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Structural Media Pluralism

## Media Pluralism Between Market Mechanisms and Control: The German Divide

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This article starts from the assumption that patterns of media concentration and measures of regulating media pluralism are not the results of random media policy adjustments, but are rooted in trajectories of public sphere conceptions and shaped by a set of varying actor interests. In Germany, regulation of media plurality differs greatly between the print media and the broadcast sector. The print media market is shaped by commercial ownership and largely deregulated, except for special measures of fusion control. The broadcast sector is shaped by a dual system of public and commercial broadcasters that are regulated by non-governmental public institutions. This article focuses on two current developments regarding the regulation of pluralism in German media: The post-communist legacy of a concentrated print media market in former East Germany and the paradigmatic change in defining pluralism in the broadcast sector.

### Introduction

On a horizontal axis of comparative analysis we find a pluralism divide between West and East Germany where market concentration in the print media sector is significantly higher, a result of Western publishers adopting the structure shaped by the centralized socialist party press of the former communist republic. In many counties in eastern Germany, only one newspaper is published, and the newspapers

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<sup>°</sup> This article includes results from research conducted within the COST A 30 Action Group "East of West: Setting a New Central and Eastern European Media Research Agenda" (2005–2009), which was funded as a European COST initiative by the European Science Foundation (ESF). The authors wish to express their gratitude to Dr. Beata Klimkiewicz, who chaired Working Group 3 on Media Regulation and Policy, for her helpful comments and suggestions on this paper.

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Date submitted: 2010–03–31

have more pages and cover larger areas than in most western counties (regional monopolization). This is not a result of deregulation after reunification. Rather, most formerly state-owned media companies were sold to private commercial publishers by a federal agency, the "Treuhandsfonds" (trust fund). The chance to diversify ownership was missed by the fund at the time. This paper points out the impact of the post-communist legacy on the current print media structure in the eastern German states and also the role of political decisions insensitive to pluralism issues. It also discusses the unique German merger control system that so far has ensured external diversity but is nevertheless under pressure by large publishing companies. A map of economic and media content concentration of German daily newspapers illustrates the sharp contrast between the print media in former East and West Germany.

On a vertical axis of longitudinal analysis we find a divide between two predominant media policy paradigms to assure a pluralist supply on the marketplace of ideas. Digitalization and convergence introduced a new approach to defining media concentration and, since 1997, has brought about a caesura of institutionalized conglomeration. The increased trend to conglomeration in the private broadcast media sector could not be successfully contained by a regulation that measures the shares a business venture held, and it has caused a paradigmatic change in how the audience shares of media outlets are measured. It has also created a stronger institutionalization of media pluralism control. The value of the diversity of ideas reflected in broadcast media has a strong impact on the formation and regulation of Germany's dual broadcast system, which differs from a mere regulation of market competition.

### **Part I. The German Newspaper Market: The Pluralism Divide Between East and West Germany and the Merger Control System of the Print Market**

Compared with other countries (except for the Nordic states and Switzerland), Germany still has a relatively diverse newspaper market. The German print media is characterized by privately owned, regional newspapers. There are only a few newspapers with national distribution, and even they are rooted in certain regions (e.g. Frankfurter Allgemeine Zeitung/Frankfurt, Süddeutsche Zeitung/Munich). Newspapers are still a main source of information for most Germans: 71.4% of Germans above 14 years of age read a newspaper daily (BDZV, 2009).<sup>1</sup>

According to the National Association of German Newspaper Publishers, there were 1,511 newspaper editions published in Germany in 2009 by 351 different publishing companies (BDZV, 2009). However, only 134 of the newspapers can be seen as uniquely different editions due to common cooperation between newspapers: Many regional newspapers publish the same national and international news and only differ in their local reporting. There are three models of this cooperation practiced by German newspaper publishers:

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<sup>1</sup> Based on ag.ma-research data, a large bi-annual representative survey of newspaper and radio audiences funded by the majority of German newspaper publishers and radio stations, both public and commercial. Retrieved January 9, 2009, from [http://www.agma-mmc.de/03\\_forschung/die\\_media\\_analyse.asp?subnav=73&topnav=10](http://www.agma-mmc.de/03_forschung/die_media_analyse.asp?subnav=73&topnav=10)

1. One newspaper distributes several "local editions" that differ only in their local news content.
2. One publishing company owns several newspaper titles (in the same or different regions) with distinct names, but one central newsroom produces the national and international news section for all of them. Only local news is covered separately by the titles.
3. Newspapers are economically independent from each other, but smaller newspapers buy the national and international news section from a larger newspaper and run only a local newsroom themselves.

This latter model is common in Germany and it has led to a decrease of diversified content, which is not reflected by the external economic pluralism of German newspapers. When both economic and content cooperation are considered, fewer than 70 independent newspapers remain in Germany (see Map 1, estimate based on own research).

#### **Concentration Control by German Merger Laws**

Without regulation, the high economic pressures would likely lead to mergers and to the disappearance of smaller newspapers. There is enormous pressure on publishers to be more efficient and reduce costs. So far, German merger control laws have inhibited an acceleration of mergers and acquisitions in the print media sector.

In the 1970s, the Social Democratic German government was alarmed by a number of acquisitions in the Ruhr Area after the WAZ media group had bought several newspapers there. The government was still sensitive to the memory of the highly monopolized press during the Weimar Republic when Alfred Hugenberg—a major backer of Adolph Hitler—controlled more than 50% of the newspapers, which were used to garner public support for national socialism and Hitler. Thus the government tried to find a way to stop the concentration process.

Until then, normal merger controls did not apply to print media mergers because the volume was too small. According to fusion control law, the anti-cartel authorities had to examine a fusion only if the combined yearly gross domestic income of the merging companies exceeded one billion Deutschmark (now 500 million Euros). Most newspaper publishing companies, despite their papers' influence, were economically much smaller and "flew under the radar" of merger controls. In 1976, the German parliament passed an amendment to the merger laws, called the "press clause," which lowered considerably the threshold for examining print media mergers—to 50 million Deutschmark or, since 2002, 25 million Euros combined gross domestic income—and set limits on the market share a publishing company may have (Heinrich, 2001). In addition, the so called "bagatelle clause" does not apply to print media companies (in other sectors, mergers are exempt from the fusion control if one of the merging companies has a gross income of 10 million Euros or less.) As a consequence, acquisitions slowed down in the 1980s and 1990s, but have picked up considerably since the economic struggles of newspapers in the

late 1990s. In Cologne, M. DuMont Schauberg, publisher of the *Kölner Stadt-Anzeiger*, bought the competing *Kölnische Rundschau* and now owns both daily newspapers and a daily tabloid in the city of Cologne as well as the *Mitteldeutsche Zeitung*, a large newspaper in former East Germany. When the sale was approved by the authorities in 1991, MDS reasoned that by saving the competing paper from bankruptcy they were actually safeguarding plurality.

However, in Berlin in 2004, the federal merger control authority did not go along with the internal-plurality argument when Holtzbrinck intended to buy the daily newspaper *Berliner Zeitung* from Gruner + Jahr (who had bought the former Communist Party newspaper in East Berlin from the trust fund). Holtzbrinck already owned another large (West) Berlin newspaper, the *Tagesspiegel*. The authorities would only allow the purchase if Holtzbrinck sold the *Tagesspiegel*, because with both newspapers they would command a 61.4% market share among subscription newspapers (not counting the tabloid *Bild*, published Axel-Springer-Verlag).

