen und Durchsetzung privat-kommerziellen Rundfunks" [Initiative and implementation of privat-commercial broadcasting], in J. Wilke (ed.), *Mediengeschichte der Bundesrepublik Deutschland* [Media history of the Federal Republic of Germany] (1999), p. 168ff.

<sup>208</sup> Schwarzkopf, "Medienwende", p. 36-38.

<sup>209</sup> Steinmetz, "Initiativen", pp. 179-180.

<sup>210</sup> Steinmetz, "Initiativen", p. 182.

<sup>211</sup> Steinmetz, "Initiativen", p. 181.

<sup>212</sup> Eifert and Hoffmann-Riem, "Entstehung", p. 60.

broadcasters, especially the state broadcasting corporations, with their common national channel, “Das Erste”, were too critical of conservative politics.<sup>213</sup> They hoped to receive better coverage by private broadcasters. Economically, publishers and private broadcasting companies saw the possibility to make business. It was assumed private radio and television would be very profitable, if only enough advertising revenues were to be generated.

What are the repercussions of this development for democratic politics and citizen participation? It is admittedly rather difficult to gauge the impact of private broadcasting on democratic processes. While some argue private channels enrich options available to the public and as such increase pluralism, others contest that private broadcasting significantly fostered media pluralism, due to media concentration and exchangeable content. However, an important feature of the democratic processes lays in the unskewed provision and receipt of information and reporting. The question arises as to whether private broadcasting still fulfils this task, taking into account, for instance, the fact that in 2008 RTL averaged twenty minutes a day covering political events or politically relevant information.<sup>214</sup> According to other sources, RTL provided fifteen minutes per day on political relevant information in its news-broadcastings, and eleven minutes in other formats.<sup>215</sup> Not surprisingly, it is conceded that after twenty-five years have passed since the introduction of private broadcasting, the results in form of channel concepts and content can not necessarily be deemed advantageous for the viewer and the political sphere.<sup>216</sup>

An ongoing debate between public service and private broadcasting can be discerned in the remit of public service broadcasting regarding online activities. This area is highly contested, as it is assumed that Internet television and other services available via Internet will predominantly shape the media market in the future.<sup>217</sup> The state aid procedure with the European Commission, initiated by the Association of Private Broadcasters, led to very detailed legislation and self-regulating guidelines (also referred to as online concepts) for the Internet activities of public service broadcasters. This regulation basically constrains the online services of public service broadcasters in certain areas. In a complex procedure called the three step test, involving mainly broadcasting operators and the broadcasting councils, the operators prepare their online concept focusing particularly on the basic guidelines laid down in the law.<sup>218</sup> These prescribe, among other things, that online services must be prompted by journalistic or editorial work, meet the democratic or cultural needs of

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<sup>213</sup> Schwarzkopf, “Medienwende”, p. 30 with further remarks.

<sup>214</sup> H.-J. Weiß, “Nachgesehen: Politische Publizistik in privaten Fernsehvollprogrammen” [Scrutinized: Political journalism in private national TV channels] ALM (ed.), *Fernsehen in Deutschland. 2008* [Television in Germany] (2009) 62, at p. 62-63.

<sup>215</sup> U. M. Krüger and T. Zapf-Schramm, “Politikthematisierung und Alltagskultivierung im Infoangebot” [Political themes in information programmes], 4 *Media Perspektiven* (2009) 201, at p. 218-219.

<sup>216</sup> Kiefer, “20 Jahre”, p. 558 with further remarks. Krüger, “Entwicklungen des Politikangebots im Fernsehprogramm” [Developments of political information programmes in television channels], in C.-M. Ridder, W. R. Langenbacher, U. Saxer and C. Steininger (eds) *Bausteine einer Theorie des öffentlich-rechtlichen Rundfunks* [Components of a theory on public service broadcasting] (2005) 252, at p. 268. See also with a critical appraisal: Weiß, “Nachgesehen”, p. 64-65.

