



## Case study report

Does media policy promote media freedom and independence?

The case of Germany

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December 2011

## **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 investigates the configuration of media policies in the aforementioned countries and examines 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, are thoroughly discussed and analysed.

Project title: European Media Policies Revisited: Valuing and Reclaiming Free and Independent Media in Contemporary Democratic Systems

Project duration: April 2010 - March 2013

EU funding: approx. 2.65 million Euro

Grant agreement: FP7-SSH-2009-A no. 244365

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## **Executive Summary**

This case study report, 'Does media policy promote media freedom and independence? The case of Germany' is the second report on Germany from the European Union-funded MEDIADEM project. While the first report, the 'Background information report. The case of Germany', published in October 2010, provides an overview of the current media landscape in Germany, this report focuses on media policy's processes and actors and their impact on the promotion of media freedom and independence. The objective of this report is to study the policy processes and the formulation or implementation of regulatory tools and policy instruments that either promote or constrain the development of free and independent media.

We have placed the core notion of this report, free and independent media, in the context of democratic societies. This is because media freedom and independence do not constitute absolute terms without any relationship to the environment the media works in. The MEDIADEM project is based on the assumption that the primary, overarching role of the media in a democratic society is to function as an agent of information and public debate that facilitates the functioning of democracy. The terms are thus employed in relation to the media's function in a democracy. It is clear from the outset that media freedom and independence are prone to various constraints. They can stem from the political sphere, from economic actors, from the media operators, or from the audience itself and will be illustrated here.

This report is based mainly on empirical research with reference to legal acts, judgments, parliamentary motions and other parliamentary documents, media experts' studies and research reports, statements of media operators and journalist associations, twenty-five expert interviews as well as supplementary academic literature. The information gathered was critically analysed and contextualised within the media policy discourse.

The first chapter provides an overview of the values and actors at work in media policy formation and implementation to outline the broad field of the German media policy landscape. These values and actors are then succinctly analysed against the background of the concept of a free and independent media. While it became clear during the research that the multitude of national and European actors and media policy forums renders it difficult to present a coherent picture, some underlying basic currents could be carved out. Media policy processes of structural regulation to engender free and independent democratic discourses are addressed in the second chapter, followed by an analysis of content regulation in the third chapter. The difficult coexistence of public service and private broadcasting, the economic situation faced by print media and the technical, media policy, and legal repercussions brought by the advent of the Internet are also illustrated. The report concludes with a discussion of the conditions of the journalistic profession and their role in fostering or constraining free and independent media and media competency initiatives in Germany.

## 1. Introduction

Democratic states and democratic societies require democratic personalities, which can evolve and develop through personal and transpersonal, thus public, communication. Personalities participating in democratic processes need to be informed and to acquire both the ability and the wish to communicate.<sup>1</sup> In the first report for the MEDIADEM project, the ‘Background information report. The case of Germany’ (Müller and Gusy, 2010: 192), we presented a brief summary of the existing media structures and regulations in Germany which frame public communication. This case study report on Germany explores media policy developments, its actors, and the results of these factors.<sup>2</sup> As a guiding question throughout, our main focus lies on the democratic function of free and independent media and how the necessary communicative spaces are created, especially as these spaces are constituted anew with new individuals, new technical means (such as the Internet), and new subjects, thus requiring changes to the regulatory framework.

Due to its salience for open and democratic societies, the Federal Constitutional Court has declared that the expression and imparting of opinions and freedom of information are human rights enshrined in the Constitution and that the exercise of these rights requires constitutional protection.<sup>3</sup> Communication can take place privately and publicly. With regard to public communication, free and independent media play a crucial role in public mass communication and thus *ideally* unbiased opinion forming. The notion of free and independent media requires that media freedom from the state be respected and guaranteed. However, other interests, from both state actors and private entrepreneurs, pull at the foundation of the media landscape, leading to the conclusion that a free and independent public sphere must be ensured and regulated to a certain degree. Regulation may comprise of different types (self regulation, co-regulation and state regulation<sup>4</sup>), ranging from independent press councils to state regulation of public service broadcasting. A media system can be organised in different ways to enable efficient democratic discourse. As is exemplified in the case of the German media landscape, it can be both the heavily regulated public service broadcasting or, in other ways, the privately organised press that engender free and independent journalism of a high quality. Whether and how free and independent journalism might be achieved, what actors are involved in the formulation and implementation of media regulation and what interests steer the policy debate are the key questions we will address in this report. The analysis will use as a starting point the core idea of the MEDIADEM project: how media systems can be organised in a way that enables free and independent discourse as an intrinsic element of democratic societies and whether they are in fact organised in this way. Or, to reiterate the MEDIADEM theoretical report, ‘This project is interested in the media as an institution specifically in the context of a democratic society. (...) With this premise, this project centres on those processes of media policy formulation and implementation that promote democratic media, focusing specifically on aspects of media freedom and independence (...)’ (Anagnostou, Craufurd Smith and Psychogiopoulou, 2010: 11).<sup>5</sup>

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<sup>1</sup> Based on a script of a talk given by H. Rossen-Stadtfeld, ‘The EU state aid decision on the German Public Service Broadcasters’ online activities’, conference *The Internet: Between cultural value and economic good*, Berlin, 22-23 September 2011.

<sup>2</sup> Besides legal and parliamentary documents and academic studies, this report is based on interviews with twenty-five experts. We would like to thank all interviewees for helping us with their knowledge, experience and insight regarding media policy and media policy processes. We also thank the presenters and participants in the conference ‘*The Internet: Between cultural value and economic good*’, which took place in Berlin, 22-23 September 2011. Without the input of all of these people, this report could not have been written.

<sup>3</sup> Federal Constitutional Court, judgment of 16 June 1981, no. 1 BvL 89/78, in BVerfGE 57, 295, at p. 319.

<sup>4</sup> A differentiated model of regulation and incentives propose Schulz and Held, 2011: 44.

<sup>5</sup> A theoretical background of the notion of freedom and independence with regard to media regulation is provided in the study by the Hans-Bredow-Institut et al., 2011: 13-37.

The German Basic Law, the interpretations of the Federal Constitutional Court and the law of the European Union provide the legal framework in which media policy develops. They describe and also confine the playing field of the actors involved in the formulation and implementation of media policy. As set out above, free and independent media are intrinsic to a democratic society. This intrinsic character applies to traditional forms of press and broadcasting as well as electronic and combined thus converged forms of media.<sup>6</sup> From that angle, and this shall form the focus of this report, the Constitution requires a state with a free, comprehensive and objective media system, in which no single group predominates and free and independent public discourse can take place. This includes, of course, cultural and entertaining outlets as well.

However, it would be naïve to believe that the national legal system remains unchanging and that simply because of the existence of a legal framework a media system works in a way that makes independent democratic discourse possible. Firstly, European actors such as the European Commission, the Court of Justice of the European Union and the European Court of Human Rights influence and form the national legal system and thus the national media system. Although the German Federal Constitutional Court still holds a decisive position, the European courts complement its jurisdiction. The possible tensions of this multilevel relationship erupt occasionally, as it can be seen in the wake of the *von Hannover* and *Görgülü* judgments from the European Court of Human Rights (Frowein, 2005; Wildhaber, 2005).<sup>7</sup> Secondly, an important attribute of the media market is its economic salience. Several ten thousands of employees and freelancers work in the media market in Germany (Deutscher Journalisten Verband, 2008: 53; Weischenberg, Malik and Scholl, 2006: 36) and together public and private broadcasters yield annual turnovers of more than 18 billion euros (Media Perspektiven. Basisdaten, 2010: 7; Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 46). These numbers illustrate the forces at work within the media market. Thirdly, the media attract the attention of state and political actors, as well as commercial actors, as they influence in many cases our daily behaviour in shopping, ways of thinking and deciding who to vote for in elections. The debate surrounding the power of search engines and their influence on information access (Machill and Beiler, 2007; Kühling and Gauß, 2007), which has taken place in Germany as well as other states, illustrates this point. Finally, technical developments significantly shape the media market. The initial creation of private broadcasting was possible due to the then new means of cable and satellite transmissions. Today, the Internet allows new market models and poses challenges to media policy. To manage the partly antagonistic interests and forces in the media market, media policy must produce effective regulatory tools. The main tasks of media policy are to balance the various interests involved, create a functioning free and independent public sphere and to ensure a viable and sustainable market.

Focusing on media policy processes, this report commences in Chapter 2 with a presentation of the values and actors at work in German media policy. This is followed in Chapter 3 by an analysis of current debates on the structure of the media market, in which issues surrounding the advent and influence of the Internet play a major role. Positive measures and competing interests and legal restraints regarding content diversification are addressed in Chapter 4. This chapter analyses developments in public and private service broadcasting regarding news and information as well as restrictions stemming from law in general, such as criminal law. Chapter 5 explores the journalism profession as a key factor in

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<sup>6</sup> Federal Constitutional Court, judgment of 5 August 1966, no. 1 BvR 586/62, NJW 1966, p. 1604; Council of Europe, Parliamentary Assembly, Indicators for media in a democracy, Resolution 1636 (2008) of 3 October 2008.

<sup>7</sup> European Court of Human Rights (ECtHR), *von Hannover v. Germany*, judgment of 28 July 2005, no. 59320/00; ECtHR, *Görgülü v. Germany*, judgment of 26 February 2004, no. 74969/01.

free and independent media while Chapter 6 provides some observations regarding media literacy.



## 2. Values and actors of media policy

Before exploring the values of media policy, as enshrined in the German constitution, the German Basic Law, and many other legal and policy texts, and presenting the array of actors that participate in media policy, one paramount characteristic of German media policy must be observed: media policy is a complex and very diverse field of actors and forums that interact and interrelate, shaping both phases of media policy, the formulation and implementation of statutory regulation, as well as co-regulation and self-regulation. This situation renders the presentation of the multitude of institutions and persons involved in the process and their interests challenging. Any description must simplify matters in order to allow conclusions, but it has the advantage to carve out on a theoretical level the main currents of debate and some predominant actor constellations.

### 2.1 Values of media policy

Media policy is premised on different interests and values, partly complementary, partly being detrimental to one another. As was said in the introduction, it falls into the remit and responsibility of media policy to balance, or, where necessary, confine these forces. Bearing in mind the project's objective to identify the factors that foster or impede free and independent media in a democracy, it seems appropriate to describe the role and function of the media in a democratic society as a core value of media policy in Germany. In such a society, free and independent media serve the process of opinion shaping in political matters by allowing different views to be promoted equally.<sup>8</sup> Enshrined in the German Basic Law, receiving and imparting opinion is protected and the media as an institution is guaranteed.<sup>9</sup>

Departing from this, over the last few decades the Federal Constitutional Court has developed a constitutional legal framework within which media policy operates. Forming a differentiated corpus of legally binding rules, some principles are repeated constantly, and, with regard to the democratic function of the media, the Court has reiterated that a free and independent press is constitutive for a democracy. Complementing this, mass media in the form of broadcasting are required to provide an unbiased basis for individual and public opinion forming.<sup>10</sup> The freedom of broadcasting thus serves the public by enabling a comprehensive and encompassing room for discourse.<sup>11</sup> Thus, one core value of media policy can be described as the need to ensure free and independent media to impart politically relevant information and not just entertainment.

At the same time, media systems need to be sufficiently financially endowed. This points to the second core value of German media policy, which is its economic aspect. It is a simple truth that a publisher of a newspaper or a broadcaster needs revenue to pay employees, normally journalists, and that public service broadcasters are dependent on some kind of licence fee. Very briefly, sufficient finance enables the media to carry out its activities independently without being subjected to financial constraints. Simultaneously, unrealistic economic expectations or short-term interests might act to the media's detriment. A main concern and thus a core value of media policy addresses the economic foundation of the media system, implicating a finance regime for mass media – i.e. German public service

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<sup>8</sup> See only Art. 11 para. 1 and 2; Art. 25 para. 1 Interstate Treaty on Broadcasting and Telemedia [Rundfunkstaatsvertrag, 2010] (hereafter: Interstate Broadcasting Treaty); Art. 4 para. 1 Interstate Treaty on Broadcasting in Berlin and Brandenburg [Staatsvertrag über die Rundfunkanstalt Berlin-Brandenburg, 2009]; Art. 6 para. 3 and 4 Interstate Treaty of the South-West-Broadcasting [Staatsvertrag über den Südwestrundfunk, 2011].

<sup>9</sup> Art. 5 Basic Law [Grundgesetz, 2010].

<sup>10</sup> BVerfGE 57, 295 at p. 319.

<sup>11</sup> BVerfGE 57, 295 at p. 320.

broadcasting – as well as concentration and merger regulation for private media operators and regulation to contain the economic influence of public service broadcasters.<sup>12</sup> Regulation that seeks to contain the economic influence of public service broadcasters essentially seeks to reduce the risk that public service broadcasting services foreclose otherwise viable market options. As the media is perceived to be crucial for a democratic society, plurality of opinion and high standards of journalistic and editorial work are also to be safeguarded as well. Therefore, economic impacts must also be contained or even curtailed when posing a threat to this function.

Another important aspect regarding free and independent media lies in its freedom from the state. The role of the media in a society renders it prone to the risk of undue state or party political influence on coverage in broadcast programmes, online or in the printed press. While a private publisher can freely decide to take a specific stance in a political debate – and this is a prevalent practice - state or partisan influence may also occur within public service broadcasting. To delineate between due and undue influence, the Federal Constitutional Court derived from the German Basic Law the principle of state independence.<sup>13</sup> To ensure free and independent media in the case of public service broadcasting, state or party representatives are neither to be given decisive representation in broadcasters' managing bodies nor permitted to plan programmes and decide what to air.<sup>14</sup> Despite its difficult and sometimes imperfect implementation, the principle of state independence constitutes an important value in German media policy.

Supplementing this, transparency and credibility are two important premises for free and independent media in a democracy. Consequently, German media law provides regulatory mechanisms for broadcasting and self-regulatory mechanisms for print media, in order to ensure basic journalistic principles, including the differentiation of opinion and conjecture from fact and an obligation to report truthfully.<sup>15</sup> Comparable legislation exists for online content, depending on its source (the traditional press, broadcasting or individual blogs).<sup>16</sup> Scientific journals and state media authorities publish comprehensive information on ownership structures (Media Perspektiven. Basisdaten, 2010: 28; Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 53), which allows for gauging the possible interests of private media owners, although such information is generally addressed to professionals and thus does not necessarily foster public debate on media transparency. However, as public opinion shaping influences political decisions and elections, setting an agenda or campaigning on certain issues through the media is a potentially enticing prospect.<sup>17</sup> This brings up the question as to how the lines between public relations and journalistic work can blur.

A less structural and more content-orientated value can be deduced from the extensive case law on the protection of personal rights. Based on the dignity of the human being, the

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<sup>12</sup> Art. 11d Interstate Broadcasting Treaty regarding online activities of public service broadcasters; Art. 26 Interstate Broadcasting Treaty regarding media concentration; Art. 35-38 Act against Competition Constraints [Gesetz gegen Wettbewerbsbeschränkungen, 2011] regarding unfair competition practices of publishers.

<sup>13</sup> BVerfGE 57, 295, at p. 320.

<sup>14</sup> Art. 20a para. 3 Interstate Broadcasting Treaty prohibits public bodies, like governments, from running their own broadcasting stations; composition rules in state broadcasting acts seek to prevent governments and political parties from gaining control in the governing bodies. See only Art. 17 Interstate Treaty on North-German-Broadcasting [Staatsvertrag über den Norddeutschen Rundfunk, 2005] and, more critical, Art. 21 Interstate Treaty of the Second German Television [ZDF-Staatsvertrag, 2009].

<sup>15</sup> Publizistische Grundsätze (Pressekodex) vom Deutschen Presserat, in: Deutscher Presserat (ed.), Jahrbuch 2011 [Yearbook 2011] (2011), S. 136; Art. 7 para. 3 and Art. 10 para. 1 Interstate Broadcasting Treaty.

<sup>16</sup> Art. 54 para. 2 Interstate Broadcasting Treaty.

<sup>17</sup> An investigation into the nuclear industry's strategy by the newspaper 'die tageszeitung' illustrates a campaign initiated to change the public stance towards nuclear energy before and in the wake of the federal election in 2009. See Kaul and Heiser, 2011: 16-18.

Constitutional Court again paved the way for a legal approach for addressing cases in which the interests of the individual must be fairly adjusted against the public interest to receive information.<sup>18</sup> The Federal Constitutional Court and the respective civil court's tasks include protecting the dignity and thus the personal rights of individuals as an important value in German media policy.

Finally and very importantly, technical aspects merit attention. Media policy has always been connected to the development and inception of technical novelties. This was witnessed during the 1980s with satellite and cable television, giving place to a plethora of television and radio channels and the associated new media law developments, and it can be witnessed now with the effects of the fast development of the Internet with its new media services online and convergence of platforms.

## **2.2 Actors of media policy**

### **2.2.1 General overview**

To formulate and implement state regulation, co-regulation and self-regulation and to ensure free and independent media, many different actors with varying remits and salience are involved.<sup>19</sup> The political landscape, the legal tradition, the historic events after World War II, the deregulation in the 1980s and the resulting dual (or bifurcated) broadcasting system, the accession to the European Union, and the diverse media landscape itself all play a role in this situation. Thus, the main attribute of Germany's media policy lies in its diversity. It can even be argued that no consistent and comprehensive German media policy exists. The various fields dealing with media policy range from measures to enhance media diversity, including public service broadcasters, as provided for in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005,<sup>20</sup> and technical discussions regarding net neutrality within the European Union, to questions of audiovisual legislation at the state level and draft legislation on intellectual property law and the protection of information sources at the federal level. While all different policy actors seek to partake in the development of the media and in the media itself, not all of them seek to promote free and independent media as necessary in a modern democracy. This is for a range of different reasons. Some of the dynamics will be described briefly here.