Holtzbrinck first sold the *Tagesspiegel* to a former Holtzbrinck manager, a deal that was not accepted by the merger control authorities. Finally, Holtzbrinck was not allowed to buy the *Berliner Zeitung*. This case shows that the German merger control is still guided by the objective to safeguard external pluralism of newspaper ownership. However, it also shows that in doing so, they might find themselves between a rock and a hard place. In 2005, the *Berliner Zeitung* was sold to a foreign investor, the British private equity fund Mecom, headed by David Montgomery. Mecom did not own any newspapers in Berlin, thus the merger control law did not apply. Mecom demanded harsh austerity measures and high profit margins of the *Berliner Zeitung*. Thus, it was almost greeted with relief when MDS acquired the *Berliner Zeitung* from crisis-ridden Mecom in 2009.

The strong pressure on the government by larger publishing companies to relax fusion control regulation, especially in times of an economic downturn, a decay of the advertising market and fierce competition by the Internet may in the long run lead to a relaxation of the German fusion control laws. In 2004, the German parliament, on the basis of the media crisis and initiatives by the Axel-Springer Verlag and Holtzbrinck, supported a law raising the threshold to 100 million Euros, but the measure was rejected by the Bundesrat, the parliament's chamber of the state representatives.

The future development will depend on political priorities: If the new conservative-liberal government in Germany places the economic reasoning of larger publishing companies above the goal of ensuring content diversity of news, it may relax the media fusion control laws. Thus, the pluralism paradigm might be neglected, with the likely result that print media ownership concentration will be accelerated as a result of political decisions.

This development already has occurred in the magazine publishing sector, which is dominated in Germany by four large publishers. While there are more than 2,300 general-interest magazine titles in Germany, more than 60% of the circulation is controlled by the four largest publishers: Bertelsmann (Gruner+Jahr), Burda, Bauer and Axel-Springer-Verlag (see IVW, 2009). Major acquisitions in recent years have enhanced that situation—for example, a majority of Motorpresse Stuttgart was acquired by Gruner+Jahr/Bertelsmann in 2004; Burda bought the bankrupt Verlagsgruppe Milchstraße also in 2004.

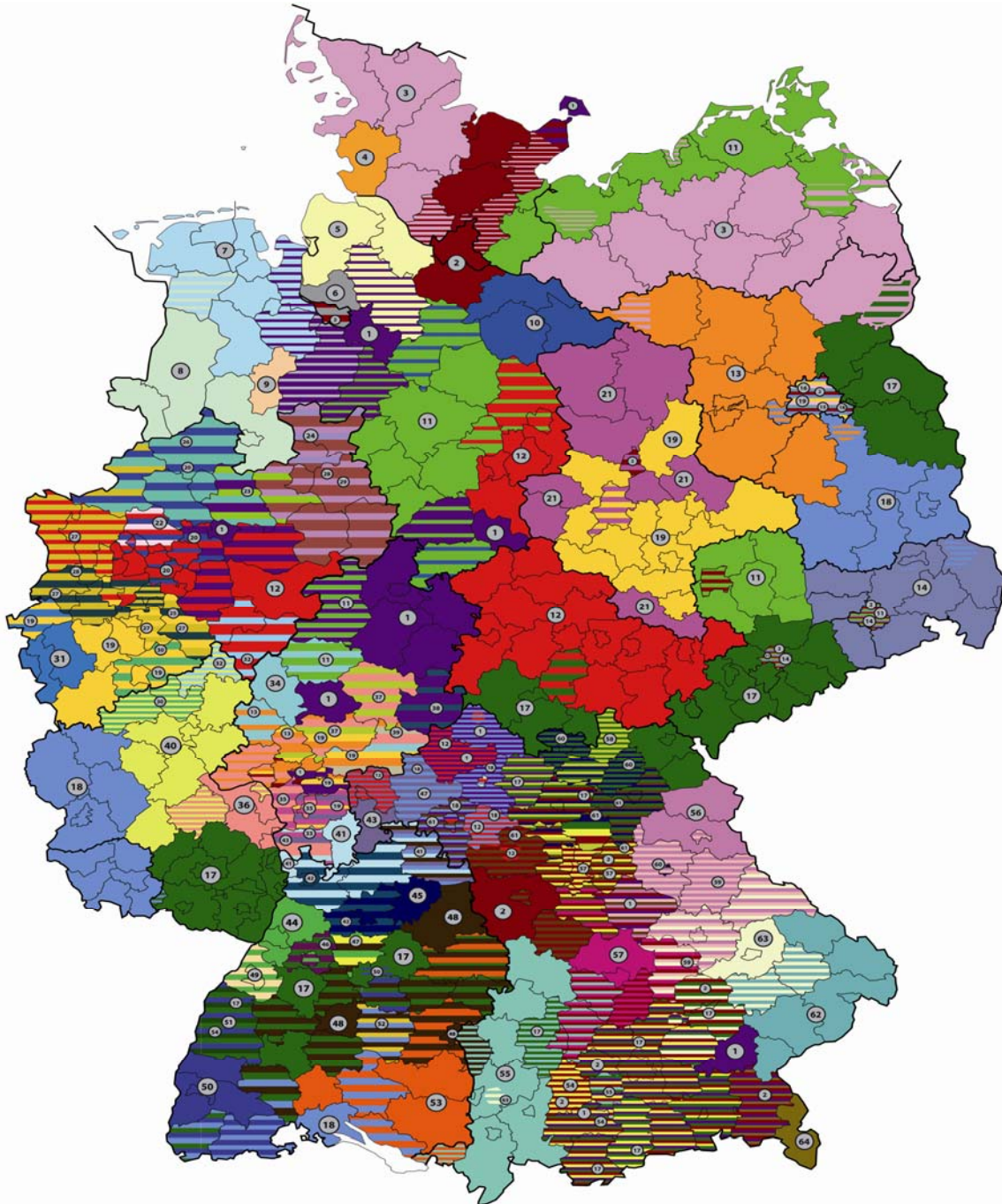
### **External Pluralism, but Regional Monopolies**

While there still seems to be a relative diversity of daily newspapers in Germany, the publishers have divided the market into regional monopolies. In order to assemble a map<sup>2</sup> of media concentration, we have researched the ownership structures of newspapers in Germany and the content cooperation (units of same national and international news). When looking at these two dimensions of concentration together (ownership and content cooperation), the regional monopolization of newspapers in Germany becomes apparent.

Map 1 combines these two dimensions. It illustrates that in large areas of Germany, there is a high regional monopolization of newspapers. Uni-colored areas indicate newspapers that are published by the same company (defined as owning more than 50% of shares) or they publish the same national/international news section, or which is often the case, both. Areas where there are more than one newspaper with different general news section are indicated by stripes.

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<sup>2</sup> The data for the map was researched mainly from primary sources (in most cases, the publishing companies themselves) in 2008, updated in August 2009. Special thanks to Melanie Hellwig and Wiebke Feldmann for their invaluable help with the data collection and visualization.