<sup>217</sup> The Council of Europe has postulated this development in a recent recommendation: Recommendation Rec(2007)3 of the Committee of Ministers to the member states on the remit of public service media in the information society, 31/01/2007, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1089759> (last visited on 12/10/2010).

<sup>218</sup> Art. 11 d) and 11 f) Interstate Broadcasting Treaty.

the society and contribute qualitatively to journalistic competition. These content prescriptions are the background for the online concepts (so called telemedia concepts), in which each public service broadcaster has to describe what it wants to place online and how this meets the legal requirements.<sup>219</sup> Shortly afterwards all broadcasting councils adopted the relevant online concept for each public service broadcasting corporation, triggering the reaction of the Association of German Magazine Publishers which claimed that these concepts threatened the balanced system of private and public service media.<sup>220</sup>

### **4.3 Convergence and the relationship of Internet and traditional media**

The whole system is facing a challenge posed by new media services via the Internet regarding the technical aspects of media services and legal developments. As for the technical convergence, it can be observed that newspapers offer online versions of their papers in the Internet. Private broadcasters maintain their own websites with programmes and offer additional services such as video-on-demand. Public service broadcasters transmit their programmes - partly - via the Internet as live stream. Finally, private blogs gain more and more influence. As described above, these developments have also influenced the media law. The question arises, however, whether the existing differentiation of outlets (print media, broadcasting and online services) in the applicable law still meets the media's needs. As this legal area develops very fast, it seems impossible to predict whether the differentiated legal system will prevail or the basic and decisive definitions will be revised.<sup>221</sup>

Some issues regarding the relationship between Internet services and traditional media, however, can already be mentioned. Currently, publishers assert they do not make profits with their online services. While some resort to paid content (such as *Hamburger Abendblatt*) or the online donation system Flattr (such as *die tageszeitung*), the publishers' organisation together with the journalists' union follows an additional policy strategy, seeking to convince the Federal Government to amend the existing intellectual property law and oblige any search engine that cites an online version of a newspaper or any commercial or professional reader of such a website to sign a contract in advance and pay for the service. Critics argue that this would impede the free flow of information and could commercialise single words or phrases unduly. As the drafted protection clause would cover very short sentences or even short phrases, common sayings or even single words could no longer be used without paying for them, once included in a newspaper online. It is unclear, at this moment, under which circumstances and with which amendments such protection clause will be introduced into the intellectual property law. The existing draft, however, seems impractical and exemplifies the connections between commercialisation and control of content.

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<sup>219</sup> See as an example: WDR, "Telemedienkonzept für das Internetangebot des WDR, 2010".

<sup>220</sup> Verband Deutscher Zeitschriftenverleger, "Absage an ein ausbalanciertes, faires System" [Rejection of a balanced, fair System], 24/06/2010, available at: <http://www.firmenpresse.de/pdf-pressinfo216387.pdf> (last visited on 12/10/2010).

<sup>221</sup> See in this regard the illustrative article: C. Möllers, "Pressefreiheit im Internet", 03 AfP (2008) 241.



#### 4.4 The democratic potential of the Internet

The Internet provides a democratic space in which new forms of participation can evolve.<sup>222</sup> Firstly, due to its decentralised structure and the still existing access neutrality, it seems much more difficult to influence, let alone, control the stream of information. Secondly, organisations, be it political parties or independent non-governmental organisations, are no longer necessarily major actors shaping political developments.<sup>223</sup> It is not yet clear, whether Internet based participation will replace traditional forms of political participation and how it will shape forms of governing. However, the evolving participative tools seem to point in the direction of a complementing form of political participation with the potential to alter basic structures.<sup>224</sup> Thirdly, the access via the Internet to credible information allows individuals to partake in democratic processes differently, especially on local or regional matters. Much more information than before can be diffused via the Internet and this is much easier to access than printed information on a similar scale. This development poses the question as to whether complementary decision structures will come into place to alter the common understanding of representative democratic processes.<sup>225</sup>

