

NEW GERMAN CRITIQUE



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Reviewed work(s):

Source: *New German Critique*, No. 78, Special Issue on German Media Studies (Autumn, 1999), pp. 23-52

Published by: [New German Critique](#)

Stable URL: <http://www.jstor.org/stable/488452>

Accessed: 15/03/2013 14:17

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*Germany's "Dual" Broadcasting System: Recipe For Pluralism In The Age of Multi-Channel Broadcasting?**

Peter Humphreys

The last decade and a half have seen a paradigmatic transformation of German broadcasting from the traditional public-service monopoly to a dual public/private system. The introduction of the "new media," cable and satellite, part of the wider communications revolution in the advanced industrial world,¹ greatly expanded the opportunities to launch new program services, undermining thereby the "scarcity of frequency" argument for continued public broadcasting monopoly. Hitherto European thinking had held that terrestrial frequencies were insufficiently available for a truly competitive and pluralistic broadcasting market. The risk of overcrowding the airwaves had been a further, purely technical rationale for public monopoly. Satellite television and its re-transmission in multi-channel cable systems abridged national and — in Germany — state [*Länder*] broadcasting sovereignties. In Germany, as elsewhere, this state of affairs necessitated a re-regulation of broadcasting. However, it undermined regulatory effectiveness and encouraged an element of

* This article draws on research into media concentration and its regulation conducted by the author at Manchester University between 1996 (January) and 1998 (December) and financed by the British Economic and Social Research Council under its Media Economics and Media Culture research programme (Grant No. L 12625109).

1. This communications revolution is ongoing. Currently digital "platforms" are being launched in western Europe. Digital broadcasting multiplies the number of possible channels even more than cable and satellite have already done.

competitive deregulation as the states competed to attract (or retain) media investment.

In Germany the process of introducing private commercial broadcasting was a matter of considerable political conflict and public debate. Many feared its negative impact on radio and television. Public-service broadcasting had rationales underpinning it other than simply the argument concerning scarcity of frequencies. There had long existed a consensus that broadcasting had public goods characteristics. Moreover, in Germany broadcasting was regarded as more than a medium: the constitutional court saw it as a vital "factor" for the functioning of democracy, society and culture. Because of this function, the public-service broadcasters had been constrained universally to provide a comprehensive, diverse, and balanced range of programming that catered to a wide range of citizens' needs. Although the public-service broadcasters supplemented their license fee income with limited advertising, without commercial competitors they were free from the pressure to provide a service geared to maximize the audiences that could be delivered to advertisers. The public broadcasters' explicit remit was to deliver a quality service providing more than mainly mass-entertainment. Moreover, this public-service paradigm had allowed for a "separation of media powers" [*publizistische Gewaltenteilung*] between a private commercial press that was accountable to the market (and mostly to those with market power) and the public-service broadcasters which were accountable to the citizenry (through their regulatory structures — see below). Therefore, among the benefits of public-service broadcasting was the fact that it counterbalanced the concentration of private press power in relatively few corporate hands and thereby promoted pluralism in the mass media system at large.²

The accountability mechanisms for broadcasting — in place in West Germany since the early post-war years and extended to the former East Germany since 1990 — marked German public-service broadcasting as a distinctive model. For obvious historical reasons, it was more self-consciously democratic and pluralistic than many other systems in western Europe. The principal democratic/pluralist feature of the German regulatory system was the key role played by "broadcasting councils" [*Rundfunkräte*] within the individual regional broadcasting corporations

2. On press concentration see the regular reports by Walter Schütz and Horst Röper in the journal *Media Perspektiven*.

and the television council of the ZDF.³ These broadcasting councils each contained varying numbers of representatives from “socially significant groups” such as cultural bodies, churches, employers associations, trade unions, and so on, along with political representatives. This “internal control” [*Binnenkontrolle*] assured that the channels were “internally pluralistic” [*Binnenpluralismus*].

Germany’s paradigmatic transformation of broadcasting structures over the last decade was part of a Europe-wide trend toward the abolition of the traditional public-service broadcasting monopoly and the opening of the regulatory barriers to private commercial entrants. In France, the country’s leading public-service broadcasting company was even privatized. In Italy, the commercialization of broadcasting has been described as a “wild deregulation.” In Germany, by contrast, the abolition of the public service monopoly was counterbalanced by unmistakable re-regulatory features.⁴ The federal constitutional court ruled in 1986 that the constitutionality of private commercial broadcasting depended on there being a continued central role for the public-service broadcasters and a guarantee that the latter’s technical, organizational, and financial requirements would be met [*Bestands- und Entwicklungsgarantie*]. Successive rulings of the court confirmed and developed this guarantee. Further, the new commercial broadcasters remained subject to a “relatively dense regulatory code of conduct.”⁵ The commercial broadcasters were franchised and supervised by a new tier of state regulatory authorities [*Landesmedienanstalten*], which supplied public accountability. They had pluralist boards composed of representatives of the socially significant groups. In this respect they appeared to be modelled on the above-

3. There were nine of these corporations in West Germany. Unification with the former East Germany in 1990 brought the number to eleven. However, in 1997 two of the south German corporations merged, leaving a total of ten. Cooperating together in the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (ARD), they provided the First German TV channel (generally referred to simply as “ARD”). The second channel was provided by *Zweites Deutsches Fernsehen* (ZDF). The ARD corporations provided their own regional channels, the “Third Channel(s).”

4. Peter Humphreys, “Political Structures and Broadcasting Marketisation: A Comparison of Britain and West Germany,” *The Market and the State: Studies in Interdependence*, eds. Michael Moran and Maurice Wright (Houndmills, Basingstoke: Macmillan, 1991) 200-18; and Humphreys, *Mass Media and Media Policy in Western Europe* (Manchester: Manchester UP, 1996).

5. Silke Ruck, “Broadcasting Law in Germany,” *European Journal of Communication* 7.2 (June 1992): 219-39. This is a special issue on Media and the Changing Landscape of Western Europe edited by Wolfgang Hoffmann-Riem.

mentioned public-service broadcasting councils. Their principal tasks were licensing and program supervision; their key purpose was to ensure that private broadcasting was sufficiently pluralistic, especially with regard to balance and diversity of opinion although this might now be achieved across a range of program services ("external pluralism").

However, the principle of public separation of power has been relinquished. As will be seen, Germany is conspicuously lax about cross-media ownership. The main investors in commercial broadcasting have been press and other media companies, notably a few giant ones. Moreover, Germany has not escaped a Europe-wide crisis of the effectiveness of regulation. To a significant degree, this has resulted from the fragmentation of regulatory jurisdictions between the states in the context of transfrontier satellite broadcasting,⁶ and from the intense competition between the states to attract (or retain) media investment. Inter-state competition for media investment [*Standortwettbewerb*] appears to have impeded the pursuit of more effective regulation.⁷

The Forces Seeking Deregulation

Apart from the technological factor, there was also an ideological factor for the radical reform of broadcasting structures. The 1980s was a decade during which the doctrine of the free market was embraced by a number of west European governments, albeit with varying degrees of enthusiasm. In broadcasting policy, this inspired an energetic attack on the public-service broadcasting monopoly. The new received wisdom was that allegedly paternalistic and bureaucratic structures and practices of broadcasting should give way to new ones providing greater "consumer sovereignty." The CDU/CSU were also keen to counterbalance "red broadcasting" [*Rotfunk*], in other words broadcasting allegedly biased toward their political rivals, the Social Democratic party (SPD). *Rotfunk* had, in their view, been featured too much in the media output of the public broadcasters.⁸

The interests of certain influential economic lobbies reinforced ideological and political motives. In Germany, as elsewhere in western Europe, a powerful coalition of business interests drove policy during the 1980s in a deregulatory, marketizing direction. The consumer electronics

6. Together with re-transmission by cable systems.

7. *Standortpolitik* is "locational policy" in economics.