### **2.2.2 Actors and processes**

In order to present the state actors shaping and implementing media policies one has first to set out the political system.<sup>21</sup> Germany as a federal state consists of sixteen states and the federal state, both of which are independent judicial entities. The federal state and the sixteen states all have a parliament, a government and an administration. Legislation regarding print media and the broadcasters, both private and public, falls into the remit of the sixteen states. The role of the state governments<sup>22</sup> is to formulate the backbone of the broadcasting order via

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<sup>18</sup> Federal Constitutional Court, decision of 24 February 1971, no. 1 BvR 435/68, in BVerfGE 30, 173. Recent decision: Federal Constitutional Court, decision of 14 September 2010, no. 1 BvR 1842/08, NJW 2011, p. 740.

<sup>19</sup> Puppis provides a systematic overview of the national, European and global actors in media policy: Puppis, 2007: 115.

<sup>20</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Paris, 20 October 2005.

<sup>21</sup> See Hesse, 1999: 96 for further information.

<sup>22</sup> See the website of the conference of the head of the states, currently residing with the state government of Schleswig-Holstein, [http://www.schleswig-holstein.de/MPK/DE/MPK\\_node.html](http://www.schleswig-holstein.de/MPK/DE/MPK_node.html), accessed 8 November 2011.

the Interstate Treaty on Broadcasting and Telemedia (hereafter: Interstate Broadcasting Treaty).<sup>23</sup> It can be derived from procedures and their outcome, the Interstate Broadcasting Treaty in particular, that a free and independent media constitutes a core value. The principle of independence from the state as well as programme autonomy is implemented for both private and public service broadcasters. However, negotiations surrounding the enacting of the Interstate Broadcasting Treaty and amendments to it also testify to a democratic deficit. Amendments are prepared solely in closed circles of state governments and are barely scrutinised by state parliaments. The state secretary offices attached to the state prime minister prepare amendments to the Interstate Broadcasting Treaty in an essentially bipartisan procedure involving conservative and social democratic politicians. The state's prime ministers have to agree upon the formulation and any amendments and sign the Interstate Broadcasting Treaty. As last step, the sixteen state parliaments must enact – without the possibility of making any changes - the Interstate Broadcasting Treaty, which then comes into force. Very rarely, as happened with the 14<sup>th</sup> Amendment of the Interstate Broadcasting Treaty,<sup>24</sup> a state parliament may reject the proposal, compelling all heads of the states to repeat the whole procedure. In addition, the number of well informed and truly competent media politicians is paradoxically very small, although parliamentarians in all sixteen state parliaments must enact the proposed legislation and thus are confronted with and accountable for the legislative outcome. Interestingly, the field of media policy does not attract many politicians, firstly because the issues dealt with require thorough expertise that is difficult and, moreover, time-consuming, to acquire and secondly, because the electorate does not ascribe it high importance.

The state influence on the preparation of the Interstate Broadcasting Treaty renders it prone to undue influence and may have an effect on free and independent media. The remit of public service broadcasters is regularly the subject of media policy discussions instigated by single state actors, as through a curtailment of the mandate activities cost might be reduced.<sup>25</sup> As the public service broadcasters' remit forms the core basis for their activities, any curtailment might affect their freedom and independence. Currently, state governments show no serious plans to enact a new public service broadcaster remit.

The Federal Government and the Federal Parliament enact legislation on general law, such as criminal law, and on technical questions. It is also the Federal Parliament that generally triggers political debates on media freedom.<sup>26</sup> While the constitutional principle of the necessity of free and independent media to democracy essentially shapes federal media policy, general law and technical issues may contradict this principle and work to limit free and independent media. The practical implications for journalists' daily work play an important role here. Criminal law procedures, for example, can impel journalists and editors to disclose confidential material and thus thwart the important journalist-source relationship. As the Internet has become an important means of imparting and receiving opinions and information, its organisational and technical features directly and instantly influence the

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<sup>23</sup> Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty) [Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV), 2010].

<sup>24</sup> 14<sup>th</sup> Interstate Treaty to amend Interstate Treaties on Broadcasting, here on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia. Landtag Nordrhein-Westfalen, Drs. 15/17 of 6 July 2010. Rejected by the state parliaments of North-Rhine Westphalia and Schleswig-Holstein. For North-Rhine Westphalia see Landtag Nordrhein-Westfalen, Plenarprotokoll 15/20 of 16 December 2010, p. 1720.

<sup>25</sup> Interview with Dr. Johannes Beermann, promedia, of 4 February 2011.

<sup>26</sup> This was the case in the request of the Social Democratic Party in the Federal Parliament for information on how the Federal Government intends to protect and ensure media pluralism and independence. See Deutscher Bundestag, Antwort der Bundesregierung. Vorhaben der Bundesregierung zur Sicherung der Medienvielfalt und Medienfreiheit of 23 August 2011, Drs. 17/6836. Regarding freedom of media and press in the European Union see also the request of the Social Democratic Party: Deutscher Bundestag, Antwort der Bundesregierung. Zur Lage der Meinungs- und Pressefreiheit in der Europäischen Union of 14 March 2011, Drs. 17/5075.

transmission of information. The free and independent communication necessary in a democracy has become interrelated with the technical means of the Internet. The Telecommunications Act,<sup>27</sup> amended in October 2011, provides the technical framework for telecommunications in Germany.<sup>28</sup> This means crucial issues are and will be decided at the federal level. This includes, for example, issues such as the rules surrounding broadband transmissions and Internet neutrality. In addition, a Committee on Internet and Digital Society has been established at the federal level within the German Federal Parliament to discuss technical and content-related issues.<sup>29</sup>

The national courts' decisions and judgments assume differentiated tasks regarding media freedom and independence. They foster the principle of free and independent media, while concurrently implementing criminal provisions or privacy rights and thus curtailing media freedom. The Federal Constitutional Court has actually created most of the legally binding framework within which media policy develops through the way it has interpreted Article 5 of the Basic Law. The Court created with its founding interpretation the legal structure for the mass media and thus the basis for free and independent media. Concurrently, it has had to balance opposing interests, such as privacy versus public interest.

Another forum for media policy has been created at the European level. Both the Council of Europe and the European Union espouse the idea of free and independent media being necessary in a democracy, albeit with different emphases. The Council of Europe's legal approach lies in Article 10 of the European Convention on Human Rights and its interpretation by the European Court of Human Rights (ECtHR). As is the case with the national courts, the ECtHR's role is to ensure free and independent media, but also to balance opposing rights. The ECtHR's judgments enjoy a binding quality on all state organs in Germany, including the courts (Meyer-Ladewig and Petzold, 2005: 15).<sup>30</sup> This concedes it an influential position. The influence of the ECtHR is especially evident in the case *Hannover v. Germany*<sup>31</sup> that dealt with the concept of public figures. Until then, the protection of public or well-known persons' privacy rights had been restricted. In practice, such persons' means of impeding publication of photographs was limited compared to other, less well-known, persons. Less important, but no less interesting, are the resolutions and recommendations of other Council of Europe organs on freedom of expression and information in the media and on indicators for media in a democracy.<sup>32</sup> Unfortunately, as can also be observed regarding other Council of Europe activities, their political influence in Germany is limited.

The European Union and its decision-making organs and political forums have incrementally become important actors regarding free and independent media, although by means of a more economic approach. Some developments merit attention. Article 11 of the European Union Charter of Fundamental Rights now provides for a legal obligation to ensure media plurality and the European Parliament has adopted a resolution which addresses, amongst other issues, the need for and the function of free and independent media in democracy<sup>33</sup> in the Member States. As for the media system in Germany, the European Commission inhabits a very tangible and far-reaching position with its state aid review

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<sup>27</sup> Telecommunication Act [Telekommunikationsgesetz, 2010].

<sup>28</sup> Deutscher Bundestag, Drs. 17/7521 of 26 October 2011 and Plenarprotokoll.17/136 of 27 October 2011, p. 16099.

<sup>29</sup> Deutscher Bundestag, Einsetzung einer Enquete-Kommission "Internet und digitale Gesellschaft", Drs. 17/950 of March 3, 2010.

<sup>30</sup> Federal Constitutional Court, decision of 14 October 2004, no. 2 BvR 1481/04, NJW 2004, p. 3407.

<sup>31</sup> ECtHR, *Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00.

<sup>32</sup> Council of Europe, PACE, Resolution 1636 (2008) of 3 October 2008; PACE, Recommendation 1506 (2001) of 24 April 2001.

<sup>33</sup> European Parliament resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system (2010/2028(INI)).

procedure (Article 108 of the Treaty of the Functioning of the European Union).<sup>34</sup> The outcome of the latest proceedings against Germany<sup>35</sup> prompted the sixteen state legislatures to adopt a revised Interstate Broadcasting Treaty regarding public services broadcasters' online content. As will be discussed later, the state aid procedure with the European Commission has had a direct influence on free and independent media in Germany, as it resulted in the curtailment of public service broadcasters' online activities.

Fourteen independent state media authorities are vested with the power, based on statutory law, to assess private broadcasters' licence procedures and programme performance.<sup>36</sup> Concurrently, they stimulate media policy developments by fostering private broadcasters. In this double function, the state media authorities seek to ensure the democratic function of private broadcasters, as the debate on programme requirements for news bulletins evidences.<sup>37</sup> Simultaneously, they seek to ensure viable market conditions for private broadcasters that might curb public service broadcasters' services. For a democratic discourse, free and independent media requires a plurality of different opinions. Regarding private operators, German media law seeks to guarantee a plurality of opinions mainly through an external pluralism model, the theory being that a diverse range of outlets shall ensure a diverse range of opinions. Media concentration is thus regarded as a threat to such an unbiased basis for forming opinions and as such a pre-emptive merger control system is applied. The Commission on Concentration in the Media implements the applicable law and deals with concentration developments in Germany by examining what operator draws what percentage of viewers. Concurrently, it assumes an important position within the frame of national media concentration supervision.<sup>38</sup>

State legislation provides the basic rules for the governing bodies of the public service broadcaster stations to ensure free and independent programmes with internal control mechanisms. Briefly, the Director General of a public service broadcaster will decide with his or her staff what programmes to produce and what issues to address. As broadcasting stations employ in some cases several thousand employees, the task of selection is divided among departments and editorial offices. The Broadcasting Council supervises the programme principles as laid down in the law *ex post* and elects the Director General. As the principle of programme autonomy gives the Director General a great margin of discretion, the Broadcasting Council cannot request that a certain programme be aired or a certain issue addressed. It can, however, criticise a programme aired *ex post* and request the Director General not to repeat it, if the broadcast violates statutory law or the programming principles. As the legislation insulates the public service broadcasters from direct state influence, the composition of the Broadcasting and Administrative Councils are important and will be discussed later in this report.

The German Press Council works as a purely self-regulatory institution following the tradition of press councils (Desgranges and Wassink, 2005: 79). It was established in 1956 to prevent the legislature from establishing a statutory control mechanism. Publishers and journalist associations had feared the installation of control organs under the auspices of the state (Weyand, 2011: 125). The Press Council's existence is thus intended to curb state influence. According to the Statute of the Council, its main objectives are ensuring the

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<sup>34</sup> Treaty of the Functioning of the European Union, OJ of the EU of 9 May 2008, no. C 115, p. 47.

<sup>35</sup> European Commission, State aid E 3/2005, Financing of public service broadcasters in Germany, C (2007) 1761, 24 April 2007.

<sup>36</sup> Art. 36 para. 2 Interstate Broadcasting Treaty.

<sup>37</sup> Direktorenkonferenz der Landesmedienanstalten (DLM), Nachrichtensendungen im privaten Rundfunk. Ein Positionspapier, Stuttgart 2010.

<sup>38</sup> See only the report about broadcasting and Internet offers under the view of cross-media concentration: Kommission zur Ermittlung der Konzentration im Medienbereich, 2010: 41f.

freedom of press (online and printed)<sup>39</sup> and maintaining the press' good reputation.<sup>40</sup> Media policy lobbying and a complaint procedure are the main tools it employs to attain these objectives. As for media policy, the Press Council has espoused a bill on press freedom and the protection of informants. This is currently being debated in the Federal Parliament.<sup>41</sup> The complaint procedure was installed in order to ensure a high quality of journalism and an accountable press. However, the system has experienced some pressure after successful complaints. The Press Council faced a fiercely led and unprecedented campaign by the influential tabloid *Bild*, published by Axel Springer Verlag, questioning the core of the self-control mechanism. This illustrates the sometimes-charged relationship of the Press Council with the press. In this case, the Press Council issued a complaint against the publisher of the *Bild* because the paper violated, in the view of the Press Council, the rights of a defendant in a criminal court proceeding by publishing his photo before the court's verdict was issued.<sup>42</sup> After this, the paper openly campaigned against the Press Council and urged its readers to email or call to '(...) tell the Press Council their opinion.'<sup>43</sup> This led to large number of very dismissive, and some supportive, commentaries left with the Press Council's staff.<sup>44</sup> It is difficult to deduce from this one incident whether it demonstrates overall disrespect on the part of *Bild* for the complaint system generally. However, it is an alarming sign.

Another potent group of actors are the private publishers and private broadcasting operators, all of which are organised in different associations.<sup>45</sup> Although the idea of free and independent media's necessity in a democracy is prevalent, the core of these associations' works is based on economic interests and the need to generate income. For example, the Association of Private Broadcasters and Telemedia Operators (VPRT) initiated the state aid procedure with the European Commission to gain a better market position by questioning the ability of public service broadcasters to offer online content.<sup>46</sup>

Finally, private lobby organisations or scientific think tanks as well as the Internet community form part of the network of media policy actors, although with diverse interests. Although the notion of the Internet community can be elusive, we have employed the term here to describe the phenomenon of citizens organising themselves via the Internet to launch political actions supporting access to and usage of free and independent media. This is exemplified in the case of the partly successful constitutional complaint against federal legislation on data retention<sup>47</sup> and in the political lobbying against legislation that provided for the Internet to be scanned in order to block content with alleged child pornography, rather than seeking the deletion of such content from the server in question. With regard to the latter issue, it seems that the protests of the Internet community motivated the Federal Government and the Federal Parliament to withdraw the legislation in question and to maintain the practice of deleting such content.<sup>48</sup>

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<sup>39</sup> Art. 10 para. 1 Press Council Statute.

<sup>40</sup> Art. 1 Press Council Statute.

<sup>41</sup> German Press Council, *Presserat fordert: Pressefreiheitsgesetz endlich verabschieden*, press release of 17 October 2010.

<sup>42</sup> German Press Council, *Entscheidung in der Beschwerdesache 0103/11/2-BA* of 9 June 2011.

<sup>43</sup> German Press Council, *Press Release of 8 August 2011, Hintergründe zum Bild-Aufruf vom 2.8.11* [Background information regarding the BILD-call of 2 August 2011].

<sup>44</sup> *Ibid.*

<sup>45</sup> Bundesverband Deutscher Zeitungsverleger (BDZV); Verband Deutscher Zeitschriftenverleger (VDZ); Verband privater Rundfunk- und Telemedien (VPRT); Arbeitsgemeinschaft Privater Rundfunk (APR).

<sup>46</sup> European Commission, *State aid E 3/2005, Financing of public service broadcasters in Germany*, C (2007) 1761, 24 April 2007, para. 70.

<sup>47</sup> Federal Constitutional Court, *judgment of 2 March 2010, no. 1 BvR 256/08*, NJW 2010, p. 833.

<sup>48</sup> Bundesregierung, *Bundesministerium der Justiz, Digitale Welt – Absage an Netzsperrern wichtiger Schritt in der Netzpolitik*, Press Release of 25 May 2011.

### 3. The structure of the media market

#### 3.1 Basic observations

The existing German media market structure can be seen as a result of historical events and political negotiating processes among the actors or groups of actors described above. In cases in which no political common denominator could be found, court decisions have paved the way. Finally, technical inventions and developments shaping the market have been either fostered politically or legally or, conversely, have emerged in a legal or political vacuum and compelled legislatures, where it was deemed necessary, to act. The distinct phases were, non-exhaustively, as follows: when the Allied Forces after World War II introduced the idea of federal public service broadcasting, they simultaneously licensed private publishers to produce newspapers. Those two actors, public service broadcasters and private publishers, are still very much involved in the formulation of rules regarding the media market. Private broadcasters entered the field during the deregulation area in the 1980s, starting with cable and satellite services. The Federal Government continued with the deregulation processes and relaxed its regulation of the telecommunications market. The former monopolists Deutsche Bundespost (now Deutsche Telekom AG) faced private competition as the entry of new operators was made possible, although it remains the strongest company in terms of revenue and employees. As the telecommunications infrastructure has become the technical backbone of today's Internet, its market configuration merits attention. As well as Deutsche Telekom AG, many private Internet access providers have allowed the Internet, with its different services, to join the traditional press, radio, and broadcasting as the fourth and still growing media form in the market. Moreover, new journalistic services have emerged based solely on online content and have created genuinely new forms of media, such as online newspapers and political blogs.<sup>49</sup> In addition, traditional media have started to use the Internet, either by creating their own websites to transport content published or broadcast already, or, more often, to provide new forms of online content using the varied features of devices such as tablet computers or smart phones. As well as these basic types of information outlets, hybrid or mixed forms exist, such as the news pages of Internet or email providers or the news aggregation services from various search engines. With the new forms of transmission available via the Internet to portable devices, new market models, such as apps, and new global players, such as search engines, have entered the market.

At the time Internet-based services became important as mass media services, the existing political structure of media policymaking and the legal structure of the media market had already been settled. This means that a completely new technical means of mass transmission, including the possibility to create and impart content, along with the emergence of new actors, hit the legal and political structure of media policymaking developed over the decades and changed the playing field for actors involved in the formulation of policy. Internet based media services began to compel the legislatures to revise and reformulate existing media law. As a result, the basic structure of rules regulating the media market still exists, but it has been partly adapted to the new market situation. However, the Interstate Broadcasting Treaty must still be revised against the background of digital convergence.<sup>50</sup>

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<sup>49</sup> Examples are: <http://www.buergerblick.de/>; <http://www.kontextwochenzeitung.de/>; <http://www.nachdenkseiten.de/>.

