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für Medienforschung **an der Universität Hamburg**

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*Regulation of Broadcasting  
and Internet Services in Germany*

*A brief overview*

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## 1. Introduction

The following article intends to give an impression of the regulatory standing in Germany.<sup>1</sup> It is not an academic analysis, but just a way to further information to people who have so far not been exposed to media regulation in Germany at all.

The article only covers the regulation of those kinds of media, which relays information to general public by means of telecommunication; film and traditional press<sup>2</sup> are excluded from this description as well as the regulation of telecommunication<sup>3</sup> is. Furthermore data protection<sup>4</sup>, the protection of privacy and special “privileges” media companies hold, e.g. the right to demand information from administrative bodies, are not the topic of this article. Moreover, the following overview does not cover the commercial law applicable to mass media either.

## 2. Background

When it comes to mass media communication, the current German regulation has to be seen in the context of historical developments as well as in respect of technical, economical and social conditions in Germany. It will be of help to understand the current standing by having a look at the history of German broadcasting.

In October 1923, broadcasting was launched in the Weimar Republic. After 1933 the National Socialists used the established centralized broadcasting system as a tool of propaganda. So after World War II the primary objective of broadcasting regulation was to provide independent and pluralistic programming; broadcasting was seen as an instrument of the society rather than one of the state. Especially the British Broadcasting Corporation (BBC<sup>5</sup>) served as a model for German public broadcasters, which were set up in different states, or a single broadcaster for some states jointly.<sup>6</sup> Later on, these public broadcasters formed a kind of network, the ARD<sup>7</sup>. In 1963, a nation-wide TV broadcaster, the ZDF<sup>8</sup>, was established by a treaty between the states. Nowadays, the public broadcast companies have two nation-wide general interest channels and the following special interest channels: They are a children’s

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<sup>1</sup> [October 2002] The regulatory framework changes rapidly, so please make sure that you have obtained the up-to-date version of this overview. An introduction to the German transformation from industrial society into information society can be found at <<http://www.kommwiss.fu-berlin.de/~gwersig/publi-pro/www/korea-I.htm>>.

<sup>2</sup> See <[http://www.presserat.de/site/service/lang\\_english/index.html](http://www.presserat.de/site/service/lang_english/index.html)>; <<http://www.prinzlaw.com/english/jurinfoe/areas/presse.htm>>.

<sup>3</sup> <<http://www.iuscomp.org/gla/statutes/TKG.htm>>; some directives are available at <<http://www.iuscomp.org/gla/statutes/statutes.htm>>.

<sup>4</sup> <[http://www.datenschutz.de/\(en\)](http://www.datenschutz.de/(en))>; <[http://www.bfd.bund.de/information/datprotec\\_en.html](http://www.bfd.bund.de/information/datprotec_en.html)>; mostly in german: <<http://www.datenschutz-berlin.de/ueber/recht.htm>>.

<sup>5</sup> <<http://www.bbc.co.uk>>.

<sup>6</sup> Bavaria: <<http://www.br-online.de>>; Hesse: <<http://www.hr-online.de>>; Saxony; Saxony-Anhalt; Thuringia: <<http://www.mdr.de>>; Hamburg; Lower Saxony; Mecklenburg-West Pomerania; Schleswig-Holstein: <<http://www.ndr.de>>; Brandenburg: <<http://www.orb.de>>; Bremen: <<http://www.radiobremen.de>>; Saarland: <<http://www.sr-online.de>>; Berlin: <<http://www.sfb.de>>; Baden-Wuerttemberg; Rhineland-Palatinate: <<http://www.swr.de>> North Rhine-Westphalia: <<http://www.wdr.de>>.

<sup>7</sup> Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, <<http://www.ard.de>>.