8. Humphreys, *Media and Media Policy in Germany: The Press and Broadcasting Since 1945* (Oxford and Providence: Berg, 1994) 202-03.

industry, the cable and satellite television lobby, the telecommunications industry, the advertizing industry, and German press groups keen to diversify in the media field, all exerted pressure for the opening up of commercial broadcasting opportunities. The new media, overcoming the technical rationale for public monopoly, raised their hopes that commercial broadcasting would be permitted. However, the incumbency of a SPD-led federal government thwarted their plans during the 1970s. In 1982 a change of national government to a CDU/CSU-led coalition suddenly presented a new possibility for the realization of their goals.⁹

***Federal Inroads into Broadcasting Policy;
The Bundespost Drives Policy in the 1980s***

The broadcasting revolution in Germany did not really get going until the CDU/CSU came to power in Bonn in 1982.¹⁰ Although Germany's federal order made broadcasting part of the "cultural sovereignty" [*Kulturhoheit*] of the states, the change of power to a CDU/CSU/FDP federal government mattered greatly. The SPD, which had been continuously in power from 1969-82, had been hostile to private commercial broadcasting and, mainly for this reason, unenthusiastic about introducing cable television on a mass basis. Since telecommunications was a federal jurisdiction the SPD had been able to use its incumbency of the federal Bundespost ministry to impose what the CDU/CSU called a "cable blockade" (although the SPD did agree to a limited number of experimental cable television pilot projects). However, with the change of power in Bonn to the CDU/CSU/FDP coalition control over the post office passed to CDU minister Christian Schwarz-Schilling, who in line with his party's media policy, was highly enthusiastic about the new media and the commercial opportunities they opened up.

From 1983 to 1985 the Bundespost poured one billion DM per annum into an ambitious national cable infrastructural program; from 1986, the Bundespost increased its investment to 1.5 billion DM per annum. The

9. See Hans Kleinsteuber, ed., *Medien: Thema Kabelfernsehen* (Berlin: Wissenschaftsverlag Volker Spiess, 1980); Axel Zerdick, "Ökonomische Interessen und Entwicklungslinien bei der Durchsetzung neuer Informations- und Kommunikationstechniken," *Rundfunk und Fernsehen* 30.4 (1982): 478-90; and Humphreys, *Media and Media Policy in Germany* 194-203.

10. In 1982 the FDP, the SPD's coalition partners, switched sides. This ushered in an extended period of CDU/CSU/FDP federal government which by virtue of several federal election victories continued until 1998. Following a general election in that year, an SPD/Green coalition took office.

CDU-controlled Bundespost also made available satellite channel capacity, and released local terrestrial frequencies across the country. Thus, the CDU/CSU/FDP federal government in Bonn provided the private sector with what would quickly become an abundant infrastructure for commercial broadcasting. The Bundespost action aimed thereby to inspire confidence among the new investors, to promote the commercial media policies of CDU/ CSU states, and to overwhelm the resistance of the recalcitrant SPD states to the liberalization of broadcasting. This activism by the federal authorities opened the way for the CDU/ CSU states to introduce private commercial broadcasting and exerted great pressure on the SPD states to do the same, not least for reasons of *Standortpolitik*.

***The Federal Constitutional Court Helps to Break the States Deadlock:
A "Dual" System***

The intervention of another federal institution — the federal constitutional court — was also fundamental to the reform process. Firstly, in 1981 the court had pronounced that in view of the new technical possibilities private commercial broadcasting, as long as it were to be suitably regulated, could no longer be obstructed on the grounds of "scarcity of frequencies," thereby giving states the green light to legislate commercial broadcasting. Secondly, in 1986 the court gave important clarification as to how the emerging public/private "dual system" should function and be regulated.¹¹

While the Bundespost was busy providing massive infrastructural investment to overcome the scarcity of frequencies, the regulatory policy making process for the new broadcast services became deadlocked politically. Regulatory policy for broadcasting was a competence of the states. They enacted their own broadcasting laws. Indeed, from 1984 onward the individual states enacted a wave of legislation for private commercial broadcasting. However, by definition individual state laws could not provide an adequate regulatory framework for new national services. For the latter, an inter-state treaty was required.¹²

The problem was that during 1983-86 the state politicians remained seemingly deadlocked over what kind of national-level regulations were

11. "FRAG Urteil des Bundesverfassungsgerichts vom 16 Juni. 198,1" BverfGE 12, and "Urteil des Bundesverfassungsgerichts vom 4. November 1986, BverfGE 73. See Humphreys, *Media and Media Policy in Germany* 339-40.

12. Thus in 1961 a *Staatsvertrag* had been necessary to found the ZDF, the second national channel co-managed by the states. *Staatsverträge* were also necessary to establish those public broadcasting corporations that are shared by states.

called for.¹³ By and large the CDU/ CSU prime ministers were keen to provide the most favorable regulatory conditions for commercial broadcasting. The SPD prime ministers, too, were eager to attract new commercial media investment but they were under pressure from their party's rank-and-file not to concede too much deregulation. This confrontation over the outstanding national rules — in essence about where to strike the balance between private enterprise and public-service — was becoming dangerously polarized by the mid-1980s with the CDU/ CSU prime ministers threatening to withdraw their stations from the ARD (the public-service broadcasting network) and warning that they might refuse to support the raising of the license fee upon which the public broadcasters depended (the level of the license fee was decided collectively by state politicians).

The deadlock was broken by several developments. First, increasingly irrespective of ideological color the states were becoming engaged in what might be called "competitive deregulation" to attract private media investment (i.e., *Standortpolitik*). The SPD state government of Hamburg, anxious to maintain the city state's status as one of Germany's premier media centers, led the way toward a "new realism" in SPD policy.¹⁴ Secondly, by the mid-1980s, the Bundespost's infrastructural program was making it more and more possible that the CDU/ CSU states might go their own way in any case. Thirdly, the states' inability to agree upon new rules strengthened the hand of those calling for the federal government to intervene on the issue of satellite broadcasting on the grounds that at stake were important economic matters rather than cultural ones. The threat of federal intrusion into their policy domain always served to rally the states. The issue was finally settled by intervention of the federal constitutional court.

One avenue of opposition had always remained particularly promising for the SPD: recourse to the federal constitutional court. In the past, the constitutional court had been very clear about the public mandate of broadcasting. It had ruled quite explicitly that broadcasting was not to be left to the "free play of forces" [*freies Spiel der Kräfte*]. Among the court's core principles for broadcasting were the need to provide for

13. Peter Glotz and Reinhold Kopp, eds., *Das Ringen um den Medienstaatsvertrag der Länder* (Berlin: Volker Spies, 1987); and Winand Gellner, *Ordnungspolitik im Fernsehen: Bundesrepublik Deutschland und Grossbritannien* (Frankfurt/Main: Lang, 1990) 230-40.

14. Hoffmann-Riem, "Medienstädte im Wettbewerb; am Beispiel Hamburgs," *Medien Journal* 2 (1989): 66-76; Humphreys, *Media and Media Policy in Germany*, ch 6.

"diversity of opinion" and the requirement of independence both from the state and from other powerful social forces.¹⁵ Precisely in order to prompt a court intervention on the controversial matter of commercial broadcasting, the SPD therefore appealed against lower Saxony's new broadcasting law (the first of the deregulatory CDU state laws) arguing, among other things, that it insufficiently guaranteed balance and diversity on the part of the new commercial broadcasters and provided too few powers to the new regulators of the private sector. The SPD complaint also pointed to the alleged weakness of the law's provisions against media concentration and cross-media concentration in particular, and to the excessive role the law granted to lower Saxony's government in the franchizing of new commercial operators, thereby infringing upon the hallowed principle of independence from the state.¹⁶

The constitutional court's subsequent intervention in 1986 proved to be decisive. Along with the Bundespost's activism, it helped to overcome the policy immobilism of *Länder* politics and to retrieve a minimum national consensus. In ruling upon the specific contested features of the lower Saxony law (which was in fact deemed "essentially" to be constitutional), the constitutional court in fact laid down some fundamental core provisions for the introduction of the "dual" public/private broadcasting system. In particular, the public-service broadcasters were to remain the bedrock of German broadcasting with a duty to continue universally to provide the basic services. This meant the comprehensive provision of high quality programs spanning entertainment, information, and education, catering to social and cultural diversity, and providing balanced pluralism. To this end, the public-service broadcasters had to be given guarantees concerning their technical, organizational, staffing, and financial requirements. In fact, the public-service broadcasters' provision of this basic service [*Grundversorgung*] was the precondition for the exemption of the private commercial broadcasters from the same high programming requirements and from the same degree of close regulation (that is, "internal control"). However, the private commercial broadcasters still had to observe a minimum standard of pluralism: all opinions, including minority ones, should "have the possibility" of being expressed. Moreover, adequate measures should be taken to prevent the appearance of "dominant influence over the expres-

15. Ruck, "Broadcasting Law in Germany" 222-23.

16. Humphreys, *Media and Media Policy in Germany* 243-44.

sion of opinion" [*vorherrschender Meinungsmacht*]. In other words, tendencies toward media concentration should be counteracted. Pluralistic "external" regulatory bodies (and the courts) were to ensure all this.¹⁷ These key principles, including the crucial "guarantee of the existence and further development" [*Bestands- und Entwicklungsgarantie*] of the public sector, were confirmed by several subsequent court rulings.¹⁸

The 1986 court ruling provided the basis for the successful negotiation of the inter-state treaty. This 1987 inter-state treaty (refined in 1991 — see below) produced the rules for a "dual" broadcasting system along the lines recommended by the constitutional court's 1986 ruling. Accordingly, the new private sector broadcasters were to be allowed to benefit from a significant, but still controlled, measure of deregulation. The private commercial broadcasters were still required to supply diverse and balanced programming although now this might be achieved across the range of new services ("external pluralism") rather than, as traditionally had been the case, within them ("internal pluralism"). Within these framework rules, it fell to the individual states to make their own detailed regulatory provisions.