However, these possibilities are faced with challenges posed by private companies and state authorities. The technical advancements to a certain degree threaten access neutrality or Internet neutrality. Internet providers like the large telecommunication networks can establish different speed standards or quality classes. If a company wants to use a faster transmission of contents, additional fees shall be paid. This development may even lead to cooperation between large Internet providers and companies such Google, essentially creating their own Internet and thus shaping users' online consumption significantly and presumably based on market interests. Such developments would, however, question the intrinsic character of the Internet, which lies in the opportunity that everybody with Internet access and a contract with a provider can publish and access contents. This means that, within the legal framework, any actual or legal person can transmit its own online programmes (such as films) or blogs. The European Commission grants technical developments of broadband optical networks an important place in the next decade and stresses the importance of equal access to such optical networks.<sup>226</sup> This does not directly concern

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<sup>222</sup> See for instance C. Leggewie and C. Bieber, "Demokratie 2.0 - Wie tragen neue Medien zur demokratischen Erneuerung bei?" [Democracy 2.0. How can new media services foster a democratic renewal?], in C. Offe (ed.), *Demokratisierung der Demokratie - Diagnosen und Reformvorschläge* [Democratisation of democracy – diagnosis and reform suggestions] (2003) 124. With a more critical appraisal: T. Meyer, "Gewöhnung an die Mediokratie?" [Customisation to mediocracy?], 190 *vorgänge* (2010) 92, at p. 98-99; B. Witte, K. Rautenberg and C. Auer, "Marketing statt Mitmach-Netz? Web 2.0-Nutzung von Bremer Parteien und Medien" [Marketing instead of participation], in J. Wolling, M. Seifert and M. Emmer (eds), *Politik 2.0?* [Politics 2.0] (2010), 241. See for instance the conference of the political foundation Heinrich-Böll-Stiftung, "Citizen 2.0: Gesellschaftliche Teilhabe im Netz kein Selbstläufer" [Citizen 2.0: Societal Participation in the Web does not work automatically], available at: <http://www.boell.de/demokratie/foerderung/demokratiefoerderung-citizen20-digitale-gesellschaft-demokratie-partizipation-9124.html> (last visited on 14/10/2010).

<sup>223</sup> See for this J. Hoff and H. K. Hansen, "Conclusion - perspectives on politics and democracy", in J. Hoff and H. K. Hansen (eds), *Digital governance:// Networked societies* (2006) 329.

<sup>224</sup> This is endorsed by O. Winkel, "Electronic Government und politische Beteiligung" [Electronic government and political participation], in S. Brink and H. A. Wolff (eds), *Gemeinwohl und Verantwortung* [Public weal and responsibility] (2004) 811, at p. 827.

<sup>225</sup> Hoff and Hansen, "Conclusion - perspectives on politics and democracy" p. 330.

<sup>226</sup> European Commission, Commission Recommendation of 20.9.2010 on regulated access to Next Generation Access Networks (NGA), C(2010) 6223 final, Annex II.

the Internet neutrality discussed here, but points to the civil engineering infrastructure that forms the backbone of the Internet. Furthermore, technical data-gathering tools render the Internet prone to inappropriate data-retention mechanisms by state authorities and low or almost no data-protection provisions compelling state authorities and private companies threaten the right to privacy.

If the communicative prospects of the Internet concerning democratic participation will actually flourish depends also on the attitude of its users. It is asserted for instance that online users do not necessarily participate in political forums and that it is mainly the existing media operators who provide politically relevant information content.<sup>227</sup> The websites of, for example, public service or private broadcasters tend to be viewed in preference to unknown blogs. If this hypothesis is true, the possible effects of receiving information from different sources would be diminished.