<sup>8</sup> Zweites Deutsches Fernsehen, <<http://www.zdf.de>>.

channel, a documentary channel, two cultural channels and regional programmes, as far as television is concerned. Each public broadcaster represented within the ARD offers several radio programmes for its respective home state(s). Besides these, there is a German international broadcaster, the Deutsche Welle.<sup>9</sup>

Broadcasting services have been offered by private entrepreneurs since 1984. Nowadays, cable TV households have the choice of approximately 33 TV channels, public and private ones. 56,4 % of all German households receive the programmes on cable, 10,4 % make use of terrestrial transmission and 33,2 % via satellite.<sup>10</sup> So far, 44,1 %<sup>11</sup> of all Germans use online-services.

### 3. Constitutional Basis

#### 3.1. Basic Rights

The basic rights of communication are laid down in art. 5 sec. 1 of the German Constitution<sup>12</sup> (Grundgesetz, GG<sup>13</sup>), which quotes:

“Everyone shall have the right to freely express and disseminate ones opinion in form of speech, writing and pictures, and to freely inform oneself by using generally accessible sources. Freedom of press and freedom of reporting by means of broadcast and by using film are guaranteed. There shall be no censorship.”

While the right to express ones opinion and informing oneself is first of all seen as a “classical” civil right, the German Constitutional Court (Bundesverfassungsgericht, BVerfG<sup>14</sup>) interprets the freedom of mass media communication, especially by means of broadcasting, according to a different underlying concept. According to the court’s point of view the freedom of media is not merely a subjective right, but also an objective guarantee, which states the obligation for the lawmaker to ensure that the media system works.<sup>15</sup> The lawmaker has the duty to ensure that a free and open process of forming public and individual opinion is given. This includes further objectives like guaranteeing variety and diversity, and the fair chance of participating in public communication. However, the lawmaker has to fulfil this task without interfering with the journalistic autonomy of the media. Mass media communication has to function without any state interference.<sup>16</sup> To fulfil these slightly paradoxical constitutional requirements the lawmaker uses both structural and procedural instruments for broadcasting regulation.

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<sup>9</sup> <<http://dw-world.de>>.

<sup>10</sup> Media Perspektiven, Basisdaten 2001, S. 8.

<sup>11</sup> van Eimeren/Gerhard/Frees, Media Perspektiven 2002, 346 (347).

<sup>12</sup> Regarding the constitutional background see <[http://www.uni-wuerzburg.de/law/gm\\_\\_indx.html](http://www.uni-wuerzburg.de/law/gm__indx.html)>.

<sup>13</sup> <[http://www.uni-wuerzburg.de/law/gm00000\\_.html](http://www.uni-wuerzburg.de/law/gm00000_.html)>.

<sup>14</sup> <<http://www.bundesverfassungsgericht.de>>.

<sup>15</sup> BVerfGE 7, 198 (204); 57, 295 (319).

<sup>16</sup> Hoffmann-Riem, Regulating Media, New York 1996, 119.

For the special broadcasting regulation, which is less “liberal” compared to press or film, two reasons are given: Firstly, broadcasting plays a special role in public communication, being suggestive, current and with spread-effect.<sup>17</sup> Secondly, there is a specific risk of market failures when it comes to private broadcasting. There is a scientific debate going on between constitutional lawyers, on whether these assumptions for broadcasting are no longer valid when it comes to digitalisation, or, the other way round, the arguments given by the constitutional court can be applied to new media services as well.

However, due to these special constitutional requirements the role of the Federal Constitutional Court shall not be underestimated when regarding the structuring of the broadcasting system in Germany for the last 50 years. Several landmark-decisions<sup>18</sup> have had an exceptional influence on the law making process.<sup>19</sup>

### 3.2 Legislative Competence

Germany is a federal republic consisting of 16 states (Bundesländer). Therefore, legislative power is shared between the federation and the states. According to art. 70 sec. 1 GG the states have the legislative competence unless the constitution provides a legislative competence for the federal state. There is a federal state competence for telecommunications, for combatting economical concentration, and in respect of several other subjects, which can be of importance when media regulation is concerned. However, the competence to ensure the functioning of the media system is in the hand of the states. Especially when it comes to the regulation of technical services, e.g. conditional access, the system of legislative competences can easily lead to conflicts between federal and state governments. One example are the provisions for conditional access systems laid down in the Access Directive 2002/19/EC (art. 6)<sup>20</sup> which have been transferred into national law by a federal act (the “Fernsehsignalübertragungsgesetz”) as well as by interstate treaty between the states (art. 53 RStV).