De-Regulation or Re-Regulation?

The 1980s witnessed a flood of legislative activity by the states as well as the establishment of a whole new layer of states regulatory authorities for the private sector. Following unification there were fifteen of these state media authorities, one for each state except Berlin and Brandenburg which shared one. These private sector regulatory authorities are members of a federal association (*Arbeitsgemeinschaft der Landesmedienanstalten in der Bundesrepublik Deutschland*) and cooperate through several organs including the standing conference of the individual authorities' directors [*Direktorenkonferenz der Landesmedienanstalten*].¹⁹ The details of the individual states' laws for private commercial broadcasting varied considerably, but they all attempted to provide for continued programming diversity, the provision of which it was for the

17. For an evaluation see Klaus Berg, "The fourth TV judgement of the Federal Constitutional Court," *EBU Review* XXXVIII/3 (1987): 37-43.

18. "Urteil des Bundesverfassungsgerichts vom 4. November 1986 – 1 BvF 1/84," repr. in *Media Perspektiven Dokumentation IV* (1986). All the Federal Constitutional Court's key rulings on broadcasting up to 1991 are summarized in Humphreys, *Media and Media Policy in Germany* 338-42.

19. For detail, see ALM, "Jahrbuch der Landesmedienanstalten 1997/98" (Munich: Reinhard Fischer, 1998).

Landesmedienanstalten to oversee. Some (SPD) laws required "internal pluralism" from the private broadcasters, some (CDU/CSU) opted for external pluralism, and the rest adopted mixed or transitional models.²⁰

The *Landesmedienanstalten* generally had supervisory boards that were composed pluralistically of representatives of the socially significant groups like the public-service broadcasting councils. However, the *Landesmedienanstalten* differed from the broadcasting councils within the public broadcasting corporations in that they were external authorities placed above the private broadcasters within their area of jurisdiction. The *Landesmediensanstalten* did not have the same range of powers as the broadcasting councils. Most obviously, whereas the broadcasting councils usually appointed the director-general of a public corporation, the *Landesmediensanstalten* had no influence over the appointment of a broadcasting organization's chief executive. They only had a supervisory and reactive influence over programming, without any say in routine operating decisions, financial matters, and so on. However, responsible for franchizing and overseeing the new private commercial sector, they were endowed with the power to fine broadcasters and the ultimate sanction of revoking or non-renewal of licenses.

Without downplaying the unquestionably significant re-regulatory elements of German broadcasting reform compared to certain other west European countries,²¹ much of this re-regulatory activity simply reflected the federalized nature of regulatory competences in Germany (that is the need for multiple state laws and regulatory authorities). Hoffmann-Riem suggested that re-regulation could also have a symbolic function: serving to provide "a politically and economically 'well-ordered' entrance into a new age of broadcasting in accordance with the market model."²²

Multimedia Diversification

One area of conspicuous regulatory weakness was the failure to curb the concentration of media power produced by the diversification and

20. Susanne Hiegemann, "Die Entwicklung des Mediensystems in der Bundesrepublik," ed. *Bundeszentrale für politische Bildung, Privat-kommerzieller Rundfunk in Deutschland*, (Bonn: BzpB, 1992) 31-88, here 66; Humphreys, *Media and Media Policy in Germany* 343; and Porter and Hasselbach, *Pluralism, Politics and the Marketplace* (London/New York: Routledge, 1991) 57- 59.

21. See Humphreys, *Mass Media and Media Policy in Western Europe*, ch 5.

22. Wolfgang Hoffmann-Riem, "Law, politics and the new media: trends in broadcasting regulation," *The Politics of the Communications Revolution in Western Europe*, eds. Kenneth Dyson and Peter Humphreys (London: Frank Cass, 1986) 144.

expansion strategies of major media companies. Ever since the late 1950s the publishers of the press had lobbied for the abolition of the public-service monopoly so that they might diversify into broadcasting operations. During the course of the 1980s, the press became extensively involved in the new commercial broadcasting sector, both in television and radio, and at local, regional, and national levels. Since broadcasting required heavy investment, unsurprisingly, the larger press corporations took the lead.²³

The new private commercial television sector quickly assumed features of oligopolistic competition between two giant “broadcasting families” [*Senderfamilien*], notably the Springer/Kirch group against Bertelsmann in alliance with the Luxembourg-based broadcasting multinational, the Compagnie Luxembourgeoise de Télédiffusion (CLT). The Springer/Kirch alliance controlled one of Germany’s principal new mainstream commercial channels, SAT1. The Bertelsmann/CLT alliance owned RTL (first known as “RTL Plus”), the other principal new mainstream commercial channel. Moreover, Germany’s third major new mainstream commercial channel PRO7 was controlled by Thomas Kirch, media mogul Leo Kirch’s son. In 1994, between them these three private commercial channels — SAT1, RTL and PRO7 — accounted for 80% of total television advertising revenue, and 90% of television advertising revenue in the private sector. Further, as Kleinsteuber and Peters have observed, these two new rival “broadcasting families” were loosely identified with the two main political parties: Springer/Kirch with the CDU/CSU; CLT/Bertelsmann with the SPD. Kirch Gruppe was based in CSU Bavaria, Bertelsmann in SPD North Rhine-Westphalia.²⁴

Bertelsmann was one of the world’s largest media concerns and by far the largest in Europe. Its global interests spanned printing, book, and magazine publishing, the record industry, and recently also broadcasting and film and television production. The Kirch Group was Germany’s leading trader in programme rights. It also had a significant stake (35%) in the Springer press concern, Germany’s leading publisher of daily newspapers, with a virtual monopoly in the popular tabloid market [through ownership of the *Bild-Zeitung*]. Intense rivalry

23. Horst Röper and Ulrich Pätzold, *Medienkonzentration in Deutschland: Medienverflechtungen und Branchenvernetzungen* (Düsseldorf: European Institute for the Media, 1993) 184.

24. Hans Kleinsteuber and Bettina Peters, “Media moguls in Germany,” *Media Moguls*, eds. Jeremy Tunstall and Michael Palmer (London & New York: Routledge, 1991) 184-205, here 188.

between Bertelsmann and Kirch did not prevent them sharing the pay-TV service Premiere. Nor did it prevent them trying to launch, in 1994 and again in 1997/8, a joint venture to provide a digital platform which would offer a range of new media services by means of a conditional access system (using smart cards and decoders).²⁵

From the viewpoint of media pluralism the problem was clear. A private television oligopoly had appeared, with considerable cross-media links. Press interests were also heavily involved in local radio stations in Germany. Springer had radio interests in different parts of the country. The WAZ press group, a shareholder in RTL, acquired a web of private radio interests in its home region North Rhine-Westphalia. Another major regional player was the Bavarian 'Gong group.' Holtzbrinck, one of Germany's most important magazine publishing concerns and a 15% shareholder in SAT1, was involved in radio in Germany's south and also its "five new states." In southern Germany "double monopolies," where dominant local publishers had radio stations, were not uncommon.²⁶ Roper and Patzold commented: "The more these structures consolidate, the more difficult it becomes for policy-making to establish limits."²⁷

The Inadequacy of German Anti-Concentration Regulation

The 1987 first inter-state treaty on broadcasting, modified by a second such treaty in 1991,²⁸ had attempted to contain concentration in the private broadcasting sector within reasonable bounds. Holdings in individual private television channels were limited to below 50% (and below 25% in two additional ones), the intention being to promote internal pluralism through the joint ownership of channels [*Anbietergemeinschaften*]. External pluralism was promoted through a provision

25. These joint venture attempts were blocked by the European Commission on the grounds that their market dominance would raise entry barriers to other EU companies.