*Map 1. Map of print media concentration. Ownership and content cooperation of daily newspapers in Germany in 2009.*

1	Dr. Dirk Ippen	33	Viernheimer Tageblatt
2	Axel Springer	34	Verlag Wetzlar Druck Zeitungsgruppe Lahn-Dill
3	Medien Holding Nord	35	Medienhaus Südhessen (Darmstädter Echo)
4	Boyens Medien (e.g. Dithmarscher Landeszeitung)	36	Verlagsgruppe Rhein Main (Wiesbaden)
5	Nordsee-Zeitung, Bremerhaven	37	Mittelhessische Druck- und Verlagsgesellschaft (Gießener Allgemeine Zeitung)
6	Bremer Tageszeitungen	38	Verlag Parzeller (Fuldaer Zeitung)
7	Nordwest-Medien (Oldenburg)	39	Hanauer Anzeiger, Druck- und Verlagshaus Hanau
8	Neue Osnabrücker Zeitung	40	Mittelrhein-Verlag (Rhein-Zeitung Koblenz)
9	Oldenburgische Volkszeitung/ Münsterländische Tageszeitung	41	Dr. Haas-Gruppe
10	Landeszeitung für die Lüneburger Heide	42	Rhein-Neckar-Zeitung (Heidelberg)
11	Verlagsgesellschaft Madsack	43	Verlag und Druckerei Main-Echo
12	WAZ-Mediengruppe (Westdeutsche Allgemeine Zeitungsverlagsgesellschaft)	44	Badische Neueste Nachrichten (Karlsruhe)
13	Frankfurter Allgemeine Zeitung (F.A.Z.)(Fazit-Stiftung)	45	Heilbronner Stimme
14	Gruner + Jahr (Bertelsmann)	46	Pforzheimer Zeitung
15	die tageszeitung (taz)	47	Ludwigsburger Kreiszeitung
16	Neues Deutschland	48	Neue Pressegesellschaft (Südwest Presse, Märkische Oderzeitung - shares in SWMH)
17	Südwestdeutsche Medien Holding (SWMH) and Medien Union Ludwigshafen	49	Badisches Tagblatt
18	Verlagsgruppe Georg von Holzbrinck	50	Eßlinger Zeitung
19	M. DuMont Schauberg	51	Offenburger Tageblatt / Arbeitsgemeinschaft Mittelbadische Presse
20	Medienhaus Lensing	52	Reutlinger General-Anzeiger
21	Bauer Media Group, Hamburg	53	Schwäbischer Verlag (Schwäbische Zeitung)
22	Medienhaus J. Bauer (Marl, Recklinghausen)	54	Abendzeitung
23	E. Holterdorf (Die Glocke)	55	Augsburger Allgemeine (Mediengruppe Pressedruck - shares in Nordkurier)
24	J. C.C. Bruns (Mindener Tageblatt)	56	Der Neue Tag (Oberpfalz)
25	W. Girardet (Westdeutsche Zeitung; general news for Remscheider General-Anzeiger, Solinger Tagblatt)	57	Donaukurier (Ingolstadt)
26	Aschendorff Medien (Westfälische Nachrichten)	58	Fränkischer Tag (Bamberg)
27	Rheinische Post Verlagsgesellschaft	59	Mittelbayerische Zeitung (Regensburg)
28	Zeitungsverlag Neue Westfälische Deutsche Druck- und Verlagsgesellschaft (SPD-Holding)	60	RNT (Ring Nordbayerischer Tageszeitungen)
29	Westfalen-Blatt Vereinigte Zeitungsverlage	61	Nürnberger Nachrichten / Nürnberger Zeitung
30	Bonner Zeitungsdruckerei und Verlagsanstalt H. Neusser, Bonn (Bonner General-Anzeiger)	62	Verlagsgruppe Passau (Passauer Neue Presse)
31	Zeitungsverlag Aachen (shares in Rheinische Post)	63	Straubinger Tagblatt
32	Siegener Zeitung, Vorländer und Rothmalers	64	A. Miller Zeitungsverlag (Traunstein, Berchtesgaden)

Given the fact that local radio stations only exist in a few states in Germany, that local television news is dominated by the large public service broadcasting stations (except for a few local TV stations in big cities), and that local and regional news on the Internet is still mostly provided by local newspapers, it can be said that in large parts of Germany, there is only one regional source of news and a severe lack of alternatives.

### **New Dimension: Trans-Regional Ownership and Trans-Regional Content Concentration**

Map 1 also shows that monopolies are beginning to grow beyond their original regions of operation. Several larger regional publishing companies have expanded beyond their "home" region. In the 1990s, publishing companies that were formerly regional, such as the Westdeutsche Allgemeine (WAZ) from the Ruhr Area and M. DuMont Schauberg (MDS) from Cologne, began expansion by investing in newspapers in Eastern Europe, in Austria and in former East Germany (see below). A new phase of trans-regional investments by formerly regional publishers began in recent years, when the WAZ group acquired the *Braunschweiger Zeitung* in Niedersachsen (2007) and M. DuMont Schauberg in Cologne bought the *Frankfurter Rundschau* (2006) and the *Berliner Zeitung* (2009).

Initially, these acquisitions were justified before the merger control authorities by announcing that the newsrooms in different regions would be kept independent from each other. The publishers argued that, by "saving" the acquired newspapers from bankruptcy, they were actually maintaining diversity, an argument that M. DuMont Schauberg had already used in its 1999 acquisition of the second Cologne newspaper *Kölnische Rundschau* (MDS now owns both daily newspapers in Cologne). However, in reality, synergy effects are likely to be used where possible. Concrete examples are the decision of the WAZ group in 2008 to merge the central and regional newsrooms of their several newspapers in the Ruhr Area into one, catering to an area of about five million people. Similarly, Gruner + Jahr decided in 2008 to merge the business news desks of their business daily *Financial Times Deutschland* and its business magazines.

### **East-West Divide and "Post-Communist" Legacy**

When looking at the map, it is striking that the regional monopolies in the former East German states (except for Berlin) cover larger areas than in the West. This is not a result of economic deregulation, but a direct impact of the post-communist privatization process of former GDR state and Socialist Unity Party (SED) property. During the socialist rule in East Germany, 15 regional daily newspapers were owned by the SED, founded between 1945 and 1952. Newspapers were mouthpieces for the party, thus diversity was not intended. The regional newspapers each catered to one of the 15 SED-party sectors, respectively.<sup>3</sup>

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<sup>3</sup> There were eight national daily newspapers in the GDR that were disbanded after 1991 except for two (*Neues Deutschland* and *Junge Welt*) which have continued as socialist newspapers. In addition to the 15 SED-ruling party newspapers, there were 14 so-called "block"-party newspapers, published by the parties other than the SED, which were incorporated into the single-party system of the GDR. Most of those were



After reunification, the state- and party-owned enterprises were either discontinued or sold by the state-run Treuhandfonds. The trust fund was responsible for privatizing most of the former GDR's state-owned enterprises, not only the media enterprises. Its main objectives were to conclude the privatization as quickly as possible and to achieve the economically best (short-term) results. The historic opportunity by this state-owned (and thus politically governed) fund to take political goals—such as diversity and participation—into account and to break up large monopolies was missed. Instead, the former SED-party newspapers were sold relatively quickly, all of them to West German regional and nationwide publishers between 1991 and 1994:

**Table 1: Regional Newspapers in Former East Germany Before and After Reunification.**

Former SED-party-newspaper	SED-sector/region	New title (if applicable) <sup>4</sup>	Majority ownership (2009)
<i>Ostsee-Zeitung</i>	Rostock	<i>Ostsee-Zeitung</i>	Until 2008: Axel-Springer AG 50% (Hamburg)/Lübecker Nachrichten GmbH (Madsack) 50%; since February 2009: Lübecker Nachrichten GmbH 100%. The Madsack group owns more than 70% of LN.
<i>Leipziger Volkszeitung</i>	Leipzig	Leipziger Volkszeitung	Until 2008: Axel-Springer AG (50%), Zeitungsgruppe Madsack (50%); since Feb. 2009: Zeitungsgruppe Madsack (Hannover, 100%)
<i>Freie Erde</i>	Neubrandenburg	Nordkurier	Kurierverlag GmbH (Kieler Nachrichten (Madsack) 33%, Schwäbische Zeitung 33%, Augsburgener Allgemeine 33%); national /international news syndicated by Schweriner Volkszeitung
<i>Schweriner Volkszeitung</i>	Schwerin	Schweriner Volkszeitung	Until 2005: Hubert Burda (Offenburg); after 2005: Schleswig-Holsteinischer Zeitungsverlag (SHZ) (Flensburg)
<i>Volksstimme</i>	Magdeburg	Volksstimme	Bauer Media Group (Hamburg)

discontinued after 1991; three of them were sold together with the SED-newspapers after 1991 (Held & Simeon, 1994).