## 4 European Framework

National regulation in Germany has greatly been influenced by European legislation, and the influence it has on national law is getting stronger. The EC is assured of its competence for laying out laws for the media sector by using art. 49 EC Treaty, which empowers the EC to ensure the freedom of services provided within the community. Following the jurisdiction of the European Court, mass communication services have to be treated as such services. The European Commission<sup>21</sup> issued a bundle of directives in order to harmonize the law of the member states for ensuring the economical liberties. These directives have to be transformed into national law. For the content-services covered by this article, especially the “Television

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<sup>17</sup> BVerfGE 90, 60 (87).

<sup>18</sup> See the compilation of links at <<http://www.ikmrecht.de/lehre/bverfge/index.html>>.

<sup>19</sup> BVerfGE 12, 205; BVerfGE 31, 314; BVerfGE 57, 295; BVerfGE 73, 118; BVerfGE 74, 297; BVerfGE 83, 238; BVerfGE 87, 181; BVerfGE 90, 60. Excerpts and head notes of all decisions can be obtained in english at <<http://www.uni-wuerzburg.de/dfv>>.

<sup>20</sup> Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); 7 March 2002.

<sup>21</sup> <[http://europa.eu.int/comm/index\\_en.htm](http://europa.eu.int/comm/index_en.htm)>.

Without Frontiers"-Directive (97/36/EC)<sup>22</sup>, the Access Directive 2002/19/EC<sup>23</sup> and the E-Commerce Directive (2000/31/EC)<sup>24</sup> are of major significance.<sup>25</sup> Besides that, German regulation has been effected by art. 81, 82 EC Treaty and rules concerning public companies.

## 5 The Legal Framework in Germany

Because of the above-mentioned system of competences, conflicts have arisen between federal and state governments on the regulation of so-called "new services", mainly available on the internet. Two laws have been enacted, of which the scope is said to be not clearly defined, thus triggering the risk of overlapping regulation. They are the Tele Services Act (Teledienstegesetz, TDG<sup>26</sup>) at federal level and the Media Services Interstate Treaty (Mediendienstestaatsvertrag, MDStV<sup>27</sup>) at state level. Broadcasting is regulated by state laws which have been harmonized by the Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag, RStV).<sup>28</sup> Besides that, there are specific media laws or interstate treaties for public broadcasters.<sup>29</sup>

A service is defined as broadcasting by the Interstate Treaty on Broadcasting, if it is intended to be received by the general public, transmitted by means of telecommunications and if it is characterised by a so-called presentation ("Darbietung"). If a service does not have the feature of a presentation it is classified as a Media Service, e.g. teleshopping and most of the internet services are seen as Media Services. Tele Services are characterised by an individual exchange between the user and the provider (e.g. the customer interaction when E-Commerce is concerned). As there is a variety of new services while the traditional broadcasting is changing, it has become difficult to apply the right law to the respective communication service. There is a debate going on in Germany whether a new framework of regulation is necessary to cope with the problems emerging from the technical convergence. Regarding the protection of minors a new regulatory system has been laid out in 2002 to cope with the effects of technical convergence (see 7 pp.).

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<sup>22</sup> Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member states concerning the pursuit of television broadcasting activities; <[http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en\\_1989L0552\\_do\\_001.pdf](http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en_1989L0552_do_001.pdf)>.

<sup>23</sup> Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); 7 March 2002; [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/l\\_10820020424en00070020.pdf](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00070020.pdf).

<sup>24</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; <[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0031&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0031&model=guichett)>.