26. Horst Röper, "Formationen deutscher Medienmultis 1992," *Media Perspektiven* 2 (1993): 56-74; Röper and Patzold, *Medienkonzentration in Deutschland* 189-96.

27. "Um so mehr sich diese Strukturen verfestigen, um so schwieriger wird es für die Politik, Grenzen festzulegen." (Röper and Patzold 187).

28. "Staatsvertrag zur Neuordnung des Rundfunkwesens (Rundfunkstaatsvertrag) vom 12. März 1987," reproduced in *Media Perspektiven. Dokumentation*, II (1987) 81-102; "Staatsvertrag über den Rundfunk im vereinten Deutschland vom 31. August 1991," reproduced in *Media Perspektiven. Dokumentation* IIa (1991): 105-72. The second treaty extended the West German model of broadcasting to the Five New *Länder* following Unification in 1990.

that limited the number of broadcasting licences that could be held by a single enterprise to a single national “generalist” channel [*Vollprogramm*] plus one “information-relevant” special interest channel [*Informations-Spartenprogramm*] each in radio and television. Moreover, the threshold for achieving “external pluralism” in the private broadcasting sector was the national availability of three separately-owned generalist channels. Until this threshold was achieved, each channel had to feature “internal pluralism” in its programming. However, the regulatory framework had contained a number of crucial weaknesses.

Firstly, with regard to cross-media ownership the treaty had seemed sensitive, above all, to the requirements of capital investment in the new private commercial broadcasting sector, and the press had been an active investor from the start. Thus, although the Constitutional Court had warned the legislators to guard against the appearance of “double monopolies”, the inter-state treaties of 1987 and 1991 prescribed no precise cross-media ownership rules, leaving this matter to the discretion of individual states which were naturally disinclined to deter media investment through overly strict regulation and even designed laws in such a way as to positively encourage investment from the press. None of the state broadcasting laws contained any specific reference to other forms of multi-media ownership (such as Leo Kirch’s diversification from programme supply into ownership of national commercial television).²⁹

Secondly, the federal structure of the German broadcasting system brought with it particular problems. Article 11 of the inter-state treaty of 1987 provided for the unhindered re-transmission of national broadcasting services so long as they met legal requirements and these were deemed to be a matter for the licensing state. This principle was confirmed by Article 35 of the 1991 inter-state treaty (which brought German law into line with European rules on transfrontier broadcasting providing for the unhindered transmission of all European programs meeting agreed minimum regulatory standards). A national satellite broadcasting service could therefore apply for and receive a license in a state where the cross-media ownership rules were suitably lax. By the same token, those states that provided the most relaxed regulatory conditions were the best placed to attract new media investment. Thus, as early as 1984 the Rhineland-Palatinate, had franchised SAT1, a channel largely

29. Porter and Hasselbach 121-27; also see Humphreys, *Media and Media Policy* in Germany 276-78.

owned by publishers of the press, including the mighty Springer concern.

The individual *Landesmedienanstalten* still disposed of the right to license the usage of the still "scarce" terrestrial frequencies and — if demand exceeded supply — also to allocate spare cable channels in their areas of jurisdiction. However, the *Landesmedienanstalten* came under political pressure to prioritize the economic interests of their respective states in the competition to attract — or retain — media investment [*Standortpolitik*]. Therefore, the large media companies exerted a degree of structural power over politicians. Porter and Hasselbach suggest that regulatory authorities favoured license applicants who promised to site specific activities in their particular state. "The Länder tried to outbid each other for the investment favours of private television stations, especially the two largest, SAT1 and RTL plus."³⁰ Similarly, Sánchez-Tabernero et al noted:

It would be difficult for any state government not to consider the interests of a 'local' media giant like Springer in Berlin and Hamburg, WAZ or Bertelsmann in Northrhine-Westphalia and Kirch in Bavaria. . . . [R]egional politicians [have found] themselves under pressure to create a friendly legal and economic framework for commercial radio and television run by the publishers. Nearly every province's [sic] government has tried to attract at least one of the commercial television headquarters to their state to strengthen it as a location for the growing 'cultural industries'."³¹

The *Landesmedienanstalten* were even criticized for being the politicians' "puppets" or as helpless "paper tigers," incapable of controlling the new multimedia empires.³² Zerdick neatly summarized the problem: "the objectives of the state's media laws, oriented less toward media policy than toward locational policy, [had] led to a state of affairs in which too many *Landesmedienanstalten* controlled too few broadcasters who, at the same time, [were] being courted avidly by the

30. Porter and Hasselbach, *Pluralism, Politics and the Marketplace* 21.

31. Alfonso Sánchez-Tabernero et al., *Media Concentration in Europe: Commercial Enterprise and the Public Interest* (Düsseldorf: European Institute for the Media, Media Monograph No. 16, 1993) 179.

32. Marie-Luise Hauch-Fleck, "Marionetten der Macht: Medienanstalten der Länder sehen die Konzentration bei den Privatsendern tatenlos zu," *Die Zeit* 25 (12 June 1992): 29; Volker Lilienthal, "Kampf der Papiertiger: Leo Kirch und Bertelsmann bauen ihren Imperien aus. Die Medienkontrolleure erweisen sich bislang als hilflos," *Die Woche* (15 Sept. 1994): 41.

respective state governments.”³³

Finally, concentration was made difficult to police by the opaque interlocking webs of interests [*Verflechtung*] that characterized not only the ownership structures but also even less transparent kinds of linkage (such as finance, program supply) between the new commercial broadcasters. The PRO7 case presented a classic illustration of the problem. Thomas Kirch, Leo Kirch’s son, held a 47.5% share in the television channel PRO7 and 3% more were held by PRO7’s managing director, formerly a top executive of Leo Kirch’s. It was generally assumed that PRO7 was dependent on the Kirch Group for finance and programme supply. Control of PRO7 would mean that the Kirch Group, which already had a major (direct and, through Springer, indirect) holding in the generalist channel SAT1, would be contravening the inter-state treaty rule limiting enterprises to control of one national generalist channel [*Vollprogramm*]. However, the regulatory authority which licensed PRO7 did not accept that PRO7 was part of Leo Kirch’s media empire and did not intervene. This issue was discussed at the level of the conference of directors of the private broadcasting regulatory authorities [*Landesmedienanstalten*] and several votes failed to resolve the issue.³⁴

Moreover, the federal cartel office was decidedly non-interventionist in the field of broadcasting. In Germany, the federal cartel office is an independent, para-state body responsible for safeguarding economic competition. Although it has no responsibility for ensuring media pluralism per se, which was the task of the Landesmedienanstalten, it is obvious that through its competence in the field of general competition policy the federal cartel office is a potentially important agency for ensuring media diversity. Indeed, its powers of intervention specifically in the press sector had been sharpened in 1976. Concerned about press concentration, the SPD-led government of the time had lowered the turnover thresholds for triggering the federal cartel office’s intervention far below the level for other economic sectors (25 million DM instead of 500 million DM). Since this innovation the cartel office had played a useful role in at least restraining – if not entirely curbing — press-concentration. However, with respect to the new commercial broadcasting sector Röper and Patzold have noted that the federal cartel office has failed to act against

33. Axel Zerdick, “Zwischen Frequenzen und Paragraphen: die Landesmedienanstalten als institutionalisierter Kompromiss,” *Bertelsmann Briefe* 129 (1993): 60-62, here 61.

34. Lilienthal, “Kampf der Papiertiger. . .” 41.

some obvious "double monopolies" where local commercial radio services were owned by locally dominant publishers. In these cases, it justified its non-intervention by arguing that the competition provided by the public broadcasters meant that there could be no market dominance. Further, the cartel office has allowed cross-media concentration to proceed on the grounds that press investment actually strengthens the private broadcasters' ability to compete with the public broadcasters. The establishment of competition for the latter, Röper and Patzold concluded, was the cartel office's prime concern in the matter. Further, it did not have any competence for acting against media concentration on pluralism grounds, only when economic competition was adversely affected.³⁵

It has been pointed out by Heinrich, in fairness to the cartel office, that it lacks appropriate powers to intervene much in the broadcasting field. For example, PRO7's (Thomas Kirch) launching of the Kabelkanal fell beyond the scope of merger control since strictly speaking, according to the purely economic criteria employed by the cartel office, it counted merely as internal company growth. Further, the federal cartel office did not have the legal powers to act against the obvious accumulation of media power by the Kirch family since no actual company connection could be proven between Thomas Kirch's control of PRO7, and through PRO7 also of the Kabelkanal, and Leo Kirch's (his father's) media empire (indeed the *Landesmedienanstalten*, too, failed to agree on this matter — see above). For critics of Germany's media oligopoly, these cases seemed to demonstrate clearly the need for stricter anti-concentration regulations geared specifically to the situation in the media field.