<sup>50</sup> Proposals have addressed the Internet outlets of all traditional media and have come to different results. See Papier and Schröder, 2010: 3; Gersdorf, 2010: 421ff.



### 3.2 The advent of the Internet based services and their influence on political and legal debates

The advent of the Internet prompted the discussion as to whether media law needed to be overhauled and whether the Basic Law and its interpretation of the Federal Constitutional Court should be revised (Holznagel, 2011; Papier and Schröder, 2010; Hachmeister and Vesting, 2011: 7-8; Bullinger, 2009: paras. 146-150). The technical convergence explains the current considerations. In terms of form, the online websites of traditional press products do not necessarily differ much from the online websites maintained by public service broadcasters. Even though broadcasters offer on demand videos of their broadcasts, like series or documentaries, which are not part of press online platforms, both - print media and broadcasters - offer texts and short on demand clips. The former distinct line between print media and broadcasting has blurred. Not surprisingly, the interpretation of the freedom of print media and broadcasting in the Basic Law and its implementation in federal or state media law currently faces criticism based on the argument that in times of platform and content convergence it is not possible to differentiate between print and broadcasting media (Ory, 2011; Schmid and Kitz, 2009).

Thus, the question of how to interpret legally core legal terms is prevailing and important for media policy, as it touches upon the basic structure of the whole media system in Germany. It has to be reiterated that the media landscape, especially the dual broadcasting system, relies on the idea that the legislature is responsible for ensuring a free and independent public communicative space for democratic discourse, as drawn from Article 5 of the Basic Law. If there were a fundamental change in this legally underpinned understanding of the media structure, i.e. the dual system and the role of the public service broadcaster, this would alter the basic structure, as the constitutional foundation for all public service broadcasters would fall away.

Two aspects merit attention in this regard: firstly, the interpretation of Article 5 of the Basic Law regarding a regulated public communicative space and, secondly, the legal distinction of broadcasting, print media and Internet based services, or 'telemedia', and thus the legal notion of broadcasting in statutory law. Both questions have very practical repercussions for private and public service broadcasters, print media and online media services at large, and thus strong political and economic interests are interrelated.

The first aspect, the interpretation of the Basic Law, refers especially to the obligation of the legislature to establish independent and free broadcasting for a public space of communication to exchange ideas and opinions *independently and freely*. The legislature decided to establish a public service broadcasting system to fulfil this requirement, but as the ways in which mass communication - relevant for democratic decisions - is carried out change, this in turn affects the broadcasting system. The function of the mass media in a democracy is to ensure and guarantee free and independent media by, among other things, providing the necessary content relevant for political debates, cultural exchange and societal development. If the assessment of media behaviour by consumers concludes that Internet services partly replace traditional broadcasting, state legislatures are obliged to provide the necessary legal framework to provide audiovisual media services, including traditional and new online media services, as part of public service broadcasting's role in fulfilling societal requirements (Vollmeier, 2004: 198-199; Hain and Reinlein, 2009: 61-64).<sup>51</sup> The study 'The salience of the Internet within the frame of protection of media plurality' shows on the basis of existing data that the journalistic and editorial provisions of traditional media outlets are predominant in the online media market (Neuberger and Lobigs, 2010: 37). People using certain offline outlets tend to receive information from the corresponding online outlet. Thus

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<sup>51</sup> A more critical stance is articulated by Ory, 2010: 23-24.

plurality of opinion shaping in the Internet does not occur automatically (Kommission zur Ermittlung der Konzentration im Medienbereich, 2010: 43). Furthermore, technical convergence does not mean functional convergence, as different media outlets fulfil distinct functions while using the same platform, such as illustrated in the way various services are accessed via tablet computers or other technical means. The former judge of the Federal Constitutional Court D. Grimm said: ‘Convergence of devices does not amount to a convergence of function and media content.’<sup>52</sup> For example, the editorial online press has also a whole other dimension besides the fact that it can be read online, simply because it is made in the tradition of a print media outlet with its editorial background and its political orientation.

The technical development of convergence also affects the legal distinction between broadcasting and print media. As the German media law concerning online provisions or Internet services is still shaped by the traditional distinction of a liberal print media law on one side and much more regulated public and private broadcasting on the other, the ideas circle around the question how to integrate the technical developments within national media law (Hachmeister and Vesting, 2011: 7; Bullinger, 2007; Möllers, 2008; Holznagel, 2011; Papier and Schröder, 2010). The legislature foreclosed, for example, online content from public service broadcasters which are comparable to print media services and not linked to any programme, which appears to leave the courts with the difficult task of implementing the vague notion of press comparability. The legal action of newspaper publishers<sup>53</sup> against the tagesschau.de app, which is software for presenting the online content of the public service broadcasters’ working coalition ARD, illustrates the difficult and sometimes very competitive situation among media operators. A coalition of private publishers, among them influential heavyweights such Axel Springer AG and the Frankfurter Allgemeine Zeitung GmbH, claim that the version of the website infringes the Interstate Broadcasting Treaty.<sup>54</sup> The Interstate Broadcasting Treaty prohibits public service broadcasters from offering ‘press comparable content’. The publishers assert that the tagesschau.de app does contain such content.<sup>55</sup> As the private publishers, private broadcasters as well as public service broadcasters come to perceive the Internet as *the* technical means to transmit news online content, partly in addition to their traditional services, this opinion fuels the heated media policy debate on how to formulate and interpret the legal framework.

The law illustrates the difficulties the legislature faces in order to define legally new online services and raises the question as to whether it should place more awareness in this subject as it concerns the future of opinion forming processes. On a European level, the European Union came to the conclusion that technical developments regarding broadcasting and the Internet needed to be addressed and thus prepared in 2002/2003 a new legislative procedure (Holtz-Bacha, 2006: 130).<sup>56</sup> The resultant legislation replaced the term ‘broadcasting’ with ‘audiovisual media services’ to find a new definition for the online environment and so anticipated the manifestation of new media services.<sup>57</sup> However, the German discussion does not only concern the notion of broadcasting and ‘telemedia’, but also reflects the dispute over the role of the public service broadcaster in the online environment.

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<sup>52</sup> Interview of 23 August 2011.

<sup>53</sup> Press release of Bundesverband Deutscher Zeitungsverleger, BDZV: Klage gegen Tagesschau-App of June 21, 2011.

<sup>54</sup> BDZV, press release of 21 June 2011, BDZV: Klage gegen Tagesschau-App.

<sup>55</sup> Ibid.

<sup>56</sup> Commission of the European Communities, Fourth Report (...) on the application of Directive 89/552/ECC “Television without Frontiers”, COM(2002)778 final of 6 January 2003.

<sup>57</sup> Directive 2007/65/EC, OJ L 332 of 18 December 2007; amended by Directive 2010/13/EU, OJ L 95 of 15 April 2010.

### **3.3 Concentration and competition law: the legal framework of the private press, private broadcasting, and new Internet services with regard to media pluralism**

Media pluralism is one core characteristic of a modern media landscape in a democratic society. The concept of media pluralism espouses the idea that diverse media outlets present the different opinions necessary for societal discourse. This applies especially in such circumstances in which no internal media pluralism statutes or a practice or culture of internal pluralism (i.e. within editorial offices) exist. A plurality of media outlets basically allows the flow of different opinions freely. Although external pluralism can provide plurality of opinion, this is not always the case. While the audience in Germany can receive more than 300 television channels, this does not automatically guarantee a plurality in opinion. Thus, structural regulation aiming at broad content offerings in terms of the number of outlets is a prerequisite for free and independent media in which public discourse can flourish. The question as to whether media policy achieves this objective has to be seen together with the issue of content regulation. This will be addressed in the following section.

Different ways exist to engender media pluralism and, as stated earlier, in the German case a dual system of regulated public service and a market orientated private press, private online services and private broadcasting exist. Here the question shall be addressed as to whether and how market rules and the accompanying competition and concentration legislation sufficiently fulfil the task of providing the framework conditions for a diverse media landscape.

State actors at both levels generally seek, as a primary objective, the external plurality of media outlets. This is evidenced in the legislation relating to print media from all sixteen federal states, none of which requires licence procedures. Although in the 1950s the Allied Forces obliged publishers to apply for licences, this constraint was soon abandoned. Premised on the Basic Law, which guarantees a free press, no licence procedure has been implemented or seriously discussed. As media policy relies on the market promoting a diverse mix of media outlets, intellectual property law (as online content can easily be copied),<sup>58</sup> the Act against Unfair Competition<sup>59</sup> and the Act against Competition Constraints<sup>60</sup> have all gained practical importance. In large cities, which exhibit a highly contested market situation as several newspapers compete for the same circle of readers, legal departments in publishing companies spend a lot of time analysing, for example, competitor's advertising campaigns solely to find possible infringements of the Act against Unfair Competition.<sup>61</sup> This especially includes looking at price reductions for newspaper subscriptions or other enticements. The Act against Competition Constraints pursues a more systemic approach as it entitles the Federal Cartel Authority to scrutinise merger applications from publishing companies.<sup>62</sup> Drawing on the publishers' annual turnover as the basis for its decisions, the Federal Cartel Authority can prohibit a merger if the acquisition would lead to a market dominant position. The Federal Parliament adopted a press merger control mechanism based on the criterion of economic significance in 1976. This was accompanied with heated political debates. Proponents of the merger control generally asserted the need to uphold a plurality of opinions in the print media market while opponents saw the state as unjustifiably intervening in the freedom of the press (Hofmann, 2010: 46-49). The actors in the debate found a political common denominator in the merger control in cartel law, although its efficiency in promoting and engendering plurality

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<sup>58</sup> Act on Copyright Law and Comparable Protection Rights [Gesetz über die Urheberrechte und verwandte Schutzrechte (UrhG), 2008].

<sup>59</sup> Act against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb (UWG), 2010].

<sup>60</sup> Act against Competition Constraints [Gesetz gegen Wettbewerbsbeschränkungen (GWB), 2011].

<sup>61</sup> See Art. 4 no. 4 and no. 5 Act against Unfair Competition.

<sup>62</sup> See Art. 35 para. 2 and Art. 38 para. 3 Act against Competition Constraints. See also Gounalakis and Zagouras, 2008.

of opinions in print media is contested (Hofmann, 2010: 49-67; Gounalakis and Zagouras, 2008: 68). Any other model such as subsidies for small publishing houses or a control system based on opinion domination, however, would require a political majority that seems rather unlikely to be attained (Gounalakis and Zagouras, *Medienkonzentrationsrecht*, 2008: 66). This purely economic approach of the state media policy towards the current press market exacerbates the situation of some regional and local print outlets. The cartel law presumes a free market will provide the financial means for the market actors and tries to ensure competitive market conditions. It does not, however, provide any tools if market conditions lead to financial constraints besides market dominance. In fact, as the number of publications decline, the concentration of editorial staff increases (also known as editorial units), and the existence of some regional newspapers is threatened simply due to lack of subscriptions and advertising revenue.

Private broadcasting shows a very different picture. Broadcasting law provides for much stricter rules regarding mergers. Politically contested due to its potential impact, the law entitles the Commission on the Concentration in the Media (hereafter Commission) to gauge the percentage of viewers for nationwide private broadcasting channels and their influence on media related markets. Furthermore, on the level of the federal states, the legislatures adopted cross media concentration provisions to address local or regional private broadcasting and press conglomerates, applying different requirements.<sup>63</sup> Regarding nationwide channels, the Commission can prohibit a merger if the acquisition will lead to a dominant mass communication position. The law aims to prevent opinion dominance and thus vests the Commission with the power to assess market share. This applies also in cross-ownership acquisitions involving broadcasting and other media outlets, including print media and online services. In such cases the Commission takes the convergent market situation, i.e. market share, into account. In any licensing procedure of a nationwide broadcaster, the Commission must be involved and give its consent to the license. The same accounts for changes in ownership structures.<sup>64</sup> It was this that led to the Commission prohibiting the acquisition of private broadcaster ProSieben.Sat1 Media AG by publisher Axel Springer AG. It concluded the merger would lead to a dominant market position and thus a dominant position concerning pluralism of opinion.<sup>65</sup> As a result, the Commission impeded the largest merger of two media companies in German history. It was heavily criticised for this decision. The composition of the Commission itself also came under criticism. Until then, the Commission had been made up of a board of media experts. The state governments went on to review and finally alter this composition,<sup>66</sup> leading to the current situation in which half the Commission's members are media experts and half are representatives (generally the directors) of the state media authorities. Although the new composition does not have necessarily undue influence on future proceedings, it is asserted that the participation of state media authorities might mitigate the so far strict implementation of concentration regulations.<sup>67</sup>

The latter incident illustrates the pressure by state governments, presumably instigated, or at least espoused by, private broadcasters and publishers. Another media policy event relating to the legislation on merger concentration procedures displays the influence of economic interests on the legislative process. With the amendment of 1996, the law provides

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<sup>63</sup> See Art. 33a) State Media Law North-Rhine Westphalia [*Landesmediengesetz Nordrhein-Westfalen*, 2009] and Art. 19 Interstate Treaty on Media Law in Hamburg and Schleswig-Holstein [*Staatsvertrag über das Medienrecht in Hamburg und Schleswig-Holstein*, 2011]. For a critical appraisal on state media concentration see: Holznapel, 2010: 261-262.

<sup>64</sup> Art. 29 Interstate Broadcasting Treaty.

<sup>65</sup> KEK, decision of 10 January 2006, no. KEK 293-1 bis 5.

<sup>66</sup> See for the repercussions of the decision: Westphal, 2008.

<sup>67</sup> See critical appraisals of the newly composed Commission on Concentration in the Media: Gounalakis and Zagouras, 2008: 212.

in Article 26 of the Interstate Broadcasting Treaty for the ceiling of 30% market share in viewers.<sup>68</sup> This was a highly disputed compromise among political actors during its negotiation. Basically, it spared the two largest private operators, the RTL-Group and then Kirch-Group (now ProSiebenSat1.Media AG), from adapting to the concentration law and gave them an additional space to grow (Hartstein, et al., 2011: para. 1).

Besides the Commission, the Federal Cartel Authority - focusing on market dominance - controls whether an intended merger complies with the Act against Restraints of Competition. The Act requires the Federal Cartel Authority to scrutinise mergers of broadcasters and publishers. It focuses only on the economic market situation and not the possible dominant position regarding opinion forming (Gounalakis and Zagouras, 2008: 198). The Federal Cartel Authority also dismissed the merger application mentioned above,<sup>69</sup> triggering broad discussions. The Federal Court of Justice ultimately had to rule on the case and upheld the decision of the Federal Cartel Authority.<sup>70</sup> The Federal Cartel Authority can also easily act on issues relating to online content, as it is not restricted in its remit to any means of transmission or to broadcasting. In March 2011 it prohibited the plan for a joint company made up of ProSiebenSat.1 Media AG and RTL interactive GmbH, a subsidiary of RTL Germany.<sup>71</sup> The companies had intended to enter the market with a joint platform providing video on demand.

### **3.4 The legal concept of public service broadcasters: state legislation creating free and independent media**

What might sound paradoxical can engender a communicative space. Free and independent media can be the result of state legislation. As the Federal Constitutional Court pointed out regarding broadcasting, the Basic Law obliges the state to create a legal framework<sup>72</sup> in which free and independent broadcasting can flourish. That means broadcasting must be free from undue influence from the state or any other group and must be endowed with the necessary financial resources to provide sufficient channels and programmes. '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 and freedom of reporting remains untouched.'<sup>73</sup> These requirements of the Federal Constitutional Court clearly pronounce the basic idea of mass communication as serving free and independent opinion shaping in a democratic society.<sup>74</sup> The Court left it to the state legislatures and governments to decide what legal form can fulfil the requirements it laid down. Historical reasons led to public service broadcasting. State legislatures established the legal framework for the running of the broadcasting stations as well as an independent procedure to discern the stations' financial needs, which is administered by the Commission for the Evaluation of Fiscal Needs.

The Federal Constitutional Court gave special attention to the issue of undue state influence on public service broadcasting, due to the potential threat it poses. The current legislation seeks to address this based on three principles: Firstly, public service broadcasting has to be free from the state. Secondly, it has to be independent organisationally. In simple terms, this means state representatives must not be in a position to govern broadcasting stations. Thirdly, the Director General of each broadcasting station must independently

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<sup>68</sup> Dritter Rundfunkänderungsstaatsvertrag, GV.NRW of 13 December 1996, p. 484.

<sup>69</sup> Bundeskartellamt, decision of 19 January 2006, no. B 6 - 92202 - Fa - 103/05.

<sup>70</sup> Federal Court of Justice, decision of 6 June 2010, no. KVR 4/09, MMR 2011, p. 60.

<sup>71</sup> Bundeskartellamt, decision of 17 March 2011, no. B 6 - 94/10.

<sup>72</sup> BVerfGE 57, 295, at p. 321.

<sup>73</sup> BVerfGE 57, 295, at p. 322, unofficial translation.

<sup>74</sup> See also BVerfGE 57, 295, at p. 319-320.

undertake programme planning. The broadcasting stations thus have discretionary power to decide premised on editorial principles what programmes shall be aired and made available online.<sup>75</sup> The composition of the governing bodies, the Broadcasting Councils and the Administrative Councils, are to ensure the broadcasting station's supervision system functions independently without overwhelming influence from one societal group. As a basic principle (also provided in the applicable legal acts), the Broadcasting Council's task is to represent the interests of society at large in taking into account all the different opinions of citizens living in Germany.<sup>76</sup> The legislature seeks to implement this principle by placing representative societal groups on the Councils, such as representatives of unions, churches, sports or science associations and cultural groups. Representatives of political parties are also admitted. While surely part of society, political parties also have a clear affiliation towards state representatives such as members of the state governments. Not uncommonly, some laws also provide that the state government is entitled to delegate a representative to the Council.