<sup>25</sup> See *Holznagel/Orlandi*, Transposition of the EC "Televison without Frontiers" Directive. Advertising, Sponsorship and Programme Quotas. Hamburg 1993; Holznagel, Broadcasting Law and Regulation of the EC, in: Holznagel/Möller (Eds.): Media Law in Europe, München 1995, 1.

<sup>26</sup> <[http://www.iid.de/iukdg/aktuelles/fassung\\_tdg\\_eng.pdf](http://www.iid.de/iukdg/aktuelles/fassung_tdg_eng.pdf)>.

<sup>27</sup> Only in german: <<http://www.alm.de/bibliothek/medstv.htm>>.

<sup>28</sup> Older version: <<http://www.iuscomp.org/gla/statutes/RuStaV.htm>>, actual german version <<http://attorney.bei.t-online.de/060021.htm>>.

<sup>29</sup> E.g. in english the media law for the public broadcaster WDR in North Rhine-Westphalia <[http://www.wdr.de/unternehmen/media/wdr\\_gesetz\\_e.pdf](http://www.wdr.de/unternehmen/media/wdr_gesetz_e.pdf)>



## 5.1 Public Broadcasting

In the so-called dual system – a broadcasting order in which public and private broadcasters co-exist<sup>30</sup> – public broadcasters according to the Constitutional Court shall fulfil a specific function. As the Court supposes that economically driven private broadcasting tends to seek mass appeal and disregards minority interests, a basic provision (“Grundversorgung”) has to be offered by public broadcasters. According to the Court the above-mentioned deficits of private broadcasting are acceptable as long as public broadcasters ensure basic provision.<sup>31</sup> However, private broadcasters are not prohibited from ensuring this basic provision either, and on the other hand, public broadcasters are not restricted to offer basic provision. How the tasks of public broadcasters are to be described and specified is one of the main points of debate in German media policy.

To enable the public service broadcasters to fulfil their tasks the states have to guarantee the necessary funding. Households having a broadcasting receiver are obliged to pay broadcasting fees. The amount to be paid is defined in a complex process in which an independent expert commission (Kommission zur Ermittlung des Finanzbedarfs der öffentlich-rechtlichen Rundfunkanstalten, KEF<sup>32</sup>) is involved. The KEF has to scrutinise the plans of public broadcasters in view of an efficient use of money. Besides the broadcasting fees as a primary source of funding, the public broadcasters are permitted to earn money by means of advertising and sponsoring. There are advertising restrictions for public broadcasters which, in the first line, attempt to prevent these broadcasters from predominantly using economically driven programming. For example, public broadcasters are not allowed to broadcast advertisements after 8 pm.

One feature that characterises public broadcasters is an internal supervisory body (“Rundfunkräte”, ZDF: “Fernsehrat”), in which so-called socially relevant groups, like trade unions, employers associations, churches, environmentalist groups etc. are represented. It is the task of these bodies to monitor the legal requirements and to make sure that diversity in programming, i.e. representing the manifold opinions to be found in society itself, is achieved. Besides that, each state government provides a legal supervision with limited power. The head of the public broadcasters, the director (German: “Intendant”), is elected by the respective internal body.

While all public broadcasters bare the same basic structure, there are significant differences, taking the social relevant groups which are represented in the internal supervisory body as an example. Another difference are the tasks of public broadcasting laid down in the legal framework. However, since 1999 the public broadcasters which are members of the ARD and the ZDF were given the permission to use digital transmission, to offer programme guides and bundle programmes (art. 19 RStV). Furthermore, they are allowed to offer so-called programme-aligned online-services (art. 4 sec. 3 ARD-, ZDF-, DW-G). Apart from these clear tasks, experts disagree on the variety of activities which can, or have to, be granted to public broadcasters. Some argue, that in a changing media environment public broadcasters have to offer new media services, and because of art. 5 sec. 1 GG they have the right to do so without any special authorisation by the lawmaker. Others argue, that they are restricted to traditional

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<sup>30</sup> See *Libertus*, Constitutional and Legal Outlines of the German Broadcasting System, 9.