<sup>4</sup> The titles of newspapers were only changed if the former title seemed too ideological (e.g., *Volkswacht*=people's watch).

<i>Neuer Tag</i>	Frankfurt/Oder	Märkische Oderzeitung	Südwestdeutsche Medienholding SWMH (Stuttgart) <sup>5</sup>
<i>Freies Wort</i>	Suhl	Freies Wort	Südwestdeutsche Medienholding SWMH (Stuttgart)
<i>Freie Presse</i>	Karl-Marx-Stadt (today: Chemnitz)	Freie Presse	Medien-Union (Ludwigshafen) <sup>6</sup>
<i>Märkische Volksstimme</i>	Potsdam	Märkische Allgemeine	Frankfurter Allgemeine Zeitung (F.A.Z., Frankfurt/Main)
<i>Berliner Zeitung</i>	East-Berlin	Berliner Zeitung <sup>7</sup>	Until 2004: Gruner+Jahr/Bertelsmann, 2005–2008: Mecom (UK), since Jan. 2009: M. DuMont Schauberg (Cologne)
<i>Freiheit</i>	Halle	Mitteldeutsche Zeitung	M. DuMont Schauberg (Cologne)
<i>Sächsische Zeitung</i>	Dresden	Sächsische Zeitung	Gruner+Jahr/Bertelsmann (60%)
<i>Lausitzer Rundschau</i>	Cottbus	Lausitzer Rundschau	Verlagsgruppe Georg von Holtzbrinck (Stuttgart)
<i>Das Volk</i>	Erfurt	Thüringer Allgemeine	Mediengruppe Westdeutsche Allgemeine (WAZ, Essen)
<i>Volkswacht</i>	Gera	Ostthüringer Zeitung	Mediengruppe Westdeutsche Allgemeine (WAZ, Essen)

With regard to the market structure, the pattern of relatively centralized newspapers was adopted. Only a few new newspapers were founded after reunification, most of which have since disappeared or merged with others. The distribution areas of today's regional monopoly newspapers in former East Germany are almost identical to the former SED sectors—and dominated by West German publishers, who were able to use this opportunity to expand their reach. Recently, increasing economic pressures have enhanced the concentration (see Table 1). In a move to pull out of regional newspaper publishing, Axel-Springer Verlag sold its shares in two eastern German newspapers (*Ostsee Zeitung* and *Leipziger Volkszeitung*) to the Madsack group in February 2009.

<sup>5</sup> The SWMH publishes, among others, the *Süddeutsche Zeitung* (Munich) and the two Stuttgart newspapers. Main shareholder of the SWMH is the Medien Union (Ludwigshafen), see "Freie Presse."

<sup>6</sup> The Chemnitz newspaper *Freie Presse* was, unlike the other SED papers, not sold by the trust fund, but sold directly without tender to the Medien Union.

<sup>7</sup> Unlike in the other former East German states, in Berlin there are competing daily newspapers (*Tagesspiegel*, *Die Tageszeitung*, *Berliner Zeitung*); however, the *Berliner Zeitung* is still mainly read in former East Berlin, while the *Tagesspiegel* is considered a West Berlin newspaper.

The newspaper market in former East Germany is much more concentrated than in former West Germany. Again, this is a direct result of economic considerations overriding other political paradigms in decision making by the political actors where other opportunities for action would have been possible.

## **Part II: The Broadcasting Sector**

When the Commission on Concentration in the Media (KEK) refused to give its blessing to the fusion of private broadcasting giant ProSiebenSAT.1 and publishing tycoon Springer, effectively derailing their merger in January 2006, Germans caught sight of their institutions safeguarding the pluralism of ideas in the media. They learned that there was obviously more to media regulation than securing market competition. A small and formerly unknown commission had overruled the creation of a horizontally and vertically integrated super media Goliath. KEK had been formed due to a paradigmatic shift in the regulation of private broadcasting in 1997. While structural pluralism had been measured before by the absolute number of outlets a media enterprise owned, it was from then on determined according to the audience share each enterprise reached with their channels and programs. Therefore, the third amendment of the German Interstate Treaty on Broadcasting (*Rundfunkstaatsvertrag*, RStV)<sup>8</sup> established the KEK as an independent regulatory body with the function to monitor the private broadcasting market and provided it with veto power to future mergers and fusions. The following analysis of structural pluralism in the broadcasting sector will further illustrate this philosophical shift in regulating competition and the diversity of ideas, will draw on central normative motifs employed in German media policy and, of course, discuss the current market structure.

### **Market Structure: The Dual System Approach**

The structure of the German radio and TV market as well as the normative motifs guiding German media policy are deeply rooted in the experiences of Nazi propaganda and the restructuring of the media after World War II under Allied occupation. Although German radio stations kept on broadcasting Nazi propaganda and rallied for mobilization until the very last day of the war, radio broadcasts were a central part of the Allied reeducation programs, and the Allied military governments sought to reorganize the German media from the beginning of the occupation period. The American approach to implement their model of a market-oriented media system with investigative and objective journalism following a negative freedom, non-interference norm (as it is also described in Hallin und Mancini, 2004) clashed with German authority-oriented (*obligkeitsstaatlich*) Weimar traditions striving for state-organized and controlled media and lacking civil societal and participatory foundations (see Kutsch 1999, p. 78). The British, instead, planned to export the BBC model to Germany, which in the end profoundly influenced the West German public service broadcasting system for which the Allies laid ground and which was barely changed during the following decades. The central themes of Allied media policy were decentralization and assuring media independence of state interference.

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<sup>8</sup> Will be referred to as the Interstate Treaty. Retrieved November 11, 2009, from [http://www.alm.de/fileadmin/Download/Gesetze/12\\_RStV-englisch.pdf](http://www.alm.de/fileadmin/Download/Gesetze/12_RStV-englisch.pdf)

When the Federal Republic was founded in 1949, the Western Allies left a broadcasting regulation following the principles of federalism and six public service broadcasters: NWDR and SWF as cooperations between two or more federal states (*länder*) in the former British and French sector, and four single-state broadcasters in the American sector. In 1953, the public TV broadcasters united in the ARD (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland*) in order to offer a common nationwide program—in addition to their regional programs (Diller 1999). In 1963, the second national public TV broadcaster, ZDF (*Zweites Deutsches Fernsehen*), began service, and cemented for the next 20 years the monopoly of public broadcasters and the rejection of competition by private media.