Although the state legislation always provides for a majority of the representatives of societal groups, state or political party influence in Broadcasting Councils cannot be denied. Even if it is difficult to denote, studies report a partisan discussion culture between conservatives and social democrats on Broadcasting Councils (Hahn, 2010: 162). Furthermore, representatives of governments' political parties are reported to consider their role in the Broadcasting Council as members of the party and thus espouse party positions instead of, as mentioned, the different opinions of society as a whole. This systemic deficit can, of course, be rectified in different ways. While state representatives or single members of the Broadcasting Council might seek to influence the whole Broadcasting Council, the composition with different groups and various societal representatives can thwart their domination. In addition, the number of party representatives can be minimised, as it was done in the case of the Interstate Treaty on Northern German Broadcasting. This interstate treaty stipulates that less than 20 per cent of the Broadcasting Council's members can be party representatives and none of them governmental. Other stations display other compositions. In the Television Council of the Second German Television, for example, representatives of political parties, governments and city representatives amount to more than 40 per cent of all Council members.<sup>77</sup> In the case of the Second German Television, undue state influence occurred in a case in which the Administrative Council denied its consent regarding a senior editorial position for political reasons. As a corollary, the state government of Rhineland-Palatinate lodged a constitutional application with the Federal Constitutional Court asking the Court to decide on the composition and number of state representatives in the public service broadcasting governing bodies premised on the principle of independence from the state.

Economic interests pull at the public service broadcasters' legal framework as well. The state aid procedure with the European Commission illustrates how public service broadcasters' online activities relate to commercial online content and how European actors have gained influence in what was once a solely national debate. The influence of the European Commission on the state legislatures is important, as public service broadcasters are created by state law, implying that the activities of public service broadcasters can also be curtailed by state legislatures.

In 2005, a conglomerate of the Association of Private Broadcasters and Telemedia Operators (VPRT) and other private operators lodged a state aid complaint with the European

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<sup>75</sup> See Federal Constitutional Court, decision of 6 October 1992, no. 1 BvR 1586/89, NJW 1992, p. 3285.

<sup>76</sup> See only Art. 16 para. 1 West-German-Broadcasting Act [Gesetz über den Westdeutschen Rundfunk Köln, 2011].

<sup>77</sup> Art. 21 para. 1 Interstate Treaty on Second German Television.

Commission against the public service broadcasters' financial licence system.<sup>78</sup> The private broadcasters essentially criticised what they described as the '(...) allegedly uncontrolled expansion of public service broadcasters into new media services (...)'.<sup>79</sup> The European Commission decided that '(...) to make sure that the determination of whether new media activities satisfy the same democratic, social and cultural needs of society is based on a set of criteria suitable to assess the public service character of the service in question also in light of other already available offers on the market,'<sup>80</sup> which resulted in new legislation for public service broadcasters and a demanding procedure for the Broadcasting Councils.<sup>81</sup> The public service broadcasters withdrew some online content, installed a time-differentiated data retention system (ranging from seven days to several years or unlimited,<sup>82</sup> as prescribed in the law<sup>83</sup>) and underwent a time consuming and costly three-step test with all online content and all broadcasting stations in which the governing bodies, the Broadcasting Councils and Television Council had to affirm the public service broadcasters' online services. Furthermore, the legislature adopted a 'negative list' for public service broadcaster online content to exclude the public service broadcaster from commercially viable offers and *any* advertising on the public service broadcasters' websites.<sup>84</sup>

The economically driven complaint by the private broadcasters found with the European Commission's state aid directorate an economically orientated organ to decide on the issue. Admittedly, state aid procedures are legitimately based on economic concerns. However, media services in modern democracies hold cultural and democratic as well as economic dimensions.<sup>85</sup> The ambiguous wording of Protocol (No 29) on the System of Public Service Broadcasting<sup>86</sup> sought to balance the different interests involved: the member states retained the competence to finance public service broadcasting and define their remit as long as the funding does not affect competition '(...) contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'<sup>87</sup> While balancing the respective interests of private and public service broadcasters is an important feature of media policy, the following problem occurs when this task is relinquished to the state aid review procedure: the procedure can be repeated any time, as the case is not final in the sense that judgments are, and the state aid procedure is premised on an economic framework of understanding, which does not necessarily take into account the media's important cultural and thus democratic aspects. As a result, the European Commission's state aid procedure exerts a far-reaching and decisive influence on the member state's public service broadcasting's core elements: the financing regimes and remits. Despite recurring criticism from private broadcasters and publishers,<sup>88</sup> the implementation through the Broadcasting Council's three-step procedure is generally accepted. Currently no political debate exists to alter the Interstate Broadcasting Treaty in this regard. Even if it seems unlikely that the publishers and private broadcasters will mount another state aid complaint with the European

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<sup>78</sup> European Commission, State aid E 3/2005, Financing of public service broadcasters in Germany, C (2007) 1761, 24 April 2007, para. 70.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid., para. 310.

<sup>81</sup> Art. 11f Interstate Broadcasting Treaty. See also: Nawrath, 2011; Peters, 26.

<sup>82</sup> See as an example, WDR, Telemedienkonzept für das Internetangebot des WDR. Vorlage zur 519. Sitzung des WDR Rundfunkrats am 18. Juni 2010, p. 18.

<sup>83</sup> Art. 11d para. 2 no. 1-4 Interstate Broadcasting Treaty.

<sup>84</sup> Annex to Art. 11d para. 5 Interstate Broadcasting Treaty: Negative List of Public Broadcasting Telemedia.

<sup>85</sup> See European Commission, Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320 of 15 November 2001, paras. 5-6.

<sup>86</sup> OJ of the European Union, C 115/312 of 9 May 2008.

<sup>87</sup> Ibid.

<sup>88</sup> VDZ, Absage an ein ausbalanciertes, faires System, press release of 24 June 2010; VPRT, VPRT legt Stellungnahme zu Drei-Stufen-Testverfahren vor. <http://www.vprt.de/verband/presse/pressemittelungen/content/vprt-legt-stellungnahmen-zu-drei-stufen-testverfahren-und->, accessed 21 October 2011.

Commission, the case remains essentially unsolved. The legal framework, however, has changed since the last complaint, as Article 11 of the European Union Fundamental Rights Charter is now applicable and has to be taken into account if the decisions of the Commission were to be challenged before the Court of Justice of the European Union (CJEU). Although current discussions do not display any signs that the actors are likely to initiate another state aid procedure with the resultant possibility of a claim before the CJEU, it remains a possibility. As such, the CJEU could become another decisive player in media policy.

### **3.5 State media authorities' role in promoting free and independent media**

The legal framework of private broadcasters exhibits a different structural composition to that relating to public service broadcasters. This is due to the distinct concept of private broadcasting which places the private entrepreneur in the centre of actors regulated by the Interstate Broadcasting Treaty and state media laws. The law provides basic provisions differentiating between regional and nationwide broadcasting, radio, television and online content, and allowing private actors to start airing once licensing procedures (if necessary) are concluded.

Fourteen state media authorities and their joint governing bodies supported by several co-regulatory bodies (for example regarding youth protection) supervise private broadcasting. What are the concrete measures for private broadcasting affecting free and independent media? Except for private Internet radio, all private broadcasters are obliged by law to submit an application with the responsible state media authority to obtain a licence. During the application procedure, the state media authorities assess, among other things, whether the applicant can guarantee it is qualified in terms of financial backing and has a sufficient programme plan to organise broadcasting.<sup>89</sup> Furthermore, and unlike print media, legal entities of public law, such as Federal Ministries or single state governments, are not entitled to apply for a licence.<sup>90</sup> 390 private television (full-coverage, thematic and regional) channels (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 49) and 252 private radio (nationwide and regional) channels (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 163) indicate that licensing procedures do not impede unduly free media.

The ex post programme supervision mechanisms<sup>91</sup> of the state media authorities and their joint-body, the Commission on Licensing and Supervision (ZAK), as well as the Commission for the Protection of Minors in the Media (KJM) fulfil an important task within the private broadcasting's field of action. Even though programme supervision concerns media content, the structural composition of the state media authorities seems to have influenced their supervisory practice. As such, this is of importance for this report's focus on the societal and democratic function of free and independent media. The factors behind the structural composition are the developments during private broadcasting's inception. During the 1980s, the formative period of private broadcasting in the federal states, state governments sought to convince broadcasting companies to establish their company seat in the represented state for two reasons: to gain influence over the private broadcaster and to allocate work opportunities. The developments in the private broadcasting market were complemented with state supervision organs, the state media authorities, which then had acted as lawful supervisory organs as well as lobby organs for private broadcasters.<sup>92</sup> Single state media

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<sup>89</sup> Art. 20a para. 1 no. 6 Interstate Broadcasting Treaty.

<sup>90</sup> Art. 20a para. 3 Interstate Broadcasting Treaty.

<sup>91</sup> See the activities in 2010 on programme complaints and supervision measures: Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 37-39.

<sup>92</sup> That is for instance the case in the procedure for allocating wireless transmission capacities: Article 51 para. 3 no. 3 Interstate Broadcasting Treaty.



authorities were responsible for the private broadcaster's supervision, depending where the station was located. Thus, private broadcasters had been able to establish their seat in the state with presumed advantages including a recalcitrant supervision.<sup>93</sup>

The question arises as to whether state media authorities gave precedence to lawful supervision (including fines) or to the economic interests of the private broadcasters, as state media authorities also seek to engender viable market conditions. The interests of viable programme options are likely to have influenced the developments in the field of, for instance, gambling-related television programmes. Call-in game shows exemplify this, as channels were granted airtime for gambling formats to yield income for other content,<sup>94</sup> although transparency requirements for viewers were questioned (Wimmer, 2007). In other fields, the state media authorities acted reluctantly to impose fines or complaints regarding less distinct programme requirements such as personal rights founded on the protection of human dignity,<sup>95</sup> although awareness exists of possible negative impacts.<sup>96</sup> It can, however, not be ascertained if the reasons are to be sought in the vague legislation or the purported disadvantages for private broadcasters.

The state legislatures changed the federal approach of lawful supervision by single state media authorities profoundly in 2008 by introducing an overall body, the ZAK, responsible for all nationwide broadcasting in order to unify the supervisory practice, reduce competition among state media authorities and presumably to prevent single interest decisions.<sup>97</sup> Furthermore, debates about the legal framework for gambling-related television programmes led in 2008 and 2009 to new regulations that introduced stricter transparency regulations,<sup>98</sup> followed by supervisory measures from the ZAK (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 38). The newly stricter transparency rules reduced the revenues yielded, leading some broadcasters to dispense with the programmes.

### **3.6 Conclusion: structural media policy for free and independent media**

The German media policy landscape has undergone a deep change as broadcasting (terrestrial and online), for example, is now subject to policy negotiation and regulation not only by the state governments, but also by the Internet community, the federal state and the European Union (Gerlach, 2011a: 118ff.; Gerlach, 2011b). These latest developments prompted the discussion as to how the German media policy should evolve (Gerlach, 2011a: 286ff.). It seems necessary, though, to see media policy more as a multi-level mechanism in which the actors from the Internet community, state and federal legislatures, the judiciary as well as European bodies, i.e. the European Union and the Council of Europe, have to be taken into account to present and instigate a comprehensive and accepted media legislation.<sup>99</sup>

German media legislation and implementation used to be differentiated according to the legal competences of the individual states and the federal state. State governments organised themselves in the state media commission, in which relevant legislation pertaining to broadcasting was (and still is) debated, bargained and prepared by few state government

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<sup>93</sup> This issue is addressed in the parliamentary debate about the new legislation introducing the ZAK. See Landtag Nordrhein-Westfalen, Plenarprotokoll 14/88 of 17 April 2008, p. 10465.

<sup>94</sup> Bayerische Landeszentrale für Neue Medien, press release of 22 March 2007, no 13.

<sup>95</sup> Landesanstalt für Medien Nordrhein-Westfalen, "Menschenwürde im privaten Rundfunk": Mahrenholz ermutigt Medienaufsicht zu beherztem Vorgehen, press release of 3 February 2010.

<sup>96</sup> A self critical appraisal is offered by Schneider, 2011. A differentiated legal analysis is provided by Klass, 2011: 52, 125-127.

<sup>97</sup> 10. Rundfunkänderungsstaatsvertrag, GV.NRW of 15 July 2008.

<sup>98</sup> Satzung der Landesmedienanstalten über Gewinnspielsendungen und Gewinnspiele of 19 December 2008.

<sup>99</sup> As multi-level governance: Gerlach, 2011a: 111 and 286.

chancelleries. The state parliaments enacted the results of the commission's meetings - the Interstate Broadcasting Treaty - usually without any decisive complaints. While media politicians, the state governments and the Federal Government sought (and still seek) to create a sustainable legal structure for media operators, resorting to courts, especially to the Federal Constitutional Court, has been in the last decades (and still is) an epitome of German media policy.<sup>100</sup> At the same time, private operators have sought to establish better market conditions, while state and federal legislatures introduced legislation to impede media concentration. Concurrently, public service broadcasters sought to retain their position regarding their remit and financial independence. With the European Union and its decision-making mechanisms, the well-known cycle of political disputes and national court proceedings was complemented with the CJEU, the state aid procedure of the European Commission and the European legislation. The European Commission's state aid procedure in particular proved an efficient lever to shape national media policy.

In this multi-level policy landscape, the legislature faces the challenge of identifying the different and partly competing interests of media operators while establishing and maintaining free and independent media in various different political forums. The state aid procedure testifies to this, as the basic concept of public service broadcasters and the economic interests of private broadcasters and publishers were affected. Furthermore, technical developments emerging with the Internet prompt the question of free and independent media in relation to an unfettered market or to a differentiated regulation concept taking the distinct functions of media outlets necessary to a democracy into account. If the state governments and legislatures were to decide to ignore the specific interpretation of the Basic Law regarding broadcasting, this would call into question the existing legal premise for the whole broadcasting system and open the playing field for an individually free and independent, but solely privately structured, communication system. It remains to be decided as to whether this will be necessary.<sup>101</sup> The Federal Constitutional Court has until now followed its own interpretation that Article 5 of the Basic Law obliges the legislature to provide the legal framework for a communicative space.<sup>102</sup> This implies the inclusion of online content from public service broadcasters in a digitally converged media landscape (Dörr, 2008: 45).<sup>103</sup>

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<sup>100</sup> The last judgment of the Federal Constitutional Court on the license fee for the public service broadcasters testifies to this. See Federal Constitutional Court, judgment of 11 September 2007, 1 BvR 2270/05, MMR 2007, p. 770. After state governments were not able to find a common political denominator for the composition of the television and administrative council of the Second German Television (ZDF) regarding state representatives in the councils, the government of Rhineland-Palatinate submitted a constitutional action with the FCC. A decision is expected in 2012.

<sup>101</sup> See for instance the differentiated legal analysis of Möllers, 2008.

<sup>102</sup> The last decision regarding public service broadcaster was 2007: Federal Constitutional Court, judgment of 11 September 2007, no. 1 BvR 2270/05, MMR 2007, p. 771.

<sup>103</sup> *Ibid.*, p. 772-773 (guarantee of technical development).

## **4. Composition and diversification of media content**

The focus of our examination is on media content that engenders democratic discourse and democratic participation. Two basic observations merit attention at this point. The idea of democratic discourse is rooted in the concept of democracy in which people discuss matters of the state and the intermediaries - print media, the broadcasting and the Internet - facilitate or provide the means for the necessary communication. Part of this communication implies communication in a public sphere that serves political decision processes by ordering and thematically presenting relevant issues (Schicha, 2010: 26). However, this should not lead to the conclusion that there exists only one public sphere. Rather, with the advent of private broadcasting and now the Internet, many also politically relevant communicative spaces exist (Schicha, 2010: 37). Another point refers to the constitutionally protected principle of the independence of the media from the state. This basic principle implies the state cannot and should not prescribe or influence the content of media outlets. Concurrently, the state has an obligation to engender and facilitate the media outlets and thus media content necessary for a democracy. It is this which leads the state to protect the media, for example, from undue economic influence, as it risks affecting content. Both aspects are important for free and independent public opinion-forming.

### **4.1 Positive measures encouraging the diversification of media content**

#### **4.1.1 News coverage in private broadcasting**

Positive legal measures to encourage diversification of programme contents exist in German media law, although their wording is relatively vague. Article 2, paragraph 2 no. 3 of the Interstate Broadcasting Treaty defines for instance the term ‘full coverage programme’ applicable for private broadcasting channels. This is an important notion because the licensing procedure regime refers to it. It means that a licence for a full coverage channel can only be issued and retained if the broadcaster fulfils specific requirements, including a programme plan with a diverse content of information, education, advice and entertainment. The law does not prescribe a concrete percentage of what diverse content of information means.<sup>104</sup> This has resulted in different interpretations in the legal literature regarding this requirement (Holznagel and Kibele, 2011: paras. 64c-65; Schulz, 2008: para. 63). It is argued, however, that - as a bare minimum - 10 per cent of the programmes must be, for instance, information (Holznagel and Kibele, 2011: para. 65).<sup>105</sup> Furthermore, the Interstate Broadcasting Treaty requires that private operators give representation to the diverse and relevant political, ideological and societal opinions in the programmes of full coverage channels.<sup>106</sup> Those prescriptions are rooted in the judgments of the Federal Constitutional Court, in which the court clearly stated that private broadcasting programmes do not have to fulfil the same strict standards as public service broadcasters, but nevertheless are required to broadcast content which serves free and independent public opinion forming.<sup>107</sup>

These requirements of the Federal Constitutional Court are important for the communicative space in which political relevant information and controversial subjects can be addressed. A communicative public space consists of programmes aired and their viewers.

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<sup>104</sup> This is a result of the constitutional interpretation of the principle of the freedom of state for broadcasting programmes.

<sup>105</sup> Although that opens the discussion about the notion of information. Schulz, 2008: paras. 64-65.

<sup>106</sup> Art. 25 para. 1 Interstate Broadcasting Treaty.

<sup>107</sup> Federal Constitutional Court, judgment of 4 November 1985, no. 1 BvF 1/84, NJW 1987, p. 241, and judgment of 12 March 2008, no. 2 BvF 4/03, MMR 2008, p. 591.