The turnover thresholds triggering the cartel office's intervention might be lowered exactly as had been done already in the case of the press. Further, the award of broadcasting licenses to broadcasting organizations (in which major cross-media interests were involved) might be treated as suitable cases for "merger control" as Germany's monopoly commission recommended. For their part, the *Landesmedienanstalten*,

35. Röper and Patzold 193-94. It should, however, be pointed out that the Cartel Office did later express strong reservations about plans by the major private TV companies Bertelsmann and Kirch Group to jointly control a digital pay-TV platform. As will be seen, this project was blocked by Brussels in 1998. Subsequently, the German Cartel Office made clear that it would not allow the ruling to be circumvented. Cartel Office director Dieter Wolf explained that pay TV made it much easier for the Cartel Office to become involved since it is more easily conceived of as an economic market. In the case of 'free TV', on the other hand, it is unclear whether the market is constituted by the audience or by the advertisers. See "Bei Verstößen hohe Bußgelder," *Focus* 25 (15 June 1998): 214-15.

which were primarily concerned with safeguarding editorial pluralism, might be endowed with the Cartel Office's powers of inquiry into the internal affairs of the broadcasters in order to ensure greater transparency concerning ownership and influence and to allow them to explore the real control relations within a broadcasting operation (so far they had been limited to sending a "questionnaire" to the broadcasters to elicit information about these matters). Also, the deficiency of measures against vertical and cross-media concentration needed seriously to be addressed.³⁶ Above all, concentration control needed to be supplied at an appropriate higher level than that of the individual Landesmedienanstalten in order to prevent "soft competition policy" from serving as an instrument of *Standortpolitik*.³⁷

Toward a More Effective Harmonization of Anti-Concentration Regulation? Or Acceptance of Faits Accomplis?

Controversy over the widely-perceived failure of the Landesmedienanstalten led to serious discussion from 1994 onward about how the concentration rules might be reformed. In their "Lübeck resolutions" of 17 September 1994, the fifteen Landesmedienanstalten recommended that a new Staatsvertrag should adopt a simpler system of "control by audience share." Accordingly, the current rules limiting shareholdings would be replaced. Instead the total share of the television audience (public and private sector) gained by channels in which an owner had an interest (of over 5%) might be limited to 25%. The purported advantage of this "audience-share model" would be that it would render unnecessary the customary webs of overlapping ownership and other links and thereby encourage greater transparency of ownership and control relations.³⁸

In 1996, after considerable negotiation,³⁹ the prime ministers of the *Länder* agreed upon a more liberal (i.e., less restrictive) version of this

36. See Jürgen Heinrich, "Keine Entwarnung bei Medienkonzentration. Ökonomische und publizistische Konzentration im deutschen Fernsehsektor 1993/94," *Media Perspektiven* 6 (1994): 297-310. Also see Dieter Dörr, "Kontrolle braucht Durchsetzungsbefugnisse. Defizite des Verfahrensrechts bei der Medienkonzentrationskontrolle," *Media Perspektiven* 2 (1995): 42-47.

37. Heinrich 298.

38. Direktorenkonferenz der Landesmedienanstalten, Beschluss der Gesamtkonferenz der Arbeitsgemeinschaft der Landesmedienanstalten in Lübeck am 17. September 1994 (Lübecker Beschlüsse).

39. For detail see Peter Humphreys and Matthias Lang, "Regulating for Media Pluralism and the Pitfalls of *Standortpolitik*: The Re-regulation of German Broadcasting Ownership rules," *German Politics* 7.2 (August 1998): 176-201.

"audience share" model. As usual, the result of their negotiations marked a compromise between the economic and cultural policy goals of the states. Reflecting the former, the third inter-state broadcasting treaty⁴⁰ allowed any enterprise to acquire as many broadcasting operations as it wants, and to gain 100% control of these, provided that the aggregate audience share of its nation-wide operations remains below 30% of the total national TV audience. Excepted from the equation would be the audience shares of channels in which an enterprise has a share of less than 25%. By this measure, critics observed, the broadcasting interests of the Bertelsmann and Kirch concerns could remain intact, an outcome that concurred with the interests of Germany's two largest states, namely North Rhine-Westphalia (Bertelsmann's base) and Bavaria (Kirch Gruppe's base).⁴¹

On the other hand, those seeking stricter anti-concentration regulation had gained the obligation on any national channel that registered an audience share of 10% to make provision for the inclusion of independent 'window programs' (i.e., small broadcasters who are independent of their 'host' major broadcaster) within its schedule. These program windows should amount to 260 minutes per week, including at least 75 minutes of prime time. Ideally, these 'window programs' were to be selected consensually by the regulators and the broadcaster. In the event of disagreement the regulators have the right to make the final choice from a short-list which is, however, determined by the broadcaster.

In order to help overcome the problem of regional *Standortpolitik* that had dogged regulation at the state level (see above), the 1996 inter-state treaty established a joint, independent organ of the 15 Länder-based regulatory authorities, called the "Commission for the Investigation of Media Concentration" [*Kommission zur Ermittlung der Konzentration*]. The KEK's role is to identify cases where media pluralism has been — or risks being — dangerously impaired by media concentration. However, its jurisdiction is invoked by individual Land-based regulatory authorities (i.e., the licensing authority for

40. Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge vom 26.8./11.9.1996, reproduced in *Media Perspektiven. Dokumentation I* (1996). For a very detailed critical analysis see Martin Stock, Horst Röper and Bernd Holznagel, *Medienmarkt und Meinungsmacht* (Berlin: Springer, 1997). For a shorter critique see Humphreys, "The goal of pluralism and the ownership rules for private broadcasting in Germany: re-regulation or de-regulation," *Cardozo Arts & Entertainment Law Journal* 16.2-3 (1998): 527-55.

41. Michael Rediske, "Ein Kartellamt für die Medien," *die tageszeitung* 4870 (9 Mar. 1996) 10.

the broadcaster in question) in cases of new applications for private broadcasting licences or if there are significant ownership changes in the existing licence holding enterprises. Also, in conducting its investigations the KEK is reliant upon the cooperation of the Landesmedienanstalten, whose investigative powers were now on a level footing with those of the federal cartel office. Furthermore, the KEK's ruling may be overridden, but only by a three-quarters majority (i.e., 12 out of 15) of the Land-based Regulatory Authorities [*Konferenz der Direktoren der Landesmedienanstalten*, KDLM].

The KEK has been criticised for its insufficient political independence [*Staatsferne*] on the grounds that its six members are appointed by the Länder prime ministers. Three were proposed by the SPD, three by the CDU/CSU. Chosen as chairman was a former SPD economics minister of North Rhine-Westphalia and President of that Land's Central Bank. This seemed to symbolise the pivotal role, as the leading SPD voice pushing for de-regulation, played by that Land (where Bertelsmann is based) in the politics of the reform of media ownership rules. Unsurprisingly, the KEK was soon attacked for implied bias: politicians and regulators in Bavaria, home state of the Kirch Group, questioned the KEK's prolonged investigation of the Kirch family's interests compared to the conspicuously quick retrospective approval that it gave to the January 1997 merger of Bertelsmann's television subsidiary ufa and the CLT.⁴² In fact, the KEK encountered considerable difficulty in pursuing its investigation of the Kirch Group, not least because of legal appeal by Kirch against the mode and scope of the investigation. Apparently assuming that there was a connection between PRO7 (Thomas Kirch) and the Kirch Group, the KEK had asked the regulatory authority that had licensed PRO7 to send out a questionnaire to determine the full extent of the Kirch Group's programme supply to the broadcasting sector at large.⁴³ According to the new rules, dominance in this 'media-relevant related market' would also be taken into consideration by the KEK if the Kirch Group's audience share should be found to just fall short (amount to a *geringfügige Unterschreitung*) of the pluralism endangering 30% ceiling. The latter would only be the case if PRO7 was considered part

42. KEK, Jahresbericht der Kommission zur Ermittlung der Konzentration im Medienbereich. Berichtszeitraum 15. Mai 1997 bis 30. Juni 1998: 22-26.