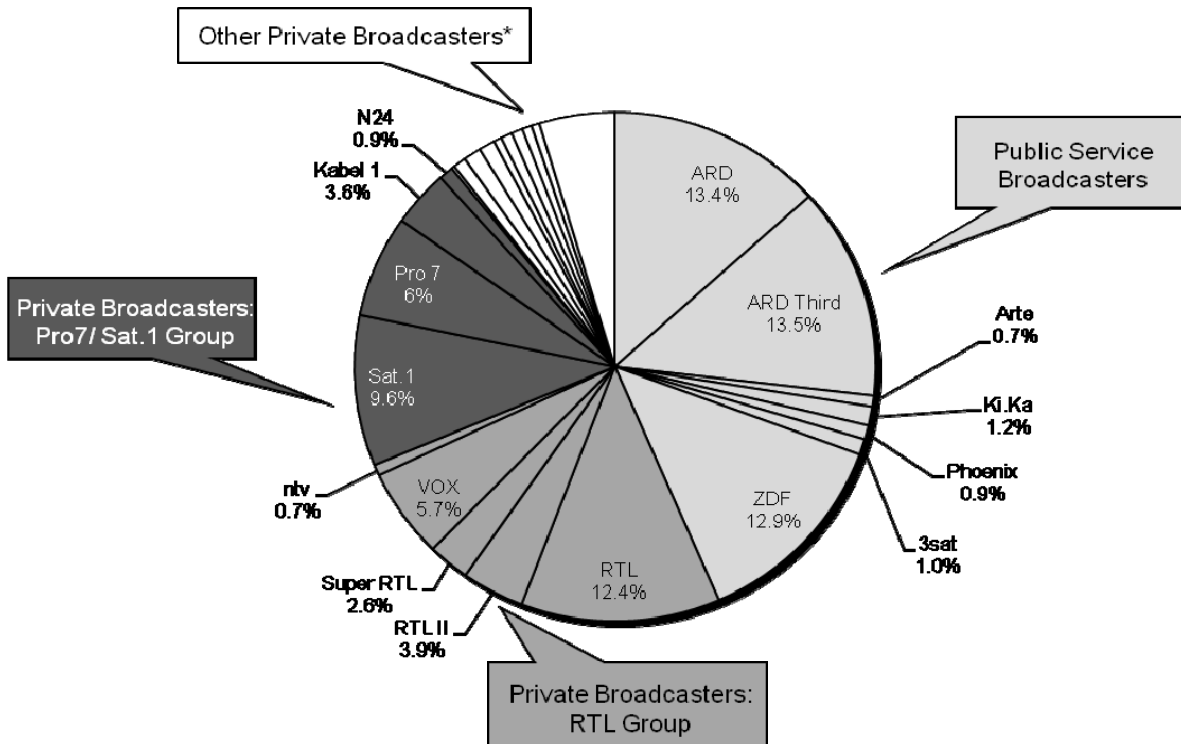


Figure 1: The Dual System: Audiences Shares in German TV 2007.

Source: Retrieved November 11, 2009, from <http://www.kek-online.de>

\*Other private Broadcasters include: 9Live (0.2%), Das Vierte (0.8%), DSF (1.1%), Eurosport (1.0%); MTV (0.5%), Nick (0.7%), Tele 5 (0.7%), Viva (0.6%), DMAX (0.5%), Other (4.3%).

The major caesura of the German broadcast system took place with the advent of private broadcasters after 1984 and the establishment of the "dual system" of public service and private broadcasting. The public service broadcasting monopoly had not gone unquestioned, yet it was the change in government in 1982 (establishing conservative majorities on the federal and state levels), a Constitutional Court ruling in 1981 allowing for private commercial broadcasts, technological advances and the international proliferation of private radio and TV that stipulated the reform of the German media system (as intentional model change) (Steinmetz 1999). After reunification, the dual system was extended to the territory of former East Germany and fixed in the German Interstate Treaty on Broadcasting. The term *dual system* refers to the coexistence of public and private broadcasters—their respective regulatory principles and institutions being separated and following very different norms and regulations. Different from other polities, the diversity of ideas expressed in the media is the central objective of media regulation in Germany—far beyond a mere guarantee of fair market competition. However, the implementation of this idea varies between the two separate worlds of broadcasting—public service and private. The legal and institutional provisions regulating public service radio and TV aim at *internal pluralism*, qualitative pluralism in media content, for example; while private broadcasting regulations aim at *external pluralism*, such as a quantitative pluralism of media ownership.

### **The German Broadcast Market**

With more than 36 million TV households, of which 34.6 million use satellite as well as cable networks to receive 30 to 40 free TV channels, and with 25 terrestrial channels received by 70% of the population, the German TV market is both the biggest and the most competitive in Europe (OSI/EUMAP, 2005: 738). The number of radio stations in 2005 grew to 353 (including digital terrestrial radios), of which 289 are private and 64 are public service stations. Most of these radio stations broadcast regionally—52 stations cover federal states, and 15 stations broadcast in more than one state (KEK, 2006).

The essential feature of the German broadcast market is the coexistence of public service and private providers—public service broadcasters dominate the scene but are being surmounted in number and cumulated audience shares of the private market, which is basically structured as a duopoly of the two major groups Bertelsmann/RTL Group and ProSiebenSAT.1 Media Group, formerly known as the Kirch Group. Thus, we can find both a diverse market with the largest number of programs to be received free (in Europe) as well as strong concentration in the commercial TV market, which is split among only two major media groups. The following will illustrate the development and structure of these two different markets known as the dual system.

### **Public Service Broadcasters**

After the Allied occupation had set the basic formal structure of the German media system, the monopoly of public service broadcasting in West Germany remained unchanged until the mid-1980s. As the Allies had intended to decentralize public broadcasting, its structure mirrors the federal constitution of the republic. Public service TV consists of two national programs (ARD, ZDF); nine regional programs (*Landesrundfunkanstalten*), each based in one federal state or region, most of which can be received

nationwide (NDR, RB, WDR, MDR, RBB, HR, SWR, SR, BR) subsumed as "Dritte" (third programs); two nationwide programs with a cultural focus (3sat, arte); a national news and documentary program (Phönix); a channel featuring programs for children (KiKa); and one program being broadcast abroad (DW).

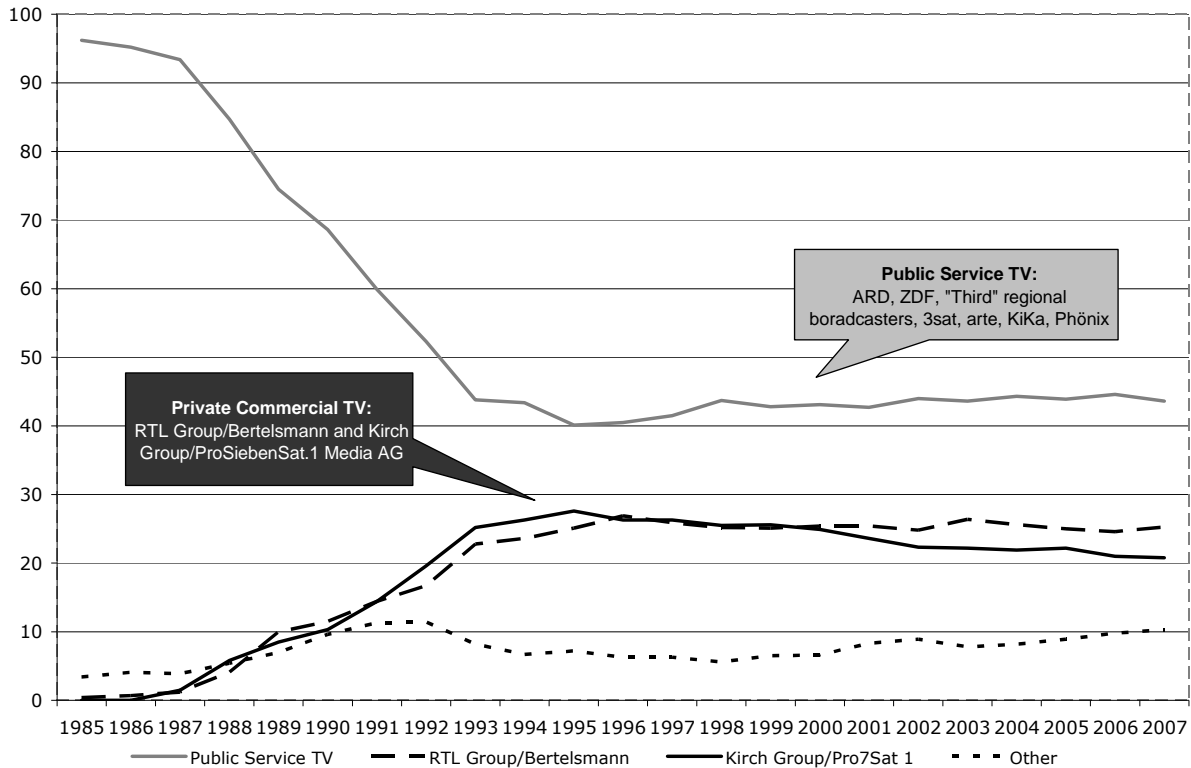
Public service broadcasters also transmit radio programs: Around 60 programs are offered, most of them are regional programs, but some broadcast nationwide, as the two stations with a cultural (Deutschlandradio Kultur) and an informational focus (Deutschlandfunk).