Another aspect must also be highlighted. Typically, one either knows the exact URL of the site one is seeking, one uses Twitter or other online information services, or one seeks information with the help of search engines. Most Internet activity in Germany involves the use of search engines to receive information on a certain topic. The estimated market share of Google in this is some 90%.<sup>228</sup> Taking into account the typical user behaviour of only scrolling the first pages with hits, the listing executed by Google determines to a great portion what information is imparted and thus shapes opinion. Furthermore, Google can edit the ranking websites on their own account and exclude thus basically content provided. Critics are however legitimately more concerned with data-protection provisions,<sup>229</sup> as Google stores all search requests and filters them to create a user profile.<sup>230</sup> Those refined data are then employed to create tailored search results or advertisements.<sup>231</sup> The influential position of search engines and the possible misuse of such data have prompted experts to think about the regulation of search engines.<sup>232</sup> Others, however, cannot discern a severe problem<sup>233</sup> and espouse the idea of transparency criteria of search engines to enable users an

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<sup>227</sup> Neuberger and Lobigs, *Die Bedeutung des Internets*, p. 37, p. 41ff.

<sup>228</sup> B. Danckert and F. J. Mayer, "Die vorherrschende Meinungsmacht von Google" [The predominant opinion power of Google], 4 MMR (2010) 219, available at: <http://www.webhits.de/deutsch/index.shtml?web> (last visited on 6/08/2010), at p. 219.

<sup>229</sup> S. Ott, "Schutz der Nutzerdaten bei Suchmaschinen. Oder: Ich weiß, wonach du letzten Sommer gesucht hast..." [Protection of user log files in search engines], *Multimedia und Recht* (2009) 448, at p. 448f.; T. Weichert, "Datenschutz bei Suchmaschinen" [Data protection in search engines], in D. Lewandowski (ed.), *Handbuch Internet-Suchmaschinen* [Handbook Internet search engines] (2009) 285.

<sup>230</sup> See for technical details only Ott, "Nutzerdaten", p. 450ff.

<sup>231</sup> S. Meyer, "Aktuelle Rechtsentwicklungen bei Suchmaschinen im Jahre 2009" [Legal developments regarding search engines in 2009], 4 *Kommunikation & Recht* (2010) 226, at p. 233-234; Ott, "Nutzerdaten", p. 452; Google Germany, "Privacy policy", available at: <http://www.google.de/intl/de/privacypolicy.html> (last visited on 6/08/2010).

<sup>232</sup> It is asserted for instance that Google has a strong influence on the journalists' research work. See H. Maurer, *Report on dangers and opportunities posed by large search engines, particularly Google* (2007), at p. 13-14; S. Ott, "Marktbeherrschende und öffentlich-rechtliche Suchmaschinen" [Market dominant and public service search engines], 7 *Kommunikation & Recht* (2007) 375, at p. 377-379; W. Schulz, T. Held and A. Laudien, *Suchmaschinen als Gatekeeper in der öffentlichen Kommunikation* [Search engines as gatekeeper for public discourse] (2005), p. 111ff., p. 119.

<sup>233</sup> J. Kühling, "Internetsuchmaschinen als Hüter des Wissens? Tatsächliche Probleme für den freien Informationszugang und rechtlicher Handlungsbedarf" [Internet search engines as knowledge keepers?], in G. F. Schuppert and A. Voßkuhle (eds), *Governance von und durch Wissen* [Governance through knowledge] (2008) 202, at p. 214.

appraisal of the search results.<sup>234</sup> The questions of search engines' market dominance, influential position on journalistic research work,<sup>235</sup> and information administration are not resolved and form part of an ongoing discussion in Germany. The European Union is most likely to act in this regard, if new rules will be adopted. Interestingly, the European Union data protection body "Article 29 Data Protection Working Party" assumes that Google, Yahoo and Microsoft did not comply with data protection rules.<sup>236</sup>