43. According to the European Commission the Kirch Group, with its stock of 15,000 films and 50,000 hours of programmes in total, was the leading German supplier of TV entertainment programmes. *Funkkorrespondenz* 27-28 (3 July 1998): 21.

of the Kirch Group. However, critics observed that the KEK had not deemed it necessary to conduct a similar investigation into Bertelsmann's position in publishing and the press.⁴⁴ The outcome, however, went in the Kirch Group's favour; eventually the KEK decided that while Thomas Kirch's TV interests were indeed to be considered as part of the Kirch Group, there was still some leeway before pluralism was threatened.⁴⁵ Thus, the principal decisions that the KEK made during its first two years seemed to confirm the view of those who had suggested that the new regulatory framework was designed to legitimise the Bertelsmann/Kirch oligopoly that dominated German private television.

It is true, soon after it commenced work in May 1997 the KEK did determine that both RTL Plus (Bertelsmann) and SAT1 (Kirch) channels each exceeded a 10% share of the national TV audience and therefore should make provision for 'window programs.' However, it has also to be pointed out that the KEK had been given no ultimate authority — only an advisory role — in respect of the choice of 'window programme' operators. The final decision here remains in the realm of the individual Land-based regulatory authorities and is therefore a matter that remains vulnerable to considerations of regional *Standortpolitik*. Also, the indications are that the KEK would probably have intervened over the plans of Bertelsmann and Kirch together to embark on a joint-venture to launch a digital pay-TV platform,⁴⁶ but in the event the project which involved the controversial merger of Kirch's existing digital pay TV company DF 1 with Premiere, the analogue subscription channel which Bertelsmann and Kirch already shared, was blocked by the European Commission's competition authority in May 1998.

Predictably enough, the KEK has been the object of considerable criticism from many sides, for being too strong, for being too weak, for being a half-measure. By 1998 influential voices were calling for further deregulation, pointing out that Germany suffered from an overabundance of regulators that was detrimental to the German media

44. "Kirch-Gruppe wehrt sich gegen KEK-Überprüfungen," *epd medien* 51.4 (July 1998): 12-13; "Kirch wehrt sich gegen Wettbewerbsbehörde: 'Ungleichbehandlung/Rechtstreit um eine Fragebogenaktion'," *Frankfurter Allgemeine Zeitung* 1 July 1998; "Befangene Kontrolleure?" *Focus* 27 (29 June 1998): 15.

45. KEK, Jahresbericht der Kommission zur Ermittlung der Konzentration im Medienbereich. Berichtszeitraum 1. Juli 1998 bis 30. Juni 1999: 21-24, 39-46.

46. See Lutz Meier, "So kann man etwas verspielen: Der Vorsitzende der Konzentrationskommission KEK sieht die Digitalpläne von Kirch und Bertelsmann skeptisch. Ärger über Medienanstalten wegen Standortpolitik bei Senderfenstern," *die tageszeitung* 1 Nov. 1997.

industry's development.⁴⁷ For its part, the KEK complained about the insufficient cooperation it had received from certain state [*Land*] regulatory authorities whose help it needed in conducting its investigations. There also surfaced tension between the state regulators and the KEK over how much or how little discretion the latter should enjoy in deciding at what point a broadcasting interest's audience-share was 'only just below' the 30% ceiling and therefore should trigger consideration of its cross-media interests. The *Landesmedienanstalten* argued that only when a company's audience-share reached 28% might the KEK be required to commence any such investigation, and neither Bertelsmann nor Kirch Group quite reached this figure. The KEK, however, did not want to be bound by fixed quantitative thresholds.⁴⁸ Thus, the new regulatory arrangements do not appear to have avoided difficult jurisdictional conflicts between the regulators, nor does the *Standortpolitik* motivated politics appear to have ended.

The "Dual System": A New Public/Private Balance?

Quickly becoming one of the more densely cabled countries in Europe, Germany entered the 1990s with no fewer than three substantial generalist, private commercial television channels: RTL, SAT1 and PRO7. The early 1990s saw the launch of VOX and RTL 2, followed shortly by Super RTL. Germany could also boast an expanding range of thematic services such as the sports channel *Deutsches Sports Fernsehen* (DSF), and a number of specialist channels providing news, music, programmes for women, children, ethnic minorities, and so on. In addition, the country had a host of local cable services and foreign channels. Also, regional public-service channels were being broadcast nationwide by satellite. Germany also had Premiere, an analogue pay-TV service with 1.6 million subscribers (in 1998); in 1999, as Premiere World, this service

47. Wolfgang Clement, the SPD Prime Minister of North Rhine-Westphalia, questioned the 'regulatory jungle' in Germany. In the view of Kurt Faltlhauser, a state minister in CSU Bavaria, a KEK that amounted to a bureaucratic impediment to the development of the media in Germany 'had no future', *Medien Dialog* 16 (June 1998): 4. The chairman of the CDU's media policy committee Anton Pfeifer stated that the KEK should not become a 'bureaucratic obstacle to the development of the media in Germany,' "CDU tadelt die KEK", *epd medien* 11 (14 Feb. 1998): 17-18. Professor Dr. Wolf-Dieter Ring, the director of the Bavarian Landesmedienanstalt, was also vocal in criticism of the KEK, *Medien Dialog* 12 (1998): 5.

48. "KEK gegen fixe Zahl für eine 'geringfügige Unterschreitung,'" *Funkkorrespondenz* 46.48 (27 Nov. 1998): 24-25.

was being transformed into a digital TV platform by its owner, the Kirch Group (Bertelsmann having pulled out in 1999).

Table 1: *Germany's Private Television Oligopoly*
The Bertelsmann Broadcasting 'Family'

Channel	Main shareholders 1993 (%)	Audience Share (%) 1993	Main shareholders 1998 (%)	Audience Share (%) 1998
RTL	CLT: 47.9 Ufa: 37.1	18.9	Ufa/CLT: 89 * BW TV: 11 **	15.0
RTL 2	CLT: 24.0 Ufa: 7.8	Insignificant	Ufa/CLT: 33.4	3.8
Super RTL	Not yet founded	—	Ufa/CLT: 50	2.6
Vox	Ufa: 24.9 Canal +: 24.9 News Corp: 49.9	Insignificant	Ufa/CLT: 24.9 Canal +: 24.9 News Corp: 49.9	2.8

* In 1997 Ufa, Bertelsmann's TV subsidiary and CLT merged.

** BW TV GmbH was 80% owned by Bertelsmann, 20% by WAZ.

The Kirch Broadcasting 'Family'

Channel	Main shareholders 1993 (%)	Audience Share (%) 1993	Main shareholders 1998 (%)	Audience Share (%) 1998
SAT1	Kirch: 43 Springer: 20 APF: 20 *	14.9	Kirch: 59 Springer: 40 *	12.2
DSF	Kirch: 24.5 Springer: 24.9	1.3	Kirch: 100	1.1
PRO7	T. Kirch: 47.5 G. Kofler: 3 **	9.2	T. Kirch: 58.4	8.5
Kabel 1	PRO7: 45 G. Kofler: 10	1.6	PRO7: 100	4.1

* Kirch Group had a 35% stake in the Springer Verlag, which had 35% of Aktuell Presse Fernsehen (APF).

** Thomas Kirch was Leo Kirch's son. Georg Kofler was a former executive of the Kirch Group.

Source: 1993 data is from Europäisches Institut, 'Bericht über die Entwicklung der Meinungsvielfalt und der Konzentration im privatem Rundfunk', in *Die Landesmedienanstalten*, ed., *Die Sicherung der Meinungsvielfalt* (Berlin: Vistas, 1995) 166 and 167; 1997 and 1998. The 1998 data is from *Jahrbuch der Landesmedienanstalten 1997/1998*, published in September 1998 by the Arbeitsgemeinschaft der Landesmedienanstalten (ALM) 296-297, 309.

The take off of commercial television meant that the public-service broadcasters' share of the viewing audience declined appreciably. In 1990 the three public-service channels (ARD, ZDF, and the third regional channels) still accounted between them for an audience share of no less than 68.7%. However, by 1995 the public broadcasters' audience share had fallen to about 40%, where it stabilised; in 1998, the figure was still just above 40%. The main beneficiaries of this decline were the three main commercial channels, SAT1 (Springer/Kirch), PRO7 (Thomas Kirch), and RTL (Bertelsmann/CLT).⁴⁹ As well as eroding the audience shares of the public service broadcasters, the new private commercial broadcasters had had a negative impact on their advertising revenues.