Thus, the average percentage of viewers of private broadcasting denotes such a public sphere, although only very roughly. Using this as a starting point, the German media landscape discloses a clear deficit in the programmes of the two large private broadcasters, ProSieben.Sat1 Media AG and RTL, regarding programmes with political relevant content.<sup>108</sup> In the times of the inception of private broadcasting, the concept of external pluralism was deemed sufficient (Humphreys, 1994: 263). It was assumed that a plurality of different broadcasters would create a plurality of opinions and thus the necessary public sphere of democratic discourse. However, the decisive question remains: does a plethora of channels and programmes provide plurality of opinion? And does it provide relevant and comprehensive political information?

Admittedly, in total, German private broadcasters provide more than 300 regional, nationwide, full coverage and specialised television channels, including sole news channels such as n-tv. The private sector thus offers a broad spectrum in which plurality is guaranteed and in which the viewers are enabled to choose a channel with political and societal relevant content. The actual behaviour of viewers and the developments in the programme planning of private broadcasters, however, calls these considerations into question. Firstly, in 2010, 84 per cent of viewers regularly watched ten different channels, among them full coverage channels of the two largest private broadcasters and the public service broadcasters (Schwotzer, 2011: 39).<sup>109</sup> Only an additional one per cent of the market share of viewers was allocated to the special news channel n-tv. This means that despite the plethora of channels and programmes, only ten television channels actually create the public sphere. Secondly, the private broadcasting companies ProSieben.Sat1 Media AG and RTL succeeded in drawing an average of 46.5 per cent viewers in 2010 to their television programmes (Schwotzer, 2011: 39; Kommission zur Ermittlung der Konzentration im Medienbereich, 2011: 72 and 73).<sup>110</sup> Thirdly, in the last twelve years, the state media authorities ascertained in their programme analysis of private broadcasters an incremental reduction of political relevant news coverage and information offers (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 35). Within the spectrum of channels watched by 46.5 per cent of the viewers, the two largest private broadcasters, ProSieben.Sat1 Media AG and RTL, averaged in 2009 politically relevant information of 4 per cent (RTL), 2 per cent (VOX), 1 per cent (Sat.1), 1 per cent (RTL II) or nothing at all (ProSieben and kabel eins) (Arbeitsgemeinschaft der Landesmedienanstalten, 2011b: 279). The state media authorities' programme analysis employed the notion of political journalism and controversial subjects as denoting political relevant information (Arbeitsgemeinschaft der Landesmedienanstalten, 2011b: 279).

The state media authorities are aware of these developments and the negative repercussions for societal discourse and the societal brief private broadcasting has (Langheinrich, 2011; Langheinrich, 2010).<sup>111</sup> Concurrently, as a response and a media policy strategic act, private broadcasters affirmed their societal obligations and questioned the narrow notion of information and the overall debate.<sup>112</sup> The costly production of news offers

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<sup>108</sup> See in this regard Nachrichtenanteile in Privatsendern gehen zurück. DLM-Symposium: Programmbericht Fernsehen 2010 vorgelegt, 12 epd medien of 25 March 2011, 14.

<sup>109</sup> Sat.1, ProSieben, kabel eins, RTL, RTL II, Super RTL, VOX, Das Erste, ZDF, ARD/Third channels.

<sup>110</sup> The channels by the two private broadcasters taken into account are: RTL, RTL II, Super RTL, VOX, and n-tv (all RTL-Group), Sat.1, ProSieben, and kabel eins (all ProSieben.Sat.1 AG).

<sup>111</sup> See also Direktorenkonferenz der Landesmedienanstalten (DLM), Nachrichtensendungen im privaten Rundfunk. Ein Positionspapier, Stuttgart 2010. The Chairs of the fourteen state media authorities addressed this issue on their annual media policy symposium: Direktorenkonferenz der Landesmedienanstalten (DLM), Wie viel Fernsehqualität wollen wir uns leisten?, press release of 8 March 2010.

<sup>112</sup> Press release of 2 March 2010, VPRT zu Positionspapier der Landesmediensnatalten zu 'Nachrichtensendungen im privaten Rundfunk', available at: <http://www.vprt.de/verband/presse/pressemitteilungen/content/vprt-zu-positionspapier-der-landesmedienanstalten-zu-%E2%80%9Enach>, accessed 17 October 2011.

and the competitive market situation, both offline in the television market and online, are the two main arguments brought forward.<sup>113</sup> However, the financing argument regarding news applies only under an economic logic concerning private television productions, in which a programme has to be commercially viable otherwise it will be cancelled. As news bulletins contradict commercial logic with their format and requirements the question arises as to whether they should be valued differently. This is especially pertinent given that the annual turnover of the RTL group increased in 2010 (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 79-81) and the basic production costs decreased overall (Goldhammer, 2011: 190-191).

As a result of the purported decrease in the news and information content of the channel VOX, the state media authorities, in their role as a supervisory organ, stressed in a re-examination procedure of operators' licences the obligation to provide information and news contents in order to retain licences.<sup>114</sup> Besides these concrete and single measures, the state media authorities commissioned an academic study to structurally explore the options for enhancing journalistic efforts in the private broadcasters' information programmes (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 35). The comprehensive and thorough study 'Regulation through Incentives' is founded on the premise that normative regulation might not succeed in achieving creative output, which lies at the root of high quality journalistic content (Schulz and Held, 2011: 21-22). The study calls for a thorough examination of the existing legislation to determine possible incentives for private operators to broadcast news content or documentaries. The incentives can include privileged access to transmission infrastructure or relaxation of advertising regulation (Schulz and Held, 2011: 106-110). The question whether to draw upon the public service broadcaster's licence fees was not part of the study's commission. Representatives of the private broadcasters, the state media authorities and scientific researchers discussed the results of the study at the state media authorities' annual Director's Symposium. The study was received controversially by private operators<sup>115</sup> and the debate remains ongoing (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 17). Although the underpinning concept of incentives for more journalistic content is appealing, it is still undecided as to whether it will actually be successful and facilitate content production.<sup>116</sup> The debate illustrates how media policy can be steered by the actors involved. The state media authorities discerned a lacuna in the private operator's programmes regarding news. As the first debates in 2010 did not succeed in changing the situation, the state media authorities supplemented their claims with a comprehensive and thorough examination of the legal framework, examining the possible legislative options.

#### **4.1.2 News coverage in public service broadcasting**

The structure of public service broadcasting in Germany entails a form that facilitates and promotes diverse channels and programmes. Eleven public service broadcasting stations contribute to programming including the two nationwide television channels, nine regional television channels, a nationwide radio station and an external radio, television and online

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<sup>113</sup> Ibid. See also: Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 35.

<sup>114</sup> Die medienanstalten, ZAK-Pressemitteilung 09/2010, Landesmedienanstalten richten weiter Fokus auf private Nachrichtenangebote, press release of 18 June 2010.

<sup>115</sup> DLM Symposium, Public Value: Was soll der private Rundfunk für die Gesellschaft leisten?, press release of 18 March 2011.

<sup>116</sup> It is questionable, for instance, whether the Swiss fee transference and evaluation model for private broadcasters actually enhances news-bulletins significantly. It is still to decide, if the implementation of programme requirements for the Swiss private broadcasters are effectively adhered to. Based on the interview with Prof. K. Imhof of 2 June 2011.

service. The television channel Das Erste, for instance, is produced in a working coalition of the nine regional broadcasters (ARD) with a clear partition of responsibilities for single programmes and with a slightly different political inclination. This construction encourages a plurality of opinions. Furthermore, the Interstate Broadcasting Treaty obliges all public service broadcasters to offer in their programming, among other things, a comprehensive overview of international, European, national and regional events in all relevant areas of life. This implies also the requirement to respect plurality of opinion, which must be mirrored in the programmes transmitted and presented online.

The basic programme regulation in the Interstate Broadcasting Treaty provides the national public service broadcasters with a more focused remit than the private operators: it states that public service broadcasters ‘act through the production and transmission of their offers as a medium and factor in the process of formation of free individual and public opinion, and thereby serving the democratic, social, and cultural needs of society.’<sup>117</sup> Thus in relation to private programme requirements, the law requires public service broadcasters to fulfil the societal needs of a democratic society, which includes a diverse outlet of programmes including news bulletins and other political relevant information. It would exceed the space available to comprehensively probe into the question as whether the public service broadcasters in Germany live up to the standards established in the law. An examination would have to address the difficult question of programme quality, which is not an easy undertaking to gauge scientifically (Kammann, Jurkuhn and Wolf, 2007: 67; Trebbe and Woelke, 2011: 206f.). Nevertheless, some observations shall be given based on discussions of programme critics in media and other publications. Taking the two full coverage television channels, Das Erste and ZDF, into account, it is argued that commercialisation of the programmes can be ascertained as they try to compete with the private operators.<sup>118</sup> This has purportedly led to broadly accepted productions aired in prime time, while documentations and in-depth analysis regarding controversial but relevant societal and political issues are aired very late. Furthermore, the public service broadcaster radio stations of the nine regional broadcasting stations air shorter and more mainstream coverage and thus often exclude necessary background information. They also cut overall expenses by reducing the number of journalists in regional networks working for television and radio stations, which exacerbates working conditions at the regional level, especially for time consuming investigative research and productions. These developments are tempered by public service broadcasters’ thematic channels airing mostly on culture, such as 3sat, or on news, such Phoenix. However, these channels account for only one per cent of total television viewers each.<sup>119</sup> Despite these observations, public service broadcasters in general still air high quality information programmes and serve the societal needs in a democracy. Furthermore, public service broadcasters’ regional activities, especially the regional programmes, facilitate the cultural identity of the inhabitants of the different states. The fact that the national public service broadcasters’ online platforms offer manifold on demand videos and other information committed to high standards also merits attention. The programme analysis undertaken by the state media authorities illustrates the distinct approach to political relevant information aired by the public service broadcasters. While the daily airtime allocated to political journalism and controversial subjects by private broadcasters ranges from four per cent (RTL) to no programmes at all (ProSieben), the public service broadcasters programmes reach very different percentages. The nationwide television full coverage channel Das Erste averaged a daily percentage of 18 per cent of airtime allocated to

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<sup>117</sup> Art. 11 para. 1 Interstate Broadcasting Treaty.

<sup>118</sup> Kammann, Jurkuhn and Wolf, 2007: 97ff provide an overview of the discussions. More recently Kammann, 2010: 41-50. A more critical appraisal in terms of commercialisation, de-politisation, and campaign journalism of public service broadcaster and private programmes provides Müller, 2009: 388-414.

<sup>119</sup> KEK, Zuschaueranteile Monatswerte 2010.

political journalism and controversial subjects, while ZDF averaged 17 per cent (Arbeitsgemeinschaft der Landesmedienanstalten, 2011b: 279-280). Public service broadcasters provide additional regional political relevant information aired by the nine different broadcasting stations on their television channels (Die Dritten) or on radio. Das Erste, ZDF, and the regional television channels account for 38.8 per cent of total viewers in Germany and thus constitute a public sphere of programmes and viewers comparable to one of the private broadcasters (Schwotzer, 2011: 39).<sup>120</sup> These numbers testify for the different output of private and public service broadcasters.

While it is difficult to ascertain the programme quality of news bulletins, it is even more difficult to ascertain state influence on public service broadcasters' content. This is simply because legal and other structures seek to curb the influence of state actors such as governmental representatives, and because open and direct influence occurs only occasionally and randomly. As outlined above, the Broadcasting Councils, which are the governing bodies, consist of a majority of representatives from the relevant societal groups, in order to confine the influence of state or party representatives on their activities. However, some cases have arisen in which an indirect effect on the programming and its political orientation might be identified. In 2009, the Administrative Council of the ZDF refused to give its consent in a reappointment of a Chief Editor presumably for political reasons.<sup>121</sup> The relevant articles of the Interstate Treaty of the Second German Television are currently being contested before the Federal Constitutional Court in an application submitted by the State Government of Rhineland-Palatinate in November 2010.<sup>122</sup> Furthermore, in 2010 the Bavarian Broadcasting station appointed the former speaker of the conservative Federal Government as General Director, which also potentially raises the question of a certain political inclination.<sup>123</sup> In another case, however, a Broadcasting Council rejected a candidate favoured by the state government. In a recent event, the MDR Broadcasting Council rejected the proposed candidate for the position of Director General, although the proposing Administrative Council, influenced by the three state governments of Saxony, Saxony-Anhalt and Thuringia, had chosen the candidate.<sup>124</sup> Here, the democratic function of the Broadcasting Council fared well and exemplifies the increasing self-confidence of the governing bodies.<sup>125</sup>

#### **4.1.3 Content requirements: rules imposing accurate, impartial and balanced reporting for print media, broadcasting and new online media services**

Any journalistic or editorial content is subject to regulatory content requirements regarding accurate reporting. Rules apply for private and public broadcasting, stemming from the Interstate Broadcasting Treaty regulation and statutory legislation.<sup>126</sup> Print products must respect basic accuracy rules laid down in statutory state press laws and self-regulatory, detailed standards laid down in the Press Code.<sup>127</sup> It has to be stressed that the most comprehensive

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<sup>120</sup> See also Media Perspektiven. Basisdaten, 2010: 77 with comparable numbers.

<sup>121</sup> For an analysis of the legal background see Dörr, 2009.

<sup>122</sup> As already mentioned above under section 3.4.

<sup>123</sup> The election contradicts 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>124</sup> Mitteldeutscher Rundfunk (MDR), Noch kein Nachfolger für MDR-Intendanten, press release of 26 September 2011. A new, different Director-General was appointed in October 2011.

<sup>125</sup> To complement the picture: there have been single cases in which the internal supervision mechanisms did not work sufficiently. For example, regarding the children's channel under the auspices of the MDR, financial irregularities occurred which are now subject to internal revisions and criminal court proceedings. See 44 epd Medien of 4 November 2011, 8-9.

<sup>126</sup> Art. 10, Art. 11 para. 2 Interstate Broadcasting Treaty.

<sup>127</sup> Deutscher Presserat, Publizistische Grundsätze (Pressekodex) of 3 December 2008.

impartiality and balance requirements exist only for public service broadcasters, while private broadcasting is required only to take different opinions into account, and print media or political blogs are more free to publicise content with a clear bias, as long as journalistic standards are respected (i.e. delineation of fact and comment). Journalistic and editorial online content's regulation depends on its outlets. Online content by public service broadcasters has to adhere to the same standards as laid down for their broadcasting content. In addition, the Interstate Broadcasting Treaty provides for accurate reporting requirements for journalistic editorial online content. The law aims to oblige the content provider of online news websites, politically relevant online magazines or blogs as well as the online version of traditional press outlets to adhere to basic journalistic standards. These include delineation of reporting and opinion, accuracy in research and checking and assessment of sources.<sup>128</sup> The same accounts for private broadcasters online content that are not considered broadcasting (such as on demand programmes). The question of whether all regulatory obligations and self-regulatory standards are adhered to is difficult to ascertain and remains an ongoing process for the actors involved. While the Broadcasting Councils and the Director General of the public service broadcasters monitor the implementation of legal requirements, the state media authorities monitor private broadcasters. Furthermore, press products and online content providers submit to the revision and sanction procedure of the German Press Council on the basis of voluntary self-commitment. While it is relatively easy to obtain the self-commitment from traditional print media publishers, the multitude of actors and the dynamics of online offers raise the question whether the Press Council will be able to include them in the revision system. The media-tailored system is supplemented by general laws such as libel, defamation, or protection of personal dignity applicable to all outlets and enforced by criminal or civil courts. These rights contribute to accurate reporting, as publishers or website owners can become liable and exposed to potential damages.

Hence, rules imposing accurate, impartial and balanced reporting exist with a different degree of obligations and the regulation or self-regulatory standards are subject of independent external (like the state media authorities, the ZAK or the Press Council) or internal (like the Broadcasting Councils) supervision procedures as applicable.<sup>129</sup>

#### **4.1.4 A subsidy system for press outlets? A recurring debate of a 'public service press'**

The German media landscape is comprised of different outlets: press, magazines, broadcasting (radio and television), and online media services. The latter display the most differentiated and vivid developments, as the traditional media publish content online and sole online news services exist simultaneously. Traditionally, print media and its online content are not subject to any financing regulation. Accounting for this is the historical development, to rely on the market to provide the necessary diversification and plurality of press products. The current financing regime of the broadcasting sector was also shaped by the developments in the last few decades. The private sector relies on advertising revenue, while public service broadcasters are financed by fees. The financial situation of online services depends on their organisational circumstances. Advertising revenues finance the online content of private broadcasters, while the public service broadcasters can invest in online services on the basis of fees. Critical blogs and other politically relevant online platforms have to be financially backed by donations, online advertising, or member fees when they are organised as legal

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<sup>128</sup> Art. 54 para. 2 Interstate Broadcasting Treaty.

<sup>129</sup> See for the Press Council system: Desgranges and Wassink, 2005; for public service broadcasters: Hahn, 2010: 145ff.; Staffelt, 2009; for private broadcasters: Donges, 2011: 11-34; Fechner, 2003; Klass, 2011: 45ff.; for Internet: Brocker, 2011: 7f.; Bull, 2011.



associations. With the exception of the tax reduction of 7 per cent VAT for press products<sup>130</sup> (compared to the regular 19 per cent VAT for other goods), the state does not provide any subsidies for press products.