Public service TV and radio is financed to a small part (less than 20%) by advertising and sponsoring revenues, and to a large part by television and radio license fees. TV advertising is restricted to the two main national public TV programs, ARD and ZDF, from Monday through Saturday until 8 p.m., with a maximum of 20 minutes advertising per day (OSI/EUMAP, 2005, p. 747). The annual financial needs of the public service broadcasters are assessed by the Commission for the Assessment of Financial Requirements (KEF), which proposes the level of the license fee to the state governments and regional state parliaments, which then have to approve any changes. The amount of the license fee<sup>9</sup> is a highly debated issue in Germany and has caused many controversies between the states and the broadcasters, as well as among citizens.

Public service broadcasters are still the major player in the German TV market, even though they have lost a significant number of viewers since the beginning of the 1990s, as Figure 2 shows. In this regard, the introduction of private TV broadcasts posed—not surprisingly—a serious challenge to public service TV, as their audiences dropped dramatically. In 1993, the private share, when added together, for the first time outnumbered public service audiences—a trend that continued with the stabilization of the TV market in the mid-1990s and is still valid today. The main setbacks for public service TV have been the establishment of a second public program (ZDF) in 1963 and the opening of the TV market for private broadcasters in the mid-1980s.

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<sup>9</sup> Currently 17.03 € per month and household for radio and TV.



**Figure 2. Development of public service and private TV audience shares 1985–2007.**<sup>10</sup>

Source: Retrieved November 15, 2009, from <http://www.kek-online.de>

The stabilization of the TV market in the mid-1990s came about because of a relatively strict regulation of the private market (limiting the audience share of each business player to a maximum of 30% in 1997) and a growing saturation of the market (Kiefer, 2004). After constant and significant growth from the mid-1980s, the limits of the market became visible as the advertising revenues decreased and private broadcasters started to struggle after the millennium turn.

#### Private Commercial Broadcasters

Since the mid-1980s, private commercial broadcasters have gained a significant share of audiences and have influenced public service programming with their focus on entertainment and new formats. During that time, two major players shared the market among themselves: Leo Kirch's Media

<sup>10</sup> Retrieved May 7, 2008, from <http://www.kek-online.de/kek/medien/zuschauer/jahr.pdf> for annual data and author's calculation. The numbers from 1985–1991 are for the Federal Republic only, from 1992 on former East Germany is included.

Group and the Bertelsmann Group. The two media giants formed a duopoly, leaving third competitors only marginal shares. After the insolvency of the Kirch Group in 2002, Axel Springer AG sought to merge with ProSiebenSAT.1 Media AG, the television section of Kirch’s former media empire. The merger was prohibited in 2006 by the Commission on Concentration in the Media (KEK), which refused—for the first time ever—to approve a change in shareholder structure, claiming that otherwise Axel Springer would gain a dominate influence over public opinion. In order to measure an “assumed predominant impact on public opinion,” the KEK developed a new approach to weigh broadcasting audience shares and print media circulation and find a percentage of cross-media market share. (This approach shall be specified in the section of this article devoted to regulation paradigms and institutions). As a result of the prohibited merger, ProSiebenSAT.1 Media AG was sold to two private-equity investors, Permira and KKR, which hold 50% shares each. In 2008, they merged ProSiebenSAT.1 with the SBS Broadcasting Group, thus selling one group of their portfolio to another. This forced merger has further weakened the troubled ProSiebenSAT.1 and increased criticism toward private-equity “predator” activity in the media market.<sup>11</sup>

The proliferation of private commercial radio stations varies broadly from one federal state to another, as can be seen in Figure 3.

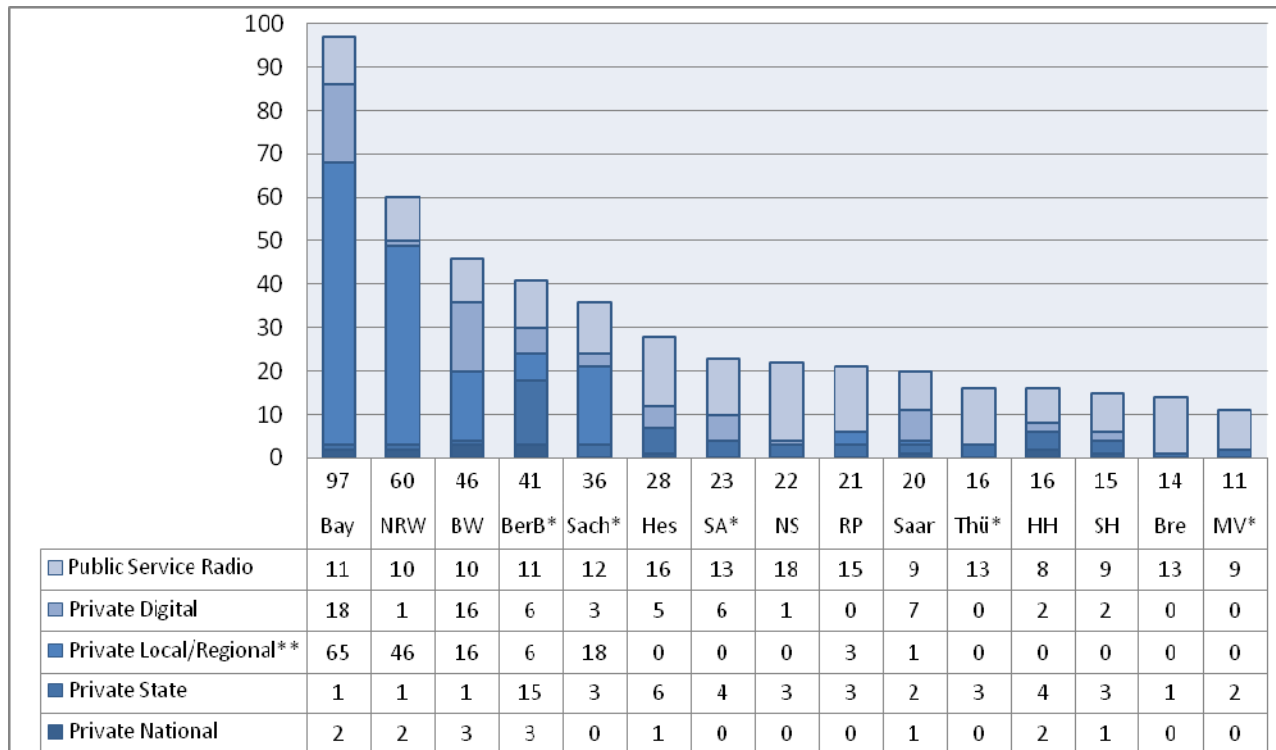


Figure 3. Numbers of Public Service and Private Commercial Radio Stations in German Federal States.