#### 4.5 Media and manipulation

Different forms of critical media influence ranging from undue impact to deliberate targeted manipulation can be observed in the German media, which has been the subject of research attention.<sup>237</sup> Firstly, the media system is perceived as a political actor itself and no longer as an observer or interpreter of political events.<sup>238</sup> Seen as political actors, media outlets can lose their credibility, as they do not inform impartially but instead try to influence political decisions intentionally. This has happened before in federal elections in the form of implicitly or explicitly postulated election endorsements.<sup>239</sup> Media outlets have also advanced open and, it is assumed, intentional political positions in debates.<sup>240</sup> Moreover, the whole interaction of media and the democratic system is analysed to ascertain to what degree the process of democratic decision-making is unduly influenced by the laws of media coverage.<sup>241</sup>

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<sup>234</sup> J. Kühling and N. Gauß, "Suchmaschinen - eine Gefahr für den Informationszugang und die Informationsvielfalt?" [Search engines – a threat to access to information?], ZUM (2007) 881, at p. 888-889.

<sup>235</sup> Discussed for instance with regard to journalists' investigations see the summary published under: "Internet-Suchmaschinen 'kein Ersatz für primäre Recherche'" [Internet search engines, no replacement for original inquiry], in: epd medien 53 (2006), p. 20-21.

<sup>236</sup> European Commission, Article 29 Data Protection Working Party, "EU data protection group says Google, Microsoft and Yahoo! do not comply with data protection rules", 26/05/2010.

<sup>237</sup> As for visualisation of politicians: M. Maurer, "Der Einfluss verbaler und visueller Informationen auf die Urteilsbildung über Politiker" [Influence of verbal and visual information in forming an opinion about politicians], in C. Schemer, W. Wirth and C. Wunsch (eds), *Politische Kommunikation: Wahrnehmung, Verarbeitung, Wirkung* [Political communication: perception, process, and effect] (2010) 53, at p. 66. See also the documentation of the high level conference: T. Leif (ed.), *Dokumentation zum 13. MainzerMedienDisput - Schweigen, Lügen und Vertuschen - Wenn die Wahrheit nicht mehr öffentlich wird* [Hush, lies and camouflage. When truth is no longer made public] (2008), available at: <http://www.mainzermediendisput.de/index.php> (last visited on 14/10/2010).

<sup>238</sup> B. Pfetsch and S. Adam, "Die Akteursperspektive in der politischen Kommunikationsforschung - Fragestellungen, Forschungsparadigmen und Problemlagen" [Perspective of the actors in the political communication science], in B. Pfetsch and S. Adam (eds), *Massenmedien als politische Akteure* [Mass media as political actor] (2008) 9.

<sup>239</sup> See the short analysis of F. Brettschneider and B. Wagner, "'And der winner should be...' Explizite und implizite Wahlempfehlungen in der *Bild-Zeitung* und der *Sun*" [Explicit and implicit election endorsements], in B. Pfetsch and S. Adam (eds), *Massenmedien als politische Akteure* [Mass media as political actor] (2008) 225.

<sup>240</sup> This happened during the financial crisis in Greece by the news magazine Focus: See Focus, Issue 8 of 22 February 2010, p 120ff.

<sup>241</sup> P. Baugut and M.-T. Grundler, *Politische (Nicht-)Öffentlichkeit in der Mediendemokratie. Eine Analyse der Beziehungen zwischen Politikern und Journalisten in Berlin* [Political (non-)publicity in the media democracy] (2009), p. 173ff.; P. Donges and O. Jarren, *Politische Kommunikation in der Mediengesellschaft* [Political communication in the media democracy] (2006), p. 279-286 with further remarks. See also T. Meyer, *Mediokratie* [Mediocracy] (2001), p. 85ff.; T. Meyer, "Mediokratie - Auf dem Weg in eine andere Demokratie?" [Mediocracy – on the road to another democracy?], B 15 - 16/2002 Aus Politik und Zeitgeschichte (2002) 7, at p. 8-11. The term political communication is used

As the concept of differentiated interdependencies points out,<sup>242</sup> journalists and politicians may act in an interdependent relationship that can influence, depending on their respective positions, either the media coverage or the work of the politician. Another aspect was highlighted regarding media concentration and the potential actual manipulative influence of a media oligopoly.<sup>243</sup> It is assumed that media concentration acts to the detriment of opinion pluralism.<sup>244</sup> While the possible skewed results of media coverage stem from internal factors, external interests also can lead to partial and sometimes manipulative coverage. Another form of manipulation can be seen in intentionally agenda-setting mechanisms in both directions: to place something into the public discussion<sup>245</sup> and, contrariwise, to prevent a subject from becoming a topic<sup>246</sup> or to omit information.