<sup>31</sup> BVerfGE 73, 118 (157 p.).

<sup>32</sup> <<http://www.kef-online.de/>>

broadcasting and at least a specific permission by the lawmaker is indispensable to offer new media services.

## 5.2 Regulation of Private Broadcasting and Internet Services

In order to understand the system of regulation of private broadcasting and internet services it is of advantage to look at different fields of regulation rather than at the legal framework laid out for different services. The following is meant to describe these different fields of regulation.

### 5.2.1 Market Entry: Licensing and Ownership Rules

Private broadcasters require a licence.<sup>33</sup> The process of licensing is structured by the state media laws, and, for nation-wide television, by the Interstate Treaty on Broadcasting. Apart from criteria known from general trade law, like reliability of the applicant, the licensing process is designed to guarantee that a maximum in diversity is achieved, or that at least the effect of compelling influence on public opinion is prevented. Some state media laws quote different additional requirements. In some states it is stipulated by media law that broadcasters assure to produce part of their programme contents in the respective state, a condition which has been challenged by the European Commission as being discriminatory. Foreign broadcasters do not need a licence in case of retransmission via cable, if their programme observes the rules of the European Convention on Transfrontier Television (1989)<sup>34</sup>. However, these broadcasters have also to be aware of the regulations laid down in the Interstate Treaty on Broadcasting.

To prevent compelling influence in the area of nation-wide television programmes a special regulation has been laid out in the Interstate Treaty on Broadcasting (art. 26-30 RStV).<sup>35</sup> There is a threshold of 30 % of the viewer market share; having more than this share is regarded as compelling influence on public opinion. Activities of companies on other markets related with the broadcasting market are taken into account if their market share exceeds 25 %. All programmes are added to a company's viewer market share if the company is related to the broadcaster in a way defined by the RStV. To judge the influence a company has on public opinion is within the responsibility of an expert commission (Kommission zur Ermittlung der Konzentration im Medienbereich, KEK<sup>36</sup>). Under certain circumstances the body of the directors of the state Media Authorities (KDLM) can overrule the decision of the KEK.<sup>37</sup>

The licensing procedure, inclusive of reasons under which a licence can be revoked, is laid down in the different state media laws. Even nation-wide broadcasters have to apply for a licence in one of the German states and are thereafter supervised by the respective state Media Authority, which has licenced the programme. Besides this fact, state-wide broadcasting (television and radio) is regulated in accordance with the state media laws in its entirety.

<sup>33</sup> Art. 20 sec. 3 RStV stipulates an exception for forms of narrowcasting.

<sup>34</sup> <<http://book.coe.int/conv/en/ui/frm/f132-e.htm>>

<sup>35</sup> Besides that, the General Antitrust Law (GWB) is applicable on media companies, as well.

<sup>36</sup> <<http://www.kek-online.de>>.

<sup>37</sup> See KEK, Securing Diversity of Opinion Against Media Concentration: Summary of the Report 2000, available at <<http://www.kek-online.de/kek/download/mk-bericht/summary.zip>>.

Some of them have adopted the ownership-rules of the Interstate Treaty on Broadcasting, others still follow the old model of multiple ownership restrictions.

For Tele Services and Media Services there is no licensing or registration needed at all. However, the Interstate Treaty on Broadcasting states in art. 20 sec. 2 RStV (the so-called transition rule) that media services which are regarded as broadcasting have to apply for a licence as well.

## 5.2.2 *Programme Requirements*

### 5.2.2.1 *Programme Guidelines and Programme Quotas*

In the so-called dual system due to the constitutional propositions, the commercial pillar is not completely free of programme-related requirements. So one can find programme guidelines in the Interstate Treaty on Broadcasting (art. 2a, 41 RStV), and in the state media laws, which state that general channels have to ensure at least a minimum of diversity; all german and foreign programmes have to be orientated at specific common-shared values like the dignity of mankind or global peaceful co-existence. These programme requirements are formally regarded as strict legal obligations, however, in practice they serve mainly as orientation points for debates on media quality.