The economic situation<sup>131</sup> of some publishers providing press outlets, especially for the regional and local press as well as the *Frankfurter Rundschau*, a nationwide print product, triggers the discussion on journalism as a public good that has to be financed. Such a financing model could include tax reimbursements for subscriptions and the exclusion of press products from VAT obligations (Eumann, 2011: 98). The debate recurs regularly, because the local and regional press market declines incrementally in terms of advertising revenues and, partly, subscriptions. The main consideration focuses on the need for a forum in which regional and local matters can be discussed adequately, as it is feared that the relevant content will either not be provided by regional or local media outlets or the outlet at issue will disappear altogether. This is the case if a publisher terminates the publication of a regional newspaper or if broadcasting ceases to cover regional or local affairs. Although in all likelihood, the private publishers would dismiss the idea of a state or publically financed press,<sup>132</sup> due to the fear of state influence, tax reductions might be welcome. However a political majority to support the idea is lacking. Thus, the print publishers are seeking to introduce alternative models of financing. The North German online platform of the newspaper *Hamburger Abendblatt* requires payment for access to some of its online content.<sup>133</sup> The alternative newspaper *taz* in Berlin follows different strategies including awareness-rising for fair payment for online content instead of a culture of free access through conferences, online campaigns<sup>134</sup> and a collective of shareholders financing a fund for the newspapers.<sup>135</sup> Finally, private publishers are seeking to obtain new revenue options in the form of an ancillary copyright law for publishers. This is politically contested because of its impracticability. The draft is still at the early stages of the legislative process. Interestingly, the debate sometimes obviates the knowledge of viable online offers that work profitably, as it was stated in a public hearing ‘Future of Quality Journalism’, held by the Federal Parliament’s Committee on Culture and Media.<sup>136</sup>

## 4.2 Competing interests and legal restraints on content diversification

### 4.2.1 The rule of law and the protection of informants and sources of information: the balance of relevant information in a democratic society and the good functioning of criminal prosecution

The European and the German national courts proclaimed in various proceedings that protection of journalists’ informants or sources of information is a prerequisite for a functioning press and thus an independent media.<sup>137</sup> Without such protection, the necessary

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<sup>130</sup> Art. 12 para. 2 no. 1, addendum 2, no. 49. VAT-Act [Umsatzsteuergesetz, 2011].

<sup>131</sup> See the analysis by Beck, Reineck and Schubert, 2010: 46-88.

<sup>132</sup> This stance is documented in a study published in 2009 by Weichert and Kramp, 2009: 46-47.

<sup>133</sup> <http://epaper.apps.abendblatt.de/>, accessed 20 October 2011.

<sup>134</sup> <http://www.taz.de/zeitung/tazinfo/taz-zahl-ich/>, accessed 20 October 2011.

<sup>135</sup> More than 11.000 shareholders provided the fund with more than ten million euros.

<sup>136</sup> This accounts for the online portals ‘spiegel-online’, ‘zeit-online’, ‘standard.at’ according to the statements in a public hearing of the Federal Parliament’s Committee on Culture and Media. Deutscher Bundestag, Ausschuss für Kultur und Medien, 31. Sitzung, Protokoll Nr. 17/31 of 23 February 2011, p. 7.

<sup>137</sup> ECtHR, Goodwin v. UK, judgment of 27 March 1996, no. 17488/90, para. 39; Federal Constitutional Court, judgment of 27 February 2007, no. 1 BvR 538/06, NJW 2007, p. 1118. Also: Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information of 8 March 2000.

democratic control of the state and the state's action by the media might be impeded, because the media has to rely on sources from within the state organisations and bodies, which might withdraw without protection. On the other hand, the state has a justifiable interest in protecting its data, such as secret documents or political delicate opinion building processes, against the public. This implies the prosecution of criminal acts when it comes to an incriminated violation of secret information, for instance when media publish confidential documents of parliamentary committees.<sup>138</sup> Hence, a regulation has to be found to balance these antagonistic aspects.

The German legislation illustrates that finding a compromise has challenged political actors. Although the Federal Constitutional Court decided in 1966 that the legislature had to gauge the various different interests and come to a practical conclusion,<sup>139</sup> the resultant legislation and its implementation were again criticised by the Federal Constitutional Court as unconstitutional in a case decided in 2007.<sup>140</sup> Admittedly, different aspects had to be considered, which rendered the legislative process demanding. Two key issues in particular merit attention. Firstly, there is the issue of the immunity from criminal liability in cases in which secret documents were received from sources and then published. The second is the issue of procedural protection from police searches in freelance journalists' premises. In 2010, the governing parties instigated a legislative procedure to amend the Criminal Law.<sup>141</sup> The objective of the draft was clear: to exclude journalists from criminal liability for breach of state secrets in cases in which they have not actively incited the informant. Although introduced in the Federal Parliament by the Federal Government, the Free Democratic Party and the Christian Democratic Party seem to espouse different stances in this regard. In a speech given in the Federal Parliament for example, it was said that the necessity of the draft had to be scrutinised carefully.<sup>142</sup> Reference was also given to the possible conflict with the conservative Chair of the Legal Committee in this regard.<sup>143</sup> Both statements can only be interpreted as dismissive. An almost-detrimental position was presented by the State Secretary of the Federal Ministry of Justice in his speech in the Bundesrat, the State Chamber, in which he reflects on the necessity of a new regulation to protect journalists' sources.<sup>144</sup> It is still unclear whether this internal debate among the governing parties will finally lead to an enactment of the draft or delay the process until a next electoral term.

Interesting and not commonly known, the existing legislation in the German Penal Code of Procedure<sup>145</sup> and its interpretation by the courts<sup>146</sup> may violate the ECHR. The joint legal experts' opinion of the German Journalists' Association (DJV) and others brought this up during the public hearing of the above-mentioned draft.<sup>147</sup> On the basis of the ECtHR's rulings<sup>148</sup> they noted that the ECtHR prescribes that only a judge or another independent body shall be entitled to issue a search order in cases when the journalist's relationship to his/her source is at stake.<sup>149</sup> While the legislation provides for such procedural safeguards for editorial

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<sup>138</sup> A legal analysis of the protection of sources is provided by Eichhoff, 2010: 248ff.

<sup>139</sup> Federal Constitutional Court, judgment of 5 August 1966, NJW 1966, p. 1607.

<sup>140</sup> Federal Constitutional Court, judgment of 27 February 2007, NJW 2007, p. 1117.

<sup>141</sup> Deutscher Bundestag, Gesetzentwurf der Bundesregierung zur Stärkung der Pressefreiheit, Drs. 17/3355 of 21 October 2010.

<sup>142</sup> Deutscher Bundestag, Plenarprotokoll 17/79 of 3 December 2010, p. 8811.

<sup>143</sup> Ibid.

<sup>144</sup> Bundesrat, Plenarprotokoll 875 of 15 October 2010, p. 376.

<sup>145</sup> Art. 98 para. 1 sentence 1 Penal Code of Procedure [Strafprozessordnung, 2011].

<sup>146</sup> See only Federal Court of Justice, decision of 13 January 1999, NJW 1999, p. 2053.

<sup>147</sup> Deutscher Bundestag, 17. Wahlperiode, Rechtsausschuss, Protokoll Nr. 35 of 26 January 2011, p. 19.

<sup>148</sup> ECtHR, *Sanoma Uitgevers B.V. v. The Netherlands*, judgment of 14 September 2010, no. 38224/03, para. 90.

<sup>149</sup> See legal position of ARD, BDZV, DJV, dju in ver.di, Deutscher Presserat, VDZ, VPRT, ZDF, Gemeinsame Stellungnahme zum Gesetzentwurf der Bundesregierung und der Fraktion Bündnis 90/Die Grünen [Joint

premises, this is not the case for the journalist's private premises or the offices of freelance journalists.<sup>150</sup> As more and more journalists do not work as employees with print media or in broadcasting, documents and data leading to the source may be stored at home, rather than at editorial offices.

#### 4.2.2 Protection of privacy vs. the public's interest for information

Striking the balance between the protection of a person's privacy or personal rights [Allgemeines Persönlichkeitsrecht], which is rooted in the constitutional principle of each person's dignity, and the public's interest in information [öffentliches Informationsinteresse], is an ongoing, day-to-day process for journalists. Only some strict legal rules exist such as libel and defamation to prohibit the publishing of defamatory statements about another person. However, whether a publication infringes the rights of a person (such as the rights to protection of privacy or family life) depends on the degree of private information shared and the degree of justifiable public interest. The Federal Constitutional Court has developed the legal interpretation in which the courts must balance the right of the person with the right to freedom of information. In the words of the Court, 'The protection of one's personal rights can be limited in view of the conflicting public interest.'<sup>151</sup> The conflicting positions and interests have to be balanced by the courts, which have to discern what right prevails in light of all the relevant circumstances.<sup>152</sup> The national courts engage in a process to weigh the justifiable interest of the public in being informed against the privacy interests in order to conclude whether personal rights were infringed.<sup>153</sup> For example, it might be justifiable to report on a politician's private affairs if they contradict obviously the positions he or she stands for in public in order for the electorate to gauge his or her credibility. However, if there is no possible link to political activity, reporting might not be justifiable. Thus, public interest will not prevail in every case and it remains in the responsibility of the journalist or the editor to decide in each case whether to publish a piece of information. The German legal system provides flexible, but also sometimes unpredictable, protection for personal rights that curb publication. Not uncommonly, legal action is sought with civil courts as they can impose injunctions with high monetary repercussions.

Another aspect of the right of privacy lies in the publication of photographs. Originally, the German law had provided a limited protection for well-known persons, defined as 'a figure of contemporary society par excellence', such as politicians, film stars or other celebrities. The legal situation had precluded basically most of the demands from members of this group not to be photographed and then depicted in press or journals. In the judgment *Hannover v. Germany*,<sup>154</sup> the ECtHR rectified this legal situation for Germany, as it discerned a violation of Article 8 of the ECHR. The judgment stems from a complaint by Caroline von Hannover whose pictures of her going about her daily business were published in German magazines. The Court balanced the right to respect for private life and the freedom of the press differently and required that the publication of photographs refers to a debate of general interest.<sup>155</sup> A publication did not violate Article 8 ECHR if it were justified by

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position regarding the draft legislation of the Federal Government and the members of parliament of the party Bündnis 90/Die Grünen], 19 January 2011, p. 10-11.

<sup>150</sup> DJV, Stellungnahme, p. 20.

<sup>151</sup> Federal Constitutional Court, decision of 7 May 1997, no. 1 BvR 1974/93, NJW 1997, p. 2670.

<sup>152</sup> "That what the law left to interpretation, has to be filled by case-law." Federal Constitutional Court, decision of 25 January 1984, no. 1 BvR 272/81, NJW 1984, p. 1743.

<sup>153</sup> Hamburg Regional Court, judgment of 26 June 2007, no. 324 O 268/07, ZUM 2008, 615.

<sup>154</sup> ECtHR, *Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00.

<sup>155</sup> ECtHR, *Hannover v. Germany*, para. 60.

considerations of public concerns.<sup>156</sup> Admittedly, the judgment only has little influence on political relevant information, because it concerned mostly the boulevard press.<sup>157</sup> However, political journalism must take into account the protection of privacy of politicians as well and decide whether to publish a photograph or not.

#### **4.2.3 The public service broadcasters' online activities and viable offers of private operators and publishers**

The legislature sought to balance with the 12<sup>th</sup> Amendment to the Interstate Broadcasting Treaty<sup>158</sup> the economic interests of private broadcasters and publishers on the one side and the interests of public service broadcasters to be present in the online environment on the other side. Instigated by the state aid procedure of the European Commission on the financing regime of the public service broadcasters, the state legislatures adopted several provisions to regulate the public service broadcasters' online activities. We discussed the political and procedural circumstances and ramifications in chapter three. Here we want to focus on the conflict of interests as regards the content services provided.<sup>159</sup> Basically, private broadcasters and publishers fear that public service broadcasters' content might foreclose otherwise viable online services, while the public service broadcasters fear that stricter regulation might foreclose its future audience and thus its future. The former bring forward arguments premised on economic considerations.<sup>160</sup> The latter assume the Internet will complement the existing media landscape or even change it significantly. The consumer behaviour especially of individuals up to 29 years of age testifies to this assumption, as 97-98 per cent use the Internet regularly.<sup>161</sup> The legislature sought to balance the interests described with the restrictions and co-regulatory procedures of the Broadcasting Councils, implicating a negative list, de-publishing requirements and a comprehensive procedure for the adoption of specific online activities. As further developments might require a differentiated legislation, it remains with the media politicians and the legislature to balance the economical interests to the public service idea of a free and independent communicative space enabling individual and collective opinion forming (Rossen-Stadtfeld, 2009, 32f.).

#### **4.3 Conclusion: composition and diversification of media content**

As was shown in the preceding analysis, the composition and diversification of media content necessary for free and independent democratic and public discourse is a field of tensions characterised by partly competing interests. The legislature and the courts have reacted differently to this situation and have created a legal framework for media content, while concurrently adhering to the principle of media freedom from the state. While private broadcasters and, particularly, state media authorities are aware of broadcasting's democratic function, economic considerations curb political relevant information programmes and news bulletins from private broadcasting operators and thus question the basic legal content requirements. The basic configuration of the German public service broadcasting and its content requirements engender a free and independent communicative space with diverse outlets for public opinion forming, although criticism exists regarding the composition of the

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<sup>156</sup> Ibid.

<sup>157</sup> See only the following cases: Federal Constitutional Court, decision of 26 February 2008, no. 1 BvR 1602/07; Federal Court of Justice, judgment of 26 October 2010, no. VI ZR 190/08.

<sup>158</sup> Gesetz- und Verordnungsblatt (GV. NRW) of 7 April 2009, p 185-222.

<sup>159</sup> See chapter 3.2 "Dynamics of media policy making and implementation: the advent of the Internet based services and its influence on political and legal debates."

<sup>160</sup> See for instance the commissioned expert opinion: Dewenter and Haucap, 2009: 93ff.

<sup>161</sup> The studies differ slightly: Initiative D21, 2011: 14; Media Perspektiven. Basisdaten, 2010: 84.

governing bodies and partly regarding the quality of the content. Here, state influence has had to be curtailed within single stations. However, state interests also challenge free and independent media in their role as a watchdog of democracy, as journalistic cooperation with informants and the publication of confidential information show. While the legislature still seems reluctant to adopt clearer regulation to protect journalists from unwarranted criminal prosecution, the Federal Constitutional Court has safeguarded journalists' position. In the field of privacy and personal rights, the media does not act completely freely, but with regard to justified public interest in information. Here, the ECtHR has refined the broad and press-friendly legal interpretation regarding photographs. Simultaneously, legal action with civil courts curbs what could well be necessary and justified coverage as injunctions imposed impede journalistic work.

## 5. The journalistic profession

### 5.1 Working conditions for journalists: the economic foundation of free and independent journalism

It is a simple truth that it is people who create intellectual content in the form of free and independent journalism and that they need to be paid *adequately* for this work. In the study 'Journalistic quality in times of economic crisis', conducted by Beck, Reineck and Schubert the authors made (2010: 68) a comparable statement: 'As editorial offices fill print products with intellectual content, it is a prerequisite to maintain them with sufficient personnel, in order to ensure quality in press outlets and magazines.'<sup>162</sup> Journalism as a backbone of a democratic press relies on financially sufficient framework conditions that ensure and provide the necessary working conditions for journalists. Of course, the understanding of sufficient financing may vary regarding the outlet involved and the editor's approach. A small and specialised online news service or political blog does not require the same budget as a full coverage television broadcasting or a nationwide press outlet. Furthermore, good quality or investigative journalism is determined not only by financial considerations, but also by the applicable legal framework (for example regarding protection of sources, freedom of information, criminal liability for journalists), education, and organisational working conditions (Schulzki-Haddouti, Bunjes and Geribert, 2009: 21ff.; Eichhoff, 2010: 189ff.). Nevertheless, to fulfil the requirements of a public watchdog, as is necessary in a democracy, journalists need to be able to think analytically and critically. The media also require the necessary staffing, adequate income and financial and social security for the personnel.

Several studies and conference publications (Beck, Reineck and Schubert, 2010; Lüneborg and Berghofer, 2010; Donsbach, et al., 2009; Meyen and Riesmeyer, 2009; Schröder and Schwanebeck, 2011; Weischenberg, Malik and Scholl, 2006)<sup>163</sup> exist which address these questions and their importance for the quality of journalism or the role of journalists in a democratic society. Not all relevant issues can be addressed here. It is also impossible to examine the working conditions of journalists without engaging in some sort of simplification. The economic situation of the Axel Springer AG as a highly viable entrepreneur differs significantly from a small publisher of a press outlet in North-Eastern Germany for instance.<sup>164</sup> Thus, the basic observations made below illustrate some general trends in Germany.

Firstly, the overall working conditions *currently* enable journalists to produce press, broadcasting, and online outlets relevant for societal and democratic discourses. The annual turnover of private broadcasting, the fees of the public service broadcaster, as well as the figures of the private press publishers testify to the financial background needed for sufficient working conditions.

Secondly, the editorial offices have to cope with more and more tasks but with a declining number of journalists (Lüneborg and Berghofer, 2010: 43-44; Blöbaum, et al., 2011: 58.) The journalists in charge of a print outlet or a broadcast have to analyse more and more information provided by news agencies and other online services. Public service broadcasters have restructured their stations and introduced online media departments. In addition to the radio and television skills, journalists in these editorial offices have had to learn how to produce online content as well.

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<sup>162</sup> Non-official translation. See also Pöttker, 2007: 19.

<sup>163</sup> See also the minutes of the public hearing of the Federal Parliaments Committee on Culture and Media of 23 February 2011, no. 17/31.

<sup>164</sup> See <http://www.qualitaet-und-vielfalt-sichern.de/>, accessed 2 November 2011.