Table 2: *Advertising Income of Public and Private Broadcasters in million DM*

Public	1989	1991	1993	1995	1997
ARD	935.4	761.2	444.9	301.8	308.1
ZDF	679.1	718.8	370.5	345.1	308.0
Total	1,614.5	1,480.0	815.5	646.9	616.1

Private	1989	1991	1993	1995	1997
RTL	294.4	1,010.8	1,844.4	1,960.1	2,238.0
SAT1	307.4	802.2	1,288.1	1,623.8	1,661.0
PRO7	14.5	165.1	670.0	1,333.9	1,580.0
Others	26.0	42.4	311.1	777.3	1,343.1
Total	642.3	2,020.5	4,113.6	5,695.1	6,822.1

Source: *Media Perspektiven Basisdaten: Daten zur Mediensituation in Deutschland* 1994, 10 and 21; 1995 10 and 19; 1998: 13 and 21.

As Table 2 (above) shows, the public-service broadcasters' advertising revenues registered a conspicuous decline in the dual broadcasting system. In the dual system, they were permitted to continue to run

49. *Media Perspektiven*. Basisdaten (1991): 70; *Media Perspektiven*. Basisdaten (1994): 76; *Media Perspektiven*. Basisdaten (1998): 73.

twenty minutes of advertising per day. However, in the liberalized broadcasting marketplace they could no longer charge monopoly prices for their advertising airtime. The latter was no longer in scarce supply. While the public broadcasters were prevented from carrying advertising after 8:00PM and also on Sundays, the private broadcasters could carry it for up to 20% of their air-time, including Sundays. The private commercial broadcasters could undercut the public broadcasters' advertising rates and still see their advertising revenue spiral upward. By contrast, the public broadcasters were adversely affected by this competition.

As Table 3 (below) shows, between 1989-97 the public-broadcasters' license fee income more than doubled. However, three important qualifications are required lest this be misconstrued as compensation for the

Table 3: *License-fee Income of Public Broadcasters in million DM*

	1989	1991	1993	1995	1997
ARD	3,685.1	4,427.3	6,906.6	7,288.7	8,314.1
ZDF	896.7	1,064.7	1,578.9	1,654.2	2,438.9
Total	4,581.8	5,492.0	8,485.5	8,942.9	10,753.0

Note: At the beginning of the 1980s the monthly license fee was 3.80 DM (radio) and 9.20 DM (television). By 1992 it had been raised four times and stood at 8.25 DM (radio) and 15.55 DM (television). In 1997 it was again raised to 9.45 DM (radio) and 18.80 DM (television). Since 1988 the regulatory authorities for private television have taken 2% of the license fee income.⁵⁰

public broadcasters' dramatic loss of advertising revenue. Firstly, the increase occurred partly because German unification simply increased the number of license-fee payers. The number of television households increased from around twenty-five million to around thirty-two million. (For the East Germans the license fee was raised in stages so that the full effect was not registered until 1993). Secondly, there were considerable costs involved in restructuring broadcasting in the former East Germany. Thirdly, the public-service broadcasters were encumbered by far higher production costs than the private sector. Together

50. Source: *Media Perspektiven Basisdaten: Daten zur Mediensituation in Deutschland 1998*: 11-12.

ARD and ZDF accounted for around 30,000 employees in radio and television in 1998, whereas the entire private sector employed less than 10,000.⁵¹ Moreover, the public broadcasters were bound, by their public-service remit, to invest in expensive program categories and to maintain extensive in-house production facilities. The public-service broadcasters' programming strategies were constrained by the need to provide internal pluralism, and respect the diverse views of the trade unions, churches, business associations, and other "socially significant groups" represented in their broadcasting councils. Their public-service remit entailed devoting considerable resources to informational and cultural output that was comparatively costly to produce. RTL, SAT1, and the other private broadcasters were much freer to follow fashion and popular taste. They could rely far more heavily on buying relatively inexpensive entertainment fare (such as U.S. series already amortized in the home market) and scheduling game-shows, chat shows, and the like, which were especially cheap to produce.

Also, behind the larger commercial stations stood giant media companies with deep pockets. The private broadcasters, therefore, could afford to outbid the public broadcasters for those popular program categories that were both strategic and expensive, such as the rights for recently released feature films and popular sports events (such as soccer and tennis). They were able, too, to lure popular stars and presenters away from the public broadcasters by offering more lucrative contracts. At the same time, the public broadcasters found it harder to afford the more popular films and series since the increased demand from the new private sector for these program categories significantly inflated their price.⁵²

A commonly heard complaint among Germany's liberal intellectual class was that the ratings seemed to be the new yardstick of success at the expense of program quality and of other public-service values.⁵³ Of course, the public-service broadcasters depended less obviously than the private broadcasters on ratings success. For the private broadcasters, after all, the ability to attract advertising revenue was a matter of life and death. All the same, although free from such direct existential worry, the German public broadcasters have been profoundly unsettled by the new

51. European Audiovisual Observatory, *Statistical Yearbook 1999* (Strasbourg: Council of Europe, 1999) 76.

52. Gunhild Freese, "Stühlerücken in der ersten Reihe," *Die Zeit* 15 (9 Apr. 1993): 24.

53. See, for example, Freddie Röchenhaus, "Wie viele Programme erträgt 1 Mensch?" *Die Zeit* Dossier 48 (26 Nov. 1993): 13-15.

competition. Above all they fear that the license fee, from which their main income derives, will lose its legitimacy if their ratings should decline too much. According to the ARD chairman (in 1994) Jobst Plog, the ARD would be hard pressed to justify its license-fee income if the ARD First Channel's audience share should fall as low as 10% (before the introduction of commercial broadcasting stable at around 42%, since 1994 it has fluctuated around the 15% figure).⁵⁴ Yet, if the public broadcasters were to chase the private broadcasters "down-market" (that is, audience maximization through scheduling mainly popular programming) in order to compete more successfully for the ratings, they would serve their enemies with another excuse to attack them.

In fact, the German public-service broadcasters soon found themselves accused by pro-commercial interests of having gone down-market. At the same time the pro-commercial lobby claimed that the new private broadcasters had themselves contributed positively to program diversity and the country's culture industries. A "convergence," the pro-commercial lobby argued, was occurring. On these grounds, the lobby called for, among other things, the eventual abolition of advertising by the public-service broadcasters. The private broadcasters had, of course, a blatantly self-interested motive for making this demand.⁵⁵ By the mid-1990s a radical political front seeking reform of the public-service broadcasters was building up momentum. Bavaria's prime minister Edmund Stoiber (CSU), backed by Saxony's prime minister Kurt Biedenkopf (CDU), suggested that the ARD's First Channel might be closed down. Georg Köfler, the proprietor of PRO7, Germany's third most successful commercial channel, supported this proposal. Others called for the privatization of ZDF. One explanation for the renewed ideological onslaught against the public-service broadcasters, suggested by ARD chairman Jobst Plog, was that it was an attempt by the right to deflect the media policy debate away from the increasingly controversial issue of media concentration. Stoiber's attacks,⁵⁶ in particular,

54. Interview in *Die Woche* (10 Mar. 1994): 34.

55. See Marie-Luise Kiefer, "Partikularinteressen als Leitlinie: zu den rundfunkpolitischen Vorstellungen des VPRT," *Media Perspektiven* 10 (1992): 614-23.

56. Marc Pitzke, "Macht und Moneten," *Die Woche* (29 Oct. 1994): 6; Gunhild Freese, "Stühlerücken in der ersten Reihe"; Marlene Wöste, "ARD Under Political Pressure," *BULLETIN* 12.1 (1995): 23-24. For a detailed critique of the Stoiber/Biedenkopf proposals see Marie-Luise, "Wettbewerbsverständnis im Stoiber/Biedenkopf Papier — hilfreich für die Rundfunkvielfalt," *Media Perspektiven* 3 (1995): 109-14.

might be seen in this light as an attempt to protect the interests of the prominent Bavarian media entrepreneur Leo Kirch.