The quota for European productions laid down in art. 4 of the “Television Without Frontiers”-Directive is mandatory for all broadcasters according to art. 6 of the Interstate Treaty on Broadcasting.

### 5.2.2.2 *Protection of Minors*

In spring 2002 the prime ministers of the states and the federal government agreed on basic terms for the amendment of the laws for protecting minors in the field of media. The common aim was to develop a coherent framework for the protection of minors as far as broadcasting and new services are concerned; currently, the substantial regulation as well as the competence of the supervisory bodies are particularly disjoint.

Two new laws have been enacted, the Act for the Protection of Minors in the Media (Jugendschutzgesetz, JuSchG)<sup>38</sup> at federal level and the Interstate Treaty on Protection of Minors in the Media (Jugendmedienschutzstaatsvertrag)<sup>39</sup> at state level, which will come into effect on 1st of April 2003. Roughly speaking, the Jugendschutzgesetz deals with media content which is physically available, like books, CDs and so on. Furthermore, the use of media content available by Tele Services or Media Services in the public is covered by the Jugendschutzgesetz, an example is the access to online games in public internet cafes. The access to films and cinemas is covered by this law as well. Regarding films age classification is carried by an established self-regulatory body (Freiwillige Selbstkontrolle der Filmwirtschaft, FSK<sup>40</sup>). For the press, the Board for Classification of Literature (Bundesprüfstelle, BPS<sup>41</sup>) is responsible, which under the new framework has to co-operate with the KJM (see below).

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<sup>38</sup> <[http://www.bmfsfj.de/Anlage22804/Jugenschutzgesetz\\_JuSchG\\_vom\\_23.\\_Juli\\_2002.pdf](http://www.bmfsfj.de/Anlage22804/Jugenschutzgesetz_JuSchG_vom_23._Juli_2002.pdf)> (german).

<sup>39</sup> <[http://www.artikel5.de/gesetze/jmstv-e\\_090802.html](http://www.artikel5.de/gesetze/jmstv-e_090802.html)> (german).

<sup>40</sup> <<http://www.fsk.de>>.

<sup>41</sup> <<http://bpjs.bmfsfj.de>>.

The interstate treaty lays out rules for the providers of Tele or Media Services and broadcasting within a new regulatory framework. There is a new concept based on the idea of „regulated self-regulation“.<sup>42</sup> First of all, there is illegal content quoted in the Interstate Treaty, i.e. first and foremost content which violates the penalty law (e.g. pornography as laid down in art. 184 Criminal Law [StGB] or so-called glorification of violence as laid down in art. 131 StGB). Besides that, providers of telemedia (the new collective term for Tele Services and Media Services) have to make sure that content which is likely to impair the development of minors is not accessible for minors of the respective age. Providers can meet these requirements by observing a time-shade-regulation or by „other means“, which can be access-blocking software. Whoever is offering television not only for one German state is required to name an appointee which is responsible for the protection of minors. The same goes for the providers of telemedia which offer the service on a commercial basis; however, small providers are not required to do so.

To monitor that the broadcasters and providers of telemedia are in line with the requirements of the Interstate Treaty falls into the responsibility of the state Media Authorities. But, as long as the providers act in accordance with the judgements of the self regulatory bodies and those bodies act within the scope of their discretionary power, the state authorities are not allowed to impose sanctions on the provider. However, these state authorities will be empowered to enact statutes and guidelines for the protection of minors and, thus, regulate this self-regulation. Furthermore, self-regulatory bodies need a kind of licence which can be revoked if they do not act in line with the requirements laid down in the Interstate Treaty. To establish a regulatory body responsible for Germany as a whole new authority, the „Kommission Jugendmedienschutz (KJM)“, will be established. The regulation of self-regulation falls primarily in the competence of this commission.