<sup>11</sup> See for example Der Spiegel, 40/29.09.08 pp. 98–99 and 46/10.11.08, pp. 84–86.



Source: ALM Jahrbuch 2005, p. 299 and 333 et seqq.

Notes: Private commercial stations of 0.5 % scope of coverage and above/ \*\* 0.4 % scope of coverage. States marked with \* are former East German states. Bay=Bavaria; NRW=North Rhine-Westphalia; BW=Baden-Württemberg; BerB=Berlin and Brandenburg; Sach= Saxony; Hes=Hesse; SA=Saxony-Anhalt; NS= Lower Saxony; RP=Rhineland-Palatinate; Saar=Saarland; Thü=Thuringia; HH=Hamburg; SH=Schleswig-Holstein; Bre=Bremen; MV=Mecklenburg West-Pomerania

There is no consistent positive correlation of size and population of a federal state to the number of private commercial radio stations<sup>12</sup>, nor can we find a significant east-west cleavage. Where there is hardly any private radio broadcasting, public stations compensate by supplying at least 10 stations to all the states, but that seems to leave few market opportunities for private commercial competition in places like Bremen,<sup>13</sup> which has 14 public radio stations for a population of 660,000. The number of radio stations varies broadly due to the regulatory authority of the states: Each state decides for itself how many and which radio programs may be received in its territory.

### Digital Broadcasting Programs

Besides six additional digital TV programs offered for free by public service broadcasters<sup>14</sup>, digital programming is the largest part of private commercial and pay TV. There also are 70 digital public service radio programs transmitted via satellite (DVB-S) and cable (DVB-C). The two dominant private broadcasting groups, ProSiebenSat.1 and RTL Group, offer two respective three digital pay TV programs<sup>15</sup>, which are available only on subscribed digital networks. The two providers of cable TV with the widest range of digital programming in their basic package offer 74 TV and 67 radio programs (Unitymedia) respective 93 TV and 75 radio stations (Kabel Deutschland). However, these numbers do include programs offering teleshopping services only and single-issue programs (such as Tier TV and motor sports TV) that have only marginal audience shares.

In Germany, more than half of all households have access to cable TV (54%).<sup>16</sup> The number of subscribers to digital cable TV increased by 28% in 2008 to 4.1 million, which means that 21% of cable households have switched to digital broadcasting. Also, 3.9 million households receive digital TV via terrestrial airwaves (DVB-T). The digital switchover from analog terrestrial TV broadcasting was finalized on November 25, 2008, two years before the official deadline of 2010.<sup>17</sup>

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<sup>12</sup> Compare 11 private commercial radio stations in small Saarland (with only one city of population 100,000+) to only four stations in Niedersachsen (with eight cities of population 100,000+).

<sup>13</sup> Where we find 14 public radio stations for a total population of 660,000.

<sup>14</sup> Eins plus, Eins extra, Eins festival, ZDFtheaterkanal, ZDFinfokanal, ZDFdokukanal.

<sup>15</sup> Sat.1 Comedy, kabel eins classics and RTL Crime, RTL Passion, RTL Living.

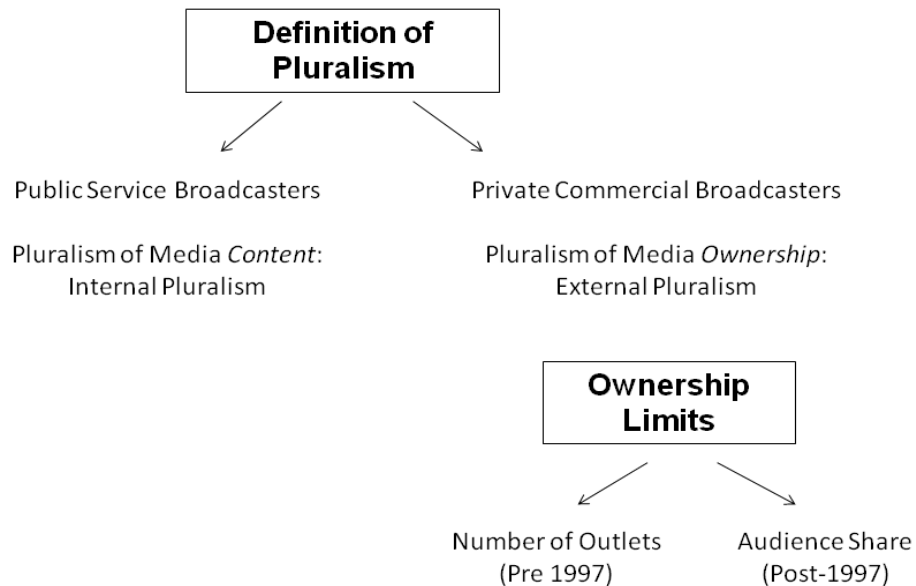
<sup>16</sup> Data from the Association of German Cable Operators ANGA, (<http://www.anga.de>; retrieved) (19.5 million households).

<sup>17</sup> See Abschlussbericht (Final Report), Task Force DVB-T Deutschland. Retrieved April 13, 2009, from [http://www.ueberallfernsehen.de/data/pm\\_task\\_force\\_101208.pdf](http://www.ueberallfernsehen.de/data/pm_task_force_101208.pdf)

### Regulation Paradigms and Institutions

The authority to regulate the broadcasting sector lies within the states, which operate with State Broadcasting Laws (*Landesrundfunkgesetzen*) to regulate the realm of public service broadcasting, and State Media Laws (*Landesmediengesetzen*) in the realm of private broadcasting. In 1987, the states created the first common regulatory framework—the Interstate Treaty—in order to have the same rules of the game applying nationwide.

The regulation of broadcasting in Germany features two major divides: one concerning the separate spheres of *public service*—internal pluralism and private broadcasting—external pluralism regulatory principles; and another divide of *absolute outlet number*—audience share ownership regulation in the private sector.



**Figure 4. The Divides of Broadcast Pluralism Regulation.**

Media pluralism regulation in Germany means much more than the regulation of fair market competition, as Henle (1995, pp. 16–17) has pointed out:

Competition regulation protects competitors among themselves, in order to guarantee the functional operability of the market, but not the diversity of opinions. The legislators of Interstate Treaty on Broadcasting explicitly decided in favor of structural regulation – and thus opposed a mere market regulation of pluralism development in the realm of private broadcasting.<sup>18</sup>

This is also expressed in the existence of separate regulation authorities. While media market regulation is taken care of by the Federal Competition Authority (*Bundeskartellamt*) executing the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* GWB), pluralism issues and the diversity of opinions in the media are subjected to a range of institutions: State Media Authorities (*Landesmedienanstalten*) monitoring compliance of commercial broadcasters with the Interstate Treaty, the Commission on Concentration in the Media (KEK) monitoring ownership and inhibiting the “exercise (of) a predominant impact on public opinion” of any media company,<sup>19</sup> as well as the Constitutional Court, whose decisions have traditionally underlined the importance of diversity in the media.