As suggested, this ideological onslaught drew much of its force from the convergence thesis, according to which the public-service broadcasters were losing their distinctive public-service character and therefore should lose their funding privileges (notably, their right to supplement their license fee with advertising revenue). However, an important cross-national survey, looking at the programming of 53 public and commercial channels in western Europe during two weeks of January in 1991, found the German public broadcasters performance to be exemplary. The German public broadcasters provided a balanced overall schedule of 50% "serious" and 50% "popular" programming. What is more, unlike most other west European public broadcasters they even maintained this balance during prime time. Germany's commercial broadcasters, by contrast, scheduled over three quarters popular programming overall and in peak-viewing time this increased to 93 percent.⁵⁷

Empirical research by Udo Krüger at the Institute for Empirical Media Research at Cologne covering the ten year period 1985-1995 suggested that the public broadcasters provision of information programming remained stable at a fairly high level (around 40% in prime time) throughout the period, whereas the private commercial broadcasters, on the other hand, furnished a much lower proportion (15% in prime time) and much of what counted as information was non-political, human interest type "infotainment" and "reality TV."⁵⁸ More recent studies by Udo Krüger have confirmed this overall pattern.⁵⁹ Although not unaffected by commercialisation tendencies (they were 'modernising' their program formats), the ARD and ZDF have maintained balanced program schedules, with fairly high levels of information content. By contrast, in the program schedules of the commercial broadcasters

57. Els De Bens et al., "Television content: Dallasification of culture?" *Dynamics of Media Politics*, eds. Karen Siune and Wolfgang Truetzschler, (London: Sage, 1992) 75- 100.

58. Udo Krüger, "Tendenzen in den Programmen der grossen Fernsehsender 1985 bis 1995" *Media Perspektiven* 8 (1996): 418-40; see also Kiefer, "Partikularinteressen als Leitlinie."

59. See Udo Krüger, "Boulevardisierung der Information im Privatfernsehen," *Media Perspektiven* 7 (1996): 362-74; Krüger, "Programmanalyse 1997: Modernisierung bei stabilen Programmstrukturen", *Media Perspektiven* 7 (1998): 314-30; Krüger, "Stabile Programmstrukturen trotz besonderer Fernsehereignisse: Programmanalyse 1998," *Media Perspektiven* 7 (1999): 322-39.

entertainment has far outweighed information. Moreover, whereas the public service broadcasters' information programs are devoted mainly to themes from politics, economics, culture and science, much of the commercial broadcasters' information programming has consisted of non-political, human interest type information (*Boulevardthemen*).

A study by Barbara Pfetsch, comparing the presentation of television news in 1885/6 immediately after the deregulation of television and in 1993 when the dual system was well established confirmed that there continued to exist a marked difference between the public-service broadcasters and the private broadcasters at the level of the overall structure of programming. The public channels' provision of general information actually increased over the period. As for the private channels, "instead of catching up with the information level of public channels, [they were] increasingly engag[ing] in the marginalization of political information".⁶⁰ However, at the level of the television news genre specifically, Pfetsch detected a convergence: the private broadcasters appeared to have followed the role model of the public-service broadcasters regarding news content, increasing the amount of political information within news shows, while the public broadcasters were adopting the style and mode of presentation of the commercial channels.⁶¹

Beset by mounting political attacks and unnerved by growing financial problems, Germany's public-service broadcasters received an important boost from the country's highest authority when in February 1994 the federal constitutional court made yet another of its monumental rulings in the field of broadcasting policy.⁶² Characteristically the court, called upon to settle a somewhat narrow issue,⁶³ took the opportunity to take up a much broader position on the future funding of the

60. Barbara Pfetsch, "Convergence through privatization? Changing media environments and televised politics in Germany." *European Journal of Communication* 11.4 (December 1996): 427-51, 438.

61. Pfetsch 449.

62. The "Urteil des Bundesverfassungsgerichts vom 22 Februar 1994 –1 BvL 30/88" is reproduced in *Media Perspektiven*. Dokumentation 1 (1994). An evaluation in English is provided by Anja Bandschuh, "Federal Constitutional Court Rules on Licence-Fee. New Support for German Public Broadcasters," *BULLETIN* 11.1 (Mar. 1994): 1-2.

63. The case had its origins in a 1984 complaint by the *Humanistische Union* and the Green party against the financing of cable television pilot-projects from a (very small) share of the license fee, the "cable penny." The Court saw this as an invitation to deliberate much more widely about the future of the license fee and the key role of the public broadcasters in the dual system.

public-service broadcasters by the license fee. Essentially the court stressed the need for the public broadcasters to be granted enough income to permit them to perform all their key functions. The public broadcasters' role was all the more important in view of the shortcomings of the commercial broadcasters regarding their inadequate "breadth of content" and "thematic variety."⁶⁴ This important ruling underpinned, therefore, the principle first expressed in the court's famous 1986 ruling introducing the dual system, that the *conditio sine qua non* for allowing partially deregulated private commercial broadcasting was the "existence and further development" of the public-service broadcasters. Commercial broadcasting was only constitutional so long as the public-service broadcasters provided the "essential basic provision required by the constitution" [*verfassungskonforme Grundversorgung*]. The ruling made plain that the politicians should not screw down the license fee in order to rig the market in favour of private commercial broadcasting. Furthermore, this 1994 ruling of the federal constitutional court stipulated that the license fee should in future be free from politicking; the politicians should not misuse their ability to set the license fee. To this end the court recommended new procedures for setting the license fee, including the establishment of a genuinely independent basis for the committee that oversees the whole process. This recommendation was subsequently implemented in the 1996 third inter-state treaty on broadcasting (which also introduced the new ownership rules — see above).

By the mid 1990s, the central focus of controversy had moved on from the licence fee issue to settle on the question of the scope of public-service broadcasters to become involved in providing new media services. Thus, the private broadcasters association, the Association for Private Broadcasting and Telecommunication [*Verband Privater Rundfunk und Telekommunikation*], complained about the launch by the public-service broadcasters of new thematic services, notably a children's channel called Kinderkanal and a documentary and current affairs channel called Phoenix. The private broadcasters viewed the launch of such channels, funded by the licence fee, as unfair competition and illustrative of the public broadcasters' ambition to use public funding to expand into the emerging new media markets. This matter was settled

64. See "Urteil des Bundesverfassungsgerichts vom 22 Februar 1994 – 1 BvL 30/88" (40-41), repr. in *Media Perspektiven. Dokumentation 1* (1994): 21.

by a ruling in February 1999 of the European Union competition authority that the public funding of these services was permissible on public service grounds.⁶⁵

Later in 1999, the public-service broadcasters' digital broadcasting ambitions received a boost when the prime ministers of the *Länder* finally agreed a fourth inter-state treaty on broadcasting. The primary purpose of this latest Staatsvertrag was to incorporate a revised European broadcasting directive into German law (on such matters as sports events that should be reserved to universal service providers, rather than pay-TV). At the same time, though, the treaty introduced a "must carry" provision for two analogue channels on Germany's cable systems to be allocated to the ARD, and one to the ZDF, for the purpose of providing up to around two dozen digital broadcasting channels (including the public broadcasters existing services).⁶⁶ Thus, as Germany gradually entered the digital broadcasting age, the prime ministers of the *Länder* appeared to be honouring the constitutional "guarantee" of the public-service broadcasters' "existence and further development."

During the negotiations over this fourth inter-state treaty, however, the CDU/CSU *Länder* had maintained their pressure for a structural reform of the ARD. In addition to seeking the abolition of advertising by public broadcasters, leading CDU/CSU politicians wanted to gain a commitment to the eventual abolition of the *Finanzausgleich*, the financial subsidy by which the larger ARD corporations guaranteed the survival of small ones, notably *Saarländischen Rundfunk* serving the Saarland (a small Land) and *Radio Bremen* serving Bremen (a city-state). Such a measure, if adopted, would compel a structural reform of the ARD. However, in the event the prime ministers of the *Länder* postponed making any decisions on these highly controversial issues to a future fifth inter-state treaty. Therefore, the future balance between private and public broadcasting in Germany seemed destined to remain a live political issue.

65. Jeanette Steemers, "Changing Channels: The redefinition of public service broadcasting for the digital age", Paper presented to the Joint Research Sessions of the European Consortium for Political Research, Mannheim, 26-31 March 1999. Available on the ECPR website: <<http://www.essex.ac.uk/ECPR>>

66. In fact, the public broadcasters first launched digital trials in 1997, "simulcasting" in analogue and digital a free digital "bouquet" of their existing services plus a few new ones like *Kinderkanal* and *Phoenix*.