It seems, nevertheless, that whilst manipulation of media outlets is not a structural, endemic problem in Germany, it does occur and cannot be denied.

## 5. Conclusion

Currently, the main structure of the media system constitutes of a dual broadcasting regime with nine different state broadcasting corporations and many private broadcasting operators. Private publishing companies provide a wide range of print media outlets and magazines, implicating over 300 different papers with a circulation of 22 millions dailies and Sunday editions per working day. Despite these numbers, critical developments of media concentration can be observed. Furthermore, all traditional media operators provide websites and maintain different offers online. Finally, the digital developments and the convergence of media shape the media landscape significantly.<sup>247</sup>

Besides these structural characteristics, several main aspects of current media policy can be discerned. Private broadcasting companies and associations sought to restrict the online activities of public service broadcasters through a state aid complaint with the European Commission, because of the likely development that Internet television and radio will become core means of media transmissions. While this procedure has so far led to a confined online framework for public service broadcasters that is additionally subject to regular supervision by the broadcasting councils, this might only be an intermediary step. In the long run, it is very likely that private broadcasters and other private media companies will seek to contest the existing financing regime, at least aiming to reduce the services of public service broadcasters to some basic functions or to participate themselves in fee revenue.

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in this regard. See for further clarification of this term: Donges and Jarren, *Politische Kommunikation*, at p. 20-22.

<sup>242</sup> Baugut and Grundler, *Mediendemokratie*, p. 345.

<sup>243</sup> W. A. Meier, "Gesellschaftliche Folgen der Medienkonzentration" [Societal repercussions of media concentration], B 12-13/2004 Aus Politik und Zeitgeschichte (2004) 3, at p. 5.

<sup>244</sup> Meier, "Medienkonzentration", p. 4.

<sup>245</sup> See only M. Maurer, *Agenda-setting* (2010), at p. 86 with further information on empirical studies.

<sup>246</sup> Initiative Nachrichtenaufklärung, "Top-Themen 2009", available at: <http://www.nachrichtenaufklaerung.de/index.php?id=190> (last visited on 9/08/2010); Ver.di, "Weiße Flecken im Journalismus" [White spots in journalism], available at: <http://mmm.verdi.de/archiv/2010/01-02/journalismus/weise-flecken-im-journalismus> (last visited on 9/08/2010).

<sup>247</sup> See only ZAK, Kommission für Zulassung und Aufsicht der Landesmedienanstalten (ed.), *Digitalisierungsbericht 2009 [Report on digital developments]* (2009).

Another interesting and also concerning development can be seen in the discussion on Internet neutrality. Existing network providers in Germany support the idea of additional fees for specific services, usually those that are most demanding of data. This kind of traffic shaping questions, however, the core principle of the whole Internet. The demand of private publishers to alter the current intellectual property law to give them a specific protection right for mainly press outlets is linked to the same question of how to make more profit with the Internet.

More organisational questions could be discerned regarding the public service broadcaster organs and the State Authorities in supervising private broadcasting. Firstly, the question of whether broadcasting councils work efficaciously in order to fulfil the supervision task demands further attention. Secondly, the influential position of state representatives and political parties mentioned here merits a deeper analysis. Taking the supervision of private broadcasters into account, the question has to be raised as to whether the responsible State Authorities fully implement the existing provisions. Furthermore, it is very likely that state governments and state lawmakers will revise and alter the existing programme supervision currently comprising joint bodies and fourteen Media State Authorities. Whether a single, autonomously working body will be vested with a more sufficient structure and a more efficacious remit and discretionary power must also be addressed.

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