### Internal Pluralism Regulation

As public service broadcasting is not constrained by structural criteria restricting its audience reach (as is commercial broadcasting), the Interstate Treaty outlines in the public service’s mandate its obligation to pluralism in content:

Public service must provide in its offerings and in its programming a comprehensive overview of international, European, national and regional events in all major spheres of life. It should hereby promote international understanding, European integration and social cohesion on a regional and national level. Its programming must serve to inform, educate, advise and entertain. It must, in particular, offer cultural contributions. Public service broadcasting must in fulfilling its mandate take into consideration the principles of objectivity and impartiality of reporting, plurality of opinion and the balance of offerings and programming. (Article 11)

Such a rigid catalog of content requirements is not applied to commercial broadcasters, yet Article 25 of the Interstate Treaty obliges them to express plurality of opinion, to give “appropriate opportunity” to important political and social groups and to take minority views into account. So-called “full programs,” such as commercial channels that broadcast nationwide, cover various thematic fields (other than special-interest programs) and receive the largest audience shares, are obliged to provide inserted channels that offer at least 260 minutes per week of regional content and content from independent providers. For the purpose of this paper, we shall omit a more detailed account of internal pluralism rules and measures or possible sanctions and turn to the structural pluralism provisions established to contain commercial broadcasters.

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<sup>18</sup> Translation by Ulrike Klinger.

<sup>19</sup> As is laid out in the KEK’s mission statement. Retrieved May 20, 2008, from <http://www.kek-online.de/cgi-bin/esc/mission.html>

### External Pluralism Regulation

In Germany, external pluralism regulation applies to commercial broadcasters only. In 1997, it underwent a significant change that altered the entire logic of pluralism and created a second divide of pluralism regulation. After the "two channels maximum" paradigm failed to structure a diverse ownership pattern and instead cemented the duopoly of two private commercial competitors, legislators decided to reform media market regulation. The shift from a program-supplier (broadcaster) to a program-user (audience) approach became the dominant focus of the reform discussion: "(The audience paradigm) by now dominates the discussion with such intensity, that the pros and cons of this model are hardly ever debated and other possible solutions utterly disappeared from the agenda" (Henle, 1995, p. 73).

The concentration limit was fixed in 1997 as follows: Any person or company may operate an unlimited number of private commercial channels—until they reach "predominance of public opinion" with a TV audience share of 30%.<sup>20</sup> This limit is reduced to 25% if the operator is holding a dominant position in a related media-relevant market<sup>21</sup> or its influence on public opinion in other media-relevant markets is estimated to be equivalent to a 30% TV audience share.<sup>22</sup> Setting the 30% threshold was as arbitrary as it was convenient, as from the beginning, none of the competing private commercial broadcasters came close to this limit, which allowed circumventing potential conflicts around withdrawing licenses.

One fundamental critique of the audience-based concentration limit is the method of gathering the necessary data. In its 2008 annual report, the KEK repeatedly pointed out several deficiencies in its data: audiences in public viewing were not included, nor were non-EU citizens counted.<sup>23</sup> Critical voices negated the validity of audience share as a measure for pluralism, arguing that selective exposure was a basic liberty with very heterogeneous variables leading to the formation of public opinion:

The fixed (audience) threshold of Article 26 Interstate Treaty is a fiction of average (*Durchschnittsfiktion*), providing in particular for potential influences on individual opinion formation no more but a normative significance, because not all viewers contribute equally to the measured market shares. (Kaase, 1999, p. 44)

When Axel Springer AG, the dominant German publisher<sup>24</sup> that also holds shares in radio stations and local TV, sought to buy the second largest broadcaster ProSiebenSAT.1 Media AG in 2005, a new challenge for the audience-share paradigm evolved: KEK had to find an innovative formula for calculating cross-media influence on public opinion. The decisive factors in weighing shares of other media markets

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<sup>20</sup> For inserting regional and/or independently produced programs a two and/or three percent bonus is rewarded.

<sup>21</sup> As media-relevant markets have been defined: Advertisement, radio, press, licenses, and production (KEK, 2006, p. 252).

<sup>22</sup> See Interstate Treaty (*Rundfunkstaatsvertrag*) Article 26.

<sup>23</sup> Four of 6.3 million foreign citizens in Germany are non-EU citizens. See KEK 2008.

<sup>24</sup> See (e.g.) Commission of the European Communities (2007, p. 44).

and translating them into TV share equivalents were thus defined: evocative power (*Suggestivkraft*), broad effect (*Breitenwirkung*) and topicality of news (*Aktualität*). The basic assumption was that only TV fulfills all three factors completely and that the influence of other media genres on public opinion could be weighted according to their compliance to those factors (see also Just, 2009). Thus, the KEK calculated that Springer's 26% share of the daily press market was equivalent to the potential influence on public opinion posed by a TV share of 17%.<sup>25</sup> Adding together all other Springer activities in media markets,<sup>26</sup> the KEK concluded that the merger of Springer and ProSiebenSAT.1 would create a conglomerate influencing public opinion equivalent to a TV broadcaster with a 47% audience share.<sup>27</sup> Even with a 5% bonus for broadcasting regional and independently produced programs, the merger would have allowed Springer the equivalent of a 42% TV audience share, beyond the limit of assumed predominance on public opinion.

This new weighting approach has been criticized as arbitrary and unfounded. As Bornemann (2006, p. 279) pointed out: "The implicit main criterion of the renunciative decision is KEK's 'sensation of predominant power over public opinion' (...). The elaborate justification of weighted influence accounting for different markets appears to be decoration only." Adding to the skepticism toward the calculation model of "equivalent" shares came the legal debate about the legitimacy of even starting this procedure. While KEK interprets the 25%–30% rule of Article 26 Interstate Treaty as not being a binding threshold to start investigations, other legal interpretations have concluded that ProSiebenSat.1 Media AG only reached about 22% of audience shares and thus had remained below the legal threshold to *assumed predominant impact* on public opinion, the central paradigm of pluralism regulation in the broadcasting sector. Therefore, so the argument goes, KEK had no legitimate incentive to either develop and apply a new weighting model in this case or to declare the merger unlawful. However, KEK's decision to reject the merger was confirmed by the Bavarian Administrative Court (*Bayerisches Verwaltungsgericht*) in November 2007. As the court's decision is still under review, the legal debate remains open.<sup>28</sup>

### Conclusion

The development of the newspaper market in Germany illustrates the impact of political decision making based on certain paradigms and priorities. These in turn are shaped by the (economic) interests of important actors. In the case of the German print media sector, the following can be observed.

- The unique merger control regulation using the fusion control law (which exists in the context of competition law) to safeguard pluralism is increasingly under pressure, even though an initiative to change the law was curbed in 2004.

<sup>25</sup> Weighting coefficient is 2/3.

<sup>26</sup> As (bi-) weekly and monthly journals (1/10), TV program journals (1/7), Internet (1/2), radio (1/2) (weighting coefficient).

<sup>27</sup> 22% ProSiebenSAT.1 and 25% Springers media-relevant equivalents.

<sup>28</sup> See KEK (2008, p. 335).

- The merger control law has not prevented regional monopolization, as it does not apply to ceasing publications, nor does it bring about new newspapers.
- The case of the selling off the former Socialist Party newspapers in the East German states to West German publishing companies, maintaining the external structure of single large regional newspapers, is an example of a missed opportunity to restructure the media system after reunification.

The development shows that a market-oriented liberal paradigm prevails in German media policy, while the pluralism paradigm is neglected.

Being one of the most diverse and competitive broadcast markets in Europe, the German dual system of public service and private commercial broadcasters still poses challenges to regulators, who seek to avoid a "predominant influence on public opinion." Starting with an approach that limited the number of programs for each commercial broadcaster to two, the German *länder* turned toward a new model in 1997. The audience-share limit approach for private commercial broadcasters has further stabilized duopoly in the private market. The attempt to cross-media merge ProSiebenSAT.1 and Springer in 2005 brought about a new model to weigh market/audience shares based on equivalence. Digitalization was completed by 2008, yet it has not broken the dominance of the two major broadcasting outlets regarding audience shares. The German case of broadcast regulation demonstrated the importance to regulate pluralism, not just competition and the normative and methodological problems involved in such an ambitious approach.

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