Thirdly, editorial offices cannot afford more significant personnel cuts. The same point has been made in a study regarding the working conditions for journalists focusing on political issues in all media formats (Lüneborg and Berghofer, 2010: 43-44). For instance, the public service broadcasters have announced restructuring measures due to austerity obligations<sup>165</sup> and it will have to be seen whether the implementation will be strategic in such a way that synergy effects enhance the outlets or only serve to reduce the necessary local and regional networks of journalists. Furthermore, press publishers have reduced journalistic personnel or created news pools for various outlets (Beck, Reineck and Schubert, 2010: 149-167). While short-term benefits might occur or even allow these print outlets to continue their work, the use of news pools or merged editorial offices for different press outlets curtails media plurality, considered a property of quality journalism (Beck, Reineck and Schubert, 2010: 235-236). The involvement of investment companies in the print sector had also some repercussions on the editorial composition and austerity measures beyond any practical feasibility, as revenue requirements brought into question the sufficiency of working conditions for journalists (Lichtenstein, 2011).<sup>166</sup>

Fourthly, media companies can only produce their outlets with the help of freelance journalists. While full time employed journalists provide the backbone of the provision of journalism services, freelance journalists, including those engaged full-time, significantly complement their work. However, the financial situation of freelance journalists has been stagnating or deteriorating and thus, presumably, also their willingness to invest into time-consuming printed articles or other media coverage.<sup>167</sup> Freelance journalists' income is documented by the journalists' union DJV based on a survey of 2,187 participants in 2008.<sup>168</sup> According to the survey, the average net income (after tax and social security contributions) amounts to 1,600 euros.<sup>169</sup> However, the income groups are divided: 69 per cent of all freelance journalists earn less than 1,600 euros.<sup>170</sup>

Finally, since 2001 private print publishers of daily newspapers have faced a slow but steady decrease in sold copies and advertising revenue (Beck, Reineck and Schubert, 2010: 86-88; Keller, 2010: 47 and 90). While in 2010, 19.44 million copies of daily newspapers were sold daily,<sup>171</sup> the figures available for October 2011 testify a slight decline to 18.83 million copies.<sup>172</sup> The overall turnover complements the sale figures, and it allows us to draw some conclusions on publishers' financial situation. Due to the positive economic developments in 2011, the turnover of private publishers increased slightly to 8.52 billion euros.<sup>173</sup> Although revenues did not decline - they actually increased - the private publishers presume the market situation will worsen in the long run. The fiercely fought negotiations for a new collective wage agreement illustrate the publishers' stance, as they sought to reduce the income of new employees. The two journalists' unions, the German Journalists Union (the Deutsche Journalisten Union, hereafter referred to as the dju) and the German Journalists Association (the Deutscher Journalisten Verband, referred to as the DJV), as well as the

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<sup>165</sup> SWR, Press release of July 2, 2010, Boudgoust kündigt strategischen Sparkurs an.

<sup>166</sup> A differentiated analysis of the situation in the private broadcasting sector provide: Schulz, Kaserer and Trappel, 2008).

<sup>167</sup> The income situation deteriorated within the last 15 years. See only: Katharina Borchert (Director Spiegel.online), public hearing at the Federal Parliaments Committee on Culture and Media, Protocol no. 17/31 of 23 February 2011, p. 9.

<sup>168</sup> Deutscher Journalisten Verband, DJV Blätter, Arbeitsbedingungen freier Journalisten. Bericht zu einer Umfrage unter freien Journalisten, Ausgabe 02/2009, Einleitung.

<sup>169</sup> Ibid., p. 43.

<sup>170</sup> Ibid., p. 44.

<sup>171</sup> Bundesverband Deutscher Zeitungsverleger, Zeitungen 2010/2011, p. 398.

<sup>172</sup> BDZV, press release of 12 October 2011, Zur wirtschaftlichen Lage der Zeitungen Deutschland 2011, of 12 October 2011.

<sup>173</sup> Ibid.

employers association, the Federal Association of German Print Publishers (the Bundesverband Deutscher Zeitungsverleger, hereafter referred to as the BDZV) agreed in August 2011 to a new collective wage agreement. The agreement applies to almost 14,000 journalists in print media.<sup>174</sup> A dispute erupted over the income of newly employed journalists in the print and online sector. While the BDZV espoused the idea of a reformed agreement in which new employees should be paid less, the unions sought to defend the status quo to prevent a ‘two class wages’ model. The unions have succeeded so far, although the publishers still pursue this distinction.<sup>175</sup> These developments illustrate the overall assumptions regarding market conditions and the prognosis that the business model of a sole printed press product might not prevail in the future media landscape. However, credible new ideas for other successful business model do not exist at this stage.<sup>176</sup>

## 5.2 Safeguarding journalistic work and standards: education of journalists, unions, ethical and editorial standards

Different aspects are considered necessary to ensure independent and qualitative journalistic work. Among them are a sufficient education,<sup>177</sup> ethical and editorial standards, an editorial system of checking the information before publication, and a union system. Besides these aspects, a system of online forums to discuss and evaluate journalistic work may be helpful.

Premised on the democratic idea that journalism shall, among other things, monitor and where necessary point out misconduct in societal and state affairs, no formal criteria exist to be fulfilled before one can work or consider oneself a journalist. In practice, however, some structures have emerged and currently shape the training background of journalists. In general, journalists will obtain a university degree and undergo additional practical training in the media [*Volontariat*] before assuming a freelance or employed position in the media. Some universities<sup>178</sup> as well as private journalism schools<sup>179</sup> provide a tailored education for journalists. These studies comprise usually basic subjects in journalism, political science, ethics and philosophy, economics as well as legal aspects followed by a practical training and the option for further specialisation.<sup>180</sup> During the courses students can learn about journalism in political affairs. Drawing from the available literature (Fengler and Vestring, 2009), students can receive an overview of the practical effect of the political mechanism and how journalists and journalism assume a specific function in it. To be aware of possible manipulations or misleading information and to contextualise them is an important characteristic of politic journalism in political affairs. How to assess the source of information is, thus, an important professional technique, addressed in the courses available. Whether the time frame for investigative research or the daily work of a journalist in the capital Berlin allows for following these techniques is another question.<sup>181</sup> It has to be reiterated that although specific vocational training is not required to work as journalist, in practice this is

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<sup>174</sup> DJV, press release of 18 August 2011, Tageszeitungen. Journalistenstreiks waren erfolgreich.

<sup>175</sup> BDZV, press release of 18 August 2011, BDZV: Neuer Tarifvertrag bringt Planungssicherheit für Verlage.

<sup>176</sup> Wolfgang Blau (Chief Editor of Zeit.online), public hearing at the Federal Parliaments Committee on Culture and Media, Protocol no. 17/31 of 23 February 2011, p. 8.

<sup>177</sup> Federal Parliaments Committee on Culture and Media, Protocol no. 17/31, p. 10-11.

<sup>178</sup> Institut für Journalistik und Kommunikationswissenschaft, Universität Hamburg, <http://www.wiso.uni-hamburg.de/institute/ijk>, accessed 26 October 2011; Institut für Journalistik, TU Dortmund, <http://www.journalistik-dortmund.de/start.html>, accessed 26 October 2011.

<sup>179</sup> Deutsche Journalisten Schule [German Journalist School] <http://www.djs-online.de/>, accessed 26 October 2011; Henri-Nannen-Schule <http://www.journalistenschule.de/>, accessed 26 October 2011.

<sup>180</sup> See for instance: Institute for journalism of the Technical University of Dortmund: Studienverlaufsplan Studiengang Journalistik.

<sup>181</sup> See for instance the personal assessments by Frey, 2010; Meng, 2010.



very common. Thus, the education can provide the necessary basis for independent and critical journalism.

Journalists' unions seek to ensure the political and legal framework conditions that engender independent journalism. As mentioned above, in Germany, two unions represent the interests of journalists, the dju and the DJV. While 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 an independent union and professional organisation.<sup>182</sup> According to its self-presentation, dju fosters, among other things, the professional, social, and economic interests of its members, espouses media policies and contributes to the protection of the freedom of the press.<sup>183</sup> DJV fosters and pursues similar political and ethical aims.<sup>184</sup> Both organisations represent a large number of journalists working full time in the media, with DJV having 38,000 members<sup>185</sup> and the dju representing approximately another 20,000 persons.<sup>186</sup> Journalists are entitled to join the unions if they can submit a working contract or a tax document that evidence their income. They can also join as freelancers, if their main income results from journalistic work. However, as the interests of employed journalists and a freelancer differ, specific professional associations also exist for freelancers.<sup>187</sup>

Journalists' unions seek to safeguard professional standards and the legal as well as economic working conditions of journalists in different ways. The dju and the DJV are vested with the power to negotiate and sign collective wage agreements with the employer association BDZV and thus support the legal basis for a sufficient income. However, single private publishers of press products dispensed with their membership in the agreement in order to no longer be bound by collective agreements, which has weakened the unions' position. On the other hand, strikes organised by the unions as well as negotiations in August 2011 led to a newly adopted collective agreement.

Furthermore, both unions seek to influence the applicable legal framework conditions for journalists. These include for instance the protection of information sources due to the amendment of the Penal Code and legislation on data retention. The DJV's legal adviser presented the unions' position in a public hearing of the Federal Parliament's Legal Committee on the protection of journalists and their informants.<sup>188</sup> The DJV and the dju supported the constitutional complaint against the German legislation transposing the Data Retention Directive,<sup>189</sup> because of the purported impediments to communication with informants. The Federal Constitutional Court quashed the national legislation because of deficient precautions for data protection, but did not question the data retention in general.<sup>190</sup> The journalists' unions possess avenues to negotiate and influence the legal framework, although political circumstances sometimes curtail their influence. This can be seen in the tedious legislative procedure for better protection for journalists' informants.

Another important tool to safeguard journalistic work lies in the German Press Council. Organised as self-regulatory body, the private publishers' associations BDZV (newspapers) and VDZ (magazines), and the unions DJV and dju are part of the legal

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<sup>182</sup> According to its self-presentation: <http://www.djv.de/UEber-uns.17.0.html>, accessed 26 October 2011.

<sup>183</sup> [http://dju.verdi.de/ueber\\_die\\_dju/selbstdarstellung/aufgaben\\_und\\_ziele](http://dju.verdi.de/ueber_die_dju/selbstdarstellung/aufgaben_und_ziele), accessed 26 October 2011.

<sup>184</sup> Deutscher Journalisten-Verband, Grundsatzprogramm des Deutschen Journalisten-Verbands [Basic policy programme] (2009).

<sup>185</sup> <http://www.djv.de/UEber-uns.17.0.html>, accessed 28 July, 2010.

<sup>186</sup> <http://mmm.verdi.de/archiv/2011/01-02/kolumne-im-arbeitsprozess-vereint>, accessed 26 October 2011.

<sup>187</sup> Freischreiber, for instance. See <http://freischreiber.de/>, accessed 26 October 2011.

<sup>188</sup> Deutscher Bundestag, Rechtsausschuss, Protokoll no. 35 of 26 January 2011, p. 17.

<sup>189</sup> Directive 2006/24/EC, OJ of the EU, L 105 of 13 April 2006, p. 54.

<sup>190</sup> Federal Constitutional Court, judgment of 2 March 2010, no. 1 BvR 256/08, NJW 2010, p. 833.

association which maintain the German Press Council.<sup>191</sup> They dispatch union and publisher representatives to the association and provide financial means to cover its expenses. The system is based on the self-regulatory journalistic principles as enshrined in the Press Code. The Code provides guidelines for journalistic work including basic principles for investigative research, delineation of editorial text and advertising, data protection, and coverage of violence and disasters. The respect for the truth and the human dignity, the profound research, and the respect for privacy are core values of the Press Council. Those principles aim to ensure a basic quality for journalistic work and seek to instil public confidence in the media. In 2010, the German Press Council decided on 812 complaints of which 223 found a breach of the Press Code standards (Deutscher Presserat, 2011: 197 and 199). The Press Council's Statute requests press publishers and journalistic online content providers to sign the self-commitment to the Press Code; here, the unions as well as the publisher associations assume the function of requesting their members to do so.<sup>192</sup>

In the 1960s and 1970s, journalists, editors and private publishers discussed the need for editorial standards. Essentially, editors and journalists sought to gain a position independent of the owner to work freely and independently and be heard in the process of senior position appointments. On the other side, media owners or the management of a media company sought to uphold their influence. It was not possible to find a compromise and the responsible legislatures retreated to adopt statutory legal measures for editorial standards promoting inner press freedom. The legislature left it to the publishers themselves to decide whether they wanted to adopt such measures. This is in line with the usual liberal approach of the legislature in allowing the private press a broad margin. In practice, separation of editorial offices and newsrooms from publishers or management generally exists,<sup>193</sup> although occasional attempts to influence the editorial work occur. In 2006, the debate resurfaced as the former owner of the *Berliner Zeitung* sought to implement a rigid austerity programme in order to increase revenue (Lichtenstein, 2011: 217-218). In addition, the then double function of director (for the publisher) and chief editor in one person triggered protests among the staff. This led to the adoption of editorial standards in 2006 by the publisher's executive board, chief editor and editorial committee in order to ensure a high quality of journalistic work whilst seeking to curtail the influence of the owner on the staff (Beck, Reineck and Schubert, 2010: 196). Public service broadcasting stations are obliged to adopt editorial standards, when the legislation provides for such an obligation. For instance, the West German Broadcasting Act (*WDR-Gesetz*) requires that the Director-General and the representative body of the editors adopt in consent editorial standards.<sup>194</sup>

It is commonly accepted that journalism in a democracy should address all subjects relevant to society. This is the reason why the ECtHR, for instance, often referred to the press as a watchdog.<sup>195</sup> In the complex field of daily issues, however, it is not always easy to discern in the production of news what might be relevant or not and what should be placed on page one. Furthermore, the quality of an article,<sup>196</sup> an online blog, or a broadcast can vary and thus in turn influence perception of the event or political development being covered. Democratic discourse through high quality media outlets is supported by the above-mentioned aspects of education, practical training, journalistic standards and broadcasters' programme guidelines<sup>197</sup> as well as reflection on and revision of articles within editorial offices by editors and colleagues (Lüneborg and Berghofer, 2010: 32-33). Some associations and projects merit

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<sup>191</sup> Art. 2 para. 1 Statute Legal Association of the German Press Council.

<sup>192</sup> Art. 10 Statute Legal Association of the German Press Council.

<sup>193</sup> Based on a study by Marcinkowski and Donk, 2011: 168.

<sup>194</sup> Art. 31 West-German-Broadcasting Act.

<sup>195</sup> ECtHR, *Goodwin v. UK*, judgment of 27 March 1996, no. 17488/90, para. 39.

<sup>196</sup> On the question of how to ascertain quality journalism: Beck, Reineck and Schubert, 2010: 16f.

<sup>197</sup> An overview of various mechanisms provides Eberwein, 2011.

particular attention in this regard: ‘netzwerk recherche’ [research network] is an association of journalists which aims to promote investigative journalism. It organises conferences, publishes handbooks on journalistic techniques, and provides research grants.<sup>198</sup> The ‘Initiative Nachrichtenaufklärung’ [News Elucidation Initiative] was established in 1997 to address important issues that are not adequately presented or are not presented at all in the media.<sup>199</sup> Backed by Bonn University and Dortmund University, it covers ten subjects annually which are not covered by the media but warrant attention.<sup>200</sup> In 2011, the leading subject was the dearth of democratic control over the Federal Agency of Financial Market Stabilisation which had been entitled to govern up to 480 billion euros (German Financial Market Stabilisation Fund) and can now govern up to 100 billion euros (Restructuring Fund), according to the Initiative.<sup>201</sup> Finally, the ‘Initiative Qualität’ merits attention.<sup>202</sup> Professional associations, private publishers, public service broadcasters, media academies, journalist unions and self-regulatory organs of print media and private broadcasting have established and maintained the ‘Initiative Qualität’ network. With workshops, continuous dialogue among the members of the network, as well as additional practical training sessions for professionals, the initiative seeks to uphold a high quality of journalistic work.

### **5.3 Digital media environment: influence of the Internet on journalism**

The Internet influences journalism and the journalistic work profoundly. During the expert hearing in the Federal Parliament’s Committee on Culture and Media under the topic ‘The Future of Quality Journalism’, the advent of the Internet and its attendant repercussions on the media were described as a profound change.<sup>203</sup> The Internet influences journalists’ daily work, especially those working in the field of political or news journalism. Online research tools now complement traditional research work. While traditional tools such as gathering data by news agencies, interviews, private investigations and informants continue to be used, journalists now also rely on online tools. They use general search engines, news search engines, Wikipedia, blogs and social media in their research (Lüneborg and Berghofer, 2010: 27; Machill, Beiler and Zenker, 2008: 108). Search engines and news search engines account respectively for 91 and 69 per cent of online research activities according to a study on political journalism (Lüneborg and Berghofer, 2010: 27).

Almost all traditional media outlets have now established online portals for their outlets. Originally a copy of the printed product, online formats have developed into distinct outlets in their own right. Journalists had to undergo additional practical training to learn the specific tools relevant for online publications and media companies as well as public service broadcasters started to allocate budget specifically for their online services. Other media outlets sprang up to provide online content without being backed by traditional media houses. They now also have the power to influence political debate or serve as forums for opinion forming.<sup>204</sup>

The latter development denotes the shift the Internet initiated: practically every user can become a publisher or journalist. This civic journalism in its various forms is viewed with some apprehension: while some see it as helpful and make use of its advantages, for other it

<sup>198</sup> <http://www.netzwerkrecherche.de/>, accessed 27 October 2011.

<sup>199</sup> <http://www.derblindefleck.de/index.php/uber-uns/>, accessed 27 October 2011.

<sup>200</sup> Statute of the Initiative Nachrichtenaufklärung, in: Pöttker and Schulzki-Haddouti, 2007: 173.

<sup>201</sup> <http://www.derblindefleck.de/index.php/top-themen/top-themen-2010-und-2011/>, accessed 27 October 2011. See also <http://www.fmsa.de/de/fmsa/soffin/finanzierung/>, accessed 14 December 2011.

<sup>202</sup> <http://www.initiative-qualitaet.de/>, accessed 27 October 2011.

<sup>203</sup> Deutscher Bundestag, Ausschuss für Kultur und Medien, 31. Sitzung, Protokoll Nr. 17/31 of 23 February 2011, p. 19.

<sup>204</sup> See for instance [www.carta.info](http://www.carta.info).

precipitates the decrease of journalistic quality. Aspects of civic journalism can also be seen in online platforms that work on the basis of the notion of crowd wisdom. The revelations of the former Minister's of Defence plagiarism in his PhD is evidence that a large group within the Internet can sufficiently complement the work of traditional journalists. In this case, an online forum was established to publically analyse the thesis and compare it with original sources. Here, the events on the Internet combined two powerful characteristics: the Internet brought together the amount of persons necessary to do the work within a short time and the text remained present online and did not simply disappear after a few days.

Furthermore, the Internet created and requires new types of journalistic fields such as data journalism and online journalism with distinct features. Data journalism requires profound analysis of raw data material, such as the cables on Wikileaks, or material from public authorities, that in themselves do not disclose any immediate meaning to the casual reader. Online journalists are specially trained to deal with the distinct technical aspects and advantages of online content.

## 6. Media literacy and transparency requirements

### 6.1 The notion of media literacy

The MEDIADDEM project seeks to explore media literacy and transparency requirements in the countries under study by focusing on the use of media in a democratic society. This includes citizens' media education in order to make informed choices about the media services to choose, and to access and evaluate the quality of the information they receive. The societal competency to understand the way the media functions, to engage in critical discourse about the media as well as to create one's own media content lies at the centre of the projects' interest.

This concept resembles the societal orientated notion prevalent especially in the United States of America<sup>205</sup> and in the European Commission's publications.<sup>206</sup> The latter ascribes to the notion of media literacy, for instance the 'ability to access the media, to understand and critically evaluate different aspects of the media and media content and to create communications in a variety of contexts.'

This focused understanding of media literacy differs from the notions employed in German debates and German literature. Here, media competency, as it is named, stems from the concept of media education. Originally, media education was seen as a tool to protect media users, especially children, from the negative influence of media consumption (Süss, Lampert and Wijnen, 2010: 106). Media competency then came to be seen as the technical knowledge to use media for one's own media productions, which has become now very practical with websites such as Youtube and Facebook. The discussion on media competency was further instigated by a more comprehensive concept presented by D. Baacke (1997: 98-99) comprising of the following four aspects: firstly the ability to engage in analytical, reflexive and ethical media criticism, secondly, knowledge of the production process for media content (i.e. the production of a newspaper, basic legal knowledge of the broadcasting system), thirdly, the abilities to use media (such as computer literacy) and, finally the knowledge of how to utilise technology to create media content. Media competency should enable the user to handle new media information avenues independently and reflectively (Baacke 1997: 98). However, understanding in academic literature and thus in practice concerning the notion and the dimension of media competency differs.<sup>207</sup> The Commission on Internet and Society's working group on media competency in the Federal Parliament employs, for example, a definition of media competency based on the understanding of the British regulator OFCOM to analyse and gauge existing tools in Germany.<sup>208</sup> OFCOM's concept comprises three elements: the ability to use, understand, and create media and communications (OFCOM, 2009: 3).<sup>209</sup> This is mirrored in the European Commission's publications. This understanding of media education and media literacy, reflected in the debates, has presumably influenced practical work and projects in Germany.

For the purpose of this chapter, the following distinctions shall be drawn and subjects addressed to depict an overview of the situation: Firstly, the strategy: what is the aim of a

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<sup>205</sup> Differentiated Aufderheide, 1993: Abstract, 10 and 26. See also Süss, Lampert and Wijnen, 2010: 108.

<sup>206</sup> The European Commission, Commission Recommendation on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society C(2009) 6464 of 20 August 2009, Introduction, para. 11.

<sup>207</sup> Until 1999 more than one hundred notions could be ascertained. Süss, Lampert and Wijnen, 2010: 105. See also the models of Groeben, 2002: 11-22; Jarren and Wassmer, 2009: 46-51.

<sup>208</sup> Deutscher Bundestag, Zweiter Zwischenbericht der Enquete-Kommission 'Internet und digitale Gesellschaft', Drs. 17/7286 of 21 October 2011, p. 7.

<sup>209</sup> See also Süss, Lampert and Wijnen, 2010: 113 for further information.

programme, a project and the backing legal foundation? Secondly, the implementation: what can be said about the landscape and the projects? Finally, the evaluation: what are the results?

## 6.2 Strategies

Media competency follows a protective approach. This is based on the notion that children, youth, and adults in general (media users) shall be shielded from negative influence. Concrete measures vary, because of the distinct needs of children, youth and adults. Media competency focuses on the empowerment of media users to act responsibly when confronted with harmful content, be it violence, pornography or phishing attacks for bank account access. Secondly, media competency strategies in Germany imply a belief in the need to educate media users regarding the special technical knowledge necessary for media consumption and media activities. While reading, mathematics and writing belong to the traditional areas of knowledge and skill, a fourth area for the online world is now also considered an important area. This implies a range of abilities from performing basic search functions in the Internet up to interactive communication. Media competency seeks to temper the potential threat of a division in the society between those able to create and use online media and those without the necessary skills (Baacke, 1997: 96-97). Thirdly, media competency seeks to engender and facilitate societal and democratic participation.<sup>210</sup> Although media competency is understood as the technique of critical and reflective choice and an informed perception of media, transparency requirements are not generally part of it. Although the Commission on Concentration in the Media regularly publishes very comprehensive concentration reports on media ownership and media concentration,<sup>211</sup> the objective of this reporting is different. With its useful information, it informs media professionals about the current situation but does not pursue an overall transparency approach to describing the media landscape in Germany.

## 6.3 Implementation: the media competency landscape

The state legislature provides in its state media laws basic provisions on media education and media competency and thus entitles the state media authorities to act in this field. The State Media Law of North-Rhine Westphalia stipulates that media competency projects shall empower media users to handle electronic media in a self-determined, responsible and creative way.<sup>212</sup> Other state media laws provide comparable regulations.<sup>213</sup> The state media authorities are funded, among other resources, by the public service broadcasting fees of which a part is used for media competency projects. This renders state media authorities important actors in this field evidenced in the multitude of co-operative projects (Arbeitsgemeinschaft der Landesmedienanstalten, 2011a: 304-322). In addition, a broad array of institutions and projects promote media competency, including schools, as media competency can be part of the curriculum, the Federal Government's Ministry for Family,

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<sup>210</sup> See for the strategies for instance Leitbilder und Themenschwerpunkte zur Förderung von Medienkompetenz 2009/2010, Landesanstalt für Medien Nordrhein-Westfalen; <http://www.lfm-nrw.de/medienkompetenz/aufgabeleitbilder-schwerpunkte/appelhoff.html>, accessed 28 October 2011; Deutscher Bundestag, Zweiter Zwischenbericht der Enquete-Kommission 'Internet und digitale Gesellschaft', Drs. 17/7286 of 21 October 2011, p. 8.

<sup>211</sup> Kommission zur Ermittlung der Konzentration im Medienbereich, 2011.

<sup>212</sup> Art. 39 State Media Law North-Rhine Westphalia.

<sup>213</sup> Art. 31 State Media Law Rhineland Palatinate; Art. 11 no. 15 Bavarian State Media Law; Art. 38 para. 2 no. 6 Interstate Treaty on Media Law in Hamburg and Schleswig-Holstein.

Elderly People, Women, and Youth, the Federal Centre for Political Education as well as private initiatives and projects (Böger, 2010).<sup>214</sup>

The projects and programmes focus mainly on technical competencies, especially online techniques. This implies data protection measurements aiming at handling the risks raised when using social network platforms. Furthermore, projects and programmes for children and youth protection play a significant role. The necessary knowledge of linkages between political or economical interests and media content and the understanding of new media services in the Internet for democratic participation, however, seems not to be prevalent (Schiffer, 2011: 32).

## **6.4 Evaluation**

An evaluation of media competency projects, whether they be in schools or as civil society projects, faces several difficulties. First of all, what constitutes media competencies is not clearly defined. Secondly, media competency programmes address a large variety of audiences from preschool children to pensioners and teach technical skills as well as critical awareness. Thus, techniques had to be gauged, the critical appraisal of media content analysed and conclusions drawn with regard to media behaviour. A model of the Zurich Pedagogic University illustrates the sophisticated and differentiated structure underlying media competency programmes comprising of four levels of competence in each area of (creating media, communicating via media, and critical reflection of media content) (Moser, 2010: 246). Presumably the complex nature of media competency has led to little scientific research of media competency's results in a way which evaluates the effects of programmes (Süss, Lampert and Wijnen, 2010: 113). One example of thorough research is provided by the Bielefeld University in its study on media behaviour in youth (Treumann, et al., 2007).

In short, German media competency initiatives focus on the protection of media users (such as which website to visit) and on technical skills. Although the democratic function of media competency is acknowledged, awareness-building as to the pressure points that might impact on the media and affect its workings does not prevail.

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<sup>214</sup> Deutscher Bundestag, Zweiter Zwischenbericht der Enquete-Kommission 'Internet und digitale Gesellschaft', Drs. 17/7286 of 21 October 2011, p. 6. A full list of current projects in North-Rhine Westphalia can be accessed at <http://www.medienkompetenzportal-nrw.de/?id=884>, accessed 27 October 2011.

## 7. Conclusion

Formulation and implementation of media policy supporting media independence and plurality necessary for individual and societal democratic communicative processes lay at the core of this case study report on Germany. The analysis showed that media policy processes and the media landscape *currently* provide the necessary outlets, press, broadcasting and online, to engender public debate and to allow a plurality of opinions to be shared. Accounting for this are the regulatory mechanisms in use - comprising of statutory law and co-regulatory and self-regulatory instruments which enable the media landscape to function and curtail undue influence of state and economic interests -, a viable market, the interest of the readers, viewers, and Internet users, as well as a functioning judiciary. However, media policy processes are partly disputed, the results contested, and unwarranted influence is sometimes exerted on legislatures, media operators and journalists. The debates on public service broadcasters' online activities, political disputes about concentration law and its implementation in anticipated cross-media mergers, undue state influence in some public service broadcaster governing bodies, the debates on new collective wage agreements, and concentration developments in the press all testify to this.

The advent of the Internet brought new possibilities for free and independent media, but simultaneously challenged the traditional media to adapt to a new technical means. Here, some positive developments could be ascertained regarding the perception of Internet-based media services. The Federal Parliament initiated a debate on a broad spectrum of issues relating to the Internet, establishing a Commission on Internet and Digital Society.<sup>215</sup> Politicians as well as experts with legal, technical, and civil society backgrounds discussed and sought to find a common denominator on issues concerning Internet neutrality, data protection, intellectual property law and media competency.<sup>216</sup> In addition, the Federal Parliament's Committee on Culture and Media organised an expert hearing on the future of quality journalism with media experts, focusing on the viability and quality of Internet-based media outlets.<sup>217</sup>

Some crucial aspects merit attention as they may impinge on the quality of the information provided by media outlets or precipitate structural changes detrimental to the media's democratic function. Media policy was once national, and, in the case of Germany, clearly defined by state and federal actors. The state governments could decide on broadcasting issues, while the federal government addressed competition law, general law, and the technical questions regarding telecommunications. The pathways of decision-making were well known among the actors and the Federal Constitutional Court remained a last resort option in the case of insurmountable political questions. However, with the entrance of new supranational actors, such as the European Union, and new technological developments, such as the Internet, media regulation (formulation and implementation) in Germany comprises of a multi-level system. European Union law influences legislation relevant to media in many areas. For example, through the state aid procedure, it provides an influential lever that includes the possibility to change the basic structure of the national public service broadcasting. Furthermore, the Internet has brought new actors, such as the hard to define Internet community, and influential content providers, such as the Google company. As a result, applicable media regulation stems from the state, and national, supranational, and international governing actors, while relevant processes are influenced, triggered or dispensed

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<sup>215</sup> Deutscher Bundestag, Einsetzung einer Enquete-Kommission "Internet und digitale Gesellschaft", Drs. 17/950 of 3 March 2010.

<sup>216</sup> See Deutscher Bundestag, Interim Report of the Commission 'Internet and digital society', Drs. 17/5625 of 19 April 2011.

<sup>217</sup> Deutscher Bundestag, Ausschuss für Kultur und Medien, 31. Sitzung, Protokoll Nr. 17/31 of 23 February 2011.



by private companies, lobby organisations, and civil society movements. In addition, the traditional distinction of the deciding state governments on the one side and the passive audience on the other, which prevailed in state broadcasting legislative procedures, seems to have blurred. As a result, political procedures have become complex as media law legislation encompasses a multitude of actors on different levels and in different forums. It can be observed that an exclusive media policy in which once-established competences are protected predominates. The complexity could, however, also allow the opening of the process of an interrelated media policy and serve new developments. While concentration processes at the local or regional level could be addressed more effectively by means of state legislation, concentration processes at the European level might be better taken care of at the European level. What sounds paradoxical might be very practical: state and national, European, and international regulation and standards do not have to exclude each other, but can act in a complementary way where necessary to form the legal system. However, this requires a different perception of national legislation interacting in a multi-level field of negotiation processes.

As it was explained in this report, economic and cultural interests might contradict each other in the policy forming process and in media law's implementation. As media outlets need sufficient financial foundations to operate, economic interests can impede the free and independent media function in providing the content necessary for democratic discourse. It is cheaper to repeat television series than to produce time-consuming documentaries, and financial means are needed to fund investigative press coverage. However, individuals need a communicative space in which ideas can be shared freely in order to be able to decide on individual and also societal issues in a democratic procedure. It seems that media policy must always balance both shaping forces anew. The newly technical developments and the multitude of actors do not mitigate the challenge, although the Basic Law provides guidelines as it guarantees in Article 5 free and independent mass communication as one of our cultural foundations. At the national level, the conflicts of the private publishers with the public service broadcasters, which prevailed in the debates since the public service broadcaster's interception, were transferred to the online activities of public service broadcasters. At the European level for instance, the Council of Europe stresses significantly the role of media in democracy, while European Union state aid regulation and relevant procedures focus more on economic issues. Here, it seems advisable to reflect on the basic democratic function of the media. Article 10 of the European Convention on Human Rights and Article 11 of the European Union Fundamental Rights Charter could pave the way.<sup>218</sup>

While political developments change the decision-making processes, technical developments have also had fundamental repercussions. In essence, all media outlets have come together in one converged platform, the Internet-based receiver, be it a tablet computer, a PC, or a smart phone. The distinction of media outlets has blurred. A short on demand video published by a newspaper does not differ from a short on demand video by a public service broadcaster. However, the sole technical perception of the media obscures the diverse function of different outlets. The law has ascribed private broadcasters a different remit and role from public service broadcasting, as was described in this report. The figures published by state media authorities on politically relevant information aired by private and public service programmes testify to this. Press outlets online, news blogs and political information websites or blogs assume another function in societal discourses, because they can publish comprehensive articles, background information, and complementary resources, like leaked original data. They can articulate a more political tone, as a tendency, within the frame of journalistic standards. Political blogs or other political information websites can dedicate

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<sup>218</sup> As for the proposal to introduce the legal concept of public service broadcasting into Article 11 EU-Fundamental Rights Charter see: Stock, 2002: 583.

themselves to distinct subjects and thus assume their own function in societal discourse. However, in the end, it is for the society and the politicians responsible for the media to decide what kind of online media landscape is preferable. The main question will remain: how shall the economical interests be balanced with the societal and democratic need for a free and independent communicative space enabling individual and collective opinion forming in press, broadcasting, and online outlets?

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## **9. List of interviews**

### **Katharina Arend**

Legal Adviser of Berliner Verlag

### **Professor Dr. Dieter Dörr**

Chair of Public Law, International and European Law, Media Law, Mainz University,  
Director of the Mainz Media Institute

### **Professor Dr. Carl-Eugen Eberle**

Director of Legal Affairs

German Television ZDF

### **State Secretary for Federal Affairs, Europe and the Media Marc Jan Eumann**

State Government North-Rhine Westphalia

### **Thomas Fuchs**

Chairman, Conference of Directors of the State Media Authorities and Director of the Media  
Authority Hamburg/Schleswig-Holstein

### **Professor Dr. Dr. h.c. mult. Dieter Grimm, LL.M. (Harvard)**

Humboldt-Universität zu Berlin and Wissenschaftskolleg zu Berlin, Institute for Advanced  
Study, Former Justice of the Federal Constitutional Court

### **Bernhard Hermann**

Radio Broadcasting Director, SWR

### **Professor Dr. Kurt Imhof**

IPMZ - Institute of Mass Communication and Media Research

University of Zurich

### **Dr. Claudia Lampert**

Researcher

Hans-Bredow-Institute for Media Research Hamburg

### **Anke Lehmann**

Head of Political Communication/PR

Association of Commercial Broadcasters and Audiovisual Services (VPRT)

### **Bernd Malzanini**

Executive Director

Commission on Concentration in the Media (KEK)

### **Albrecht Müller**

Author, publisher of the political website [www.Nachdenkseiten.de](http://www.Nachdenkseiten.de)

### **Benno H. Pöppelmann**

Legal Adviser

German Journalists' Association (DJV)

**Diemut Roether**

Editor, Head of Unit

epd-medien

**Tabea Rößner**

Member of the German Federal Parliament

Media Policy Speaker of Bündnis 90/Die Grünen

**Parliamentary State Secretary Dr. Max Stadler**

German Federal Ministry of Justice

**Lutz Tillmanns**

Executive Director

German Press Council

**Professor Dr. Gerhard Vowe**

Communication and Media Studies, University of Düsseldorf

**Gregor Wichert**

Deputy Director Legal Affairs

German Television ZDF

Six more interviews were held for this report with Private and Public Service Broadcasters (including Broadcasting Council), press and media research institutes.

**10. Discussion groups**

**The Internet: Between cultural value and economic good. An uncharted legal terrain or do we need a differentiated concept of regulation?**

Workshop organised by the Friedrich-Ebert-Stiftung, the Law Faculty of the Bielefeld University and the EU-funded MEDIADEM project, 22-23 September 2011 in Berlin

(<http://www.mediadem.eliamep.gr/workshop-on-%E2%80%98the-internet-between-cultural-value-and-economic-good-an-uncharted-legal-terrain-or-do-we-need-a-differentiated-concept-of-regulation%E2%80%99/>)