The Interstate Treaty on Protection of Minors in the Media creates a new framework for this field of regulation in Germany. It remains to be seen how it will work in practice. Some state that where the concept itself is reasonable the realization has some flaws, and, furthermore, there is still no workable separation of the scopes of the Jugendmedienschutzgesetz on one hand, and the Interstate Treaty on Protection of Minors in the Media on the other.

#### 5.2.2.3 Advertising Rules

Advertising and programming have to be distinguishable for the recipients. This is not the only but by far the most important objective as to regulating advertising.

Broadcasters have to respect special rules on advertising and sponsoring. Most of the German advertising rules for broadcasting are a word-by-word incorporation of European requirements (art. 10-12 of the “Television Without Frontiers”-Directive). Since there are already several reports on these requirements available in English we will refrain from further repetition in this article.<sup>43</sup>

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<sup>42</sup> Cf. *Schulz/Held*, Regulated Self-Regulation as a Form of Modern Government, 2002 (in print); interim report available at <<http://www.rrz.uni-hamburg.de/hans-bredow-institut/service/abpapiere/7selfreg.pdf>>.

<sup>43</sup> See *Haak*, German Broadcast Advertising Law, <[http://www.weinknecht.de/rundf\\_e.htm](http://www.weinknecht.de/rundf_e.htm)>; Bird&Bird, Evolution of new advertising techniques – Germany, <[http://europa.eu.int/comm/avpolicy/stat/bird\\_bird/pub\\_germany.pdf](http://europa.eu.int/comm/avpolicy/stat/bird_bird/pub_germany.pdf)>.

Apart from these advertising restrictions, the Interstate Treaty on Broadcasting allows forms of split-screen advertising (art. 7 sec. 4 RStV) and virtual advertising, as long as virtual advertisements replace real existing ones (e.g. in football stadiums; cf. art. 7 sec. 6 RStV).

Regarding Media Services separating advertisements from other content is mandatory (art. 13 sec. 2 MDStV). The Interstate Treaty for Media Services does not impose detailed rules like in the broadcasting sector. For Tele Services, there are no specific advertising rules.

#### 5.2.2.4 Limitation of Exclusives Rights

To make socially relevant information accessible to everyone, each broadcaster has specific rights to report from important events (art. 5 RStV). The organizer of the event has to grant access to at least one reporter team. Furthermore, in transforming art. 3a of the “Television Without Frontiers”-Directive, the obligation, referring to so-called major events, in which procedures have been set out as regards the reception of these events not only on pay-tv, but also on free-to-air TV, has been enacted. The Interstate Treaty on Broadcasting lists the events covered by this regulation (art. 5a RStV).

#### 5.2.2.5 Liability

Apart from transparency rules and the obligation to name the editor who is responsible, the liability regulation is mainly case law. Specific liability rules have been set out in art. 8-11 TDG and art. 6-9 MDStV for Tele and Media Services. These rules were changed in 2002<sup>44</sup> and are now in line with the standards set by art. 12 to 14 E-Commerce Directive.

#### 5.2.2.6 Regulation of Transmission and Services for the Distribution of Programmes

Broadcasting needs transmission capacities to reach the audience. In Germany, regulation of the technical part of telecommunication is within the purview of the federal government, the general framework is laid out in the Telecommunications Act (Telekommunikationsgesetz, TKG<sup>45</sup>); the responsible regulatory body is the Regulatory Authority for Telecommunication and Mail (Regulierungsbehörde für Telekommunikation und Post, RegTP<sup>46</sup>). Frequency management is part of the regulation laid out in the TKG. Another point of major importance for the broadcasting sector is that carriers (especially broadcasting cable providers), which have considerable market power, are subject to specific regulatory procedures such as price regulation. The RegTP is responsible for terrestrial frequencies, defining, in carrying out international agreements, the spectrum which is usable for broadcasting and for planning, in co-operation with the authorities of the states, the network structure. Whether a frequency can be used by public broadcasters and private broadcasters is decided according to procedures laid down in state regulation.

Unlike for example the situation in the United States, the cable operators in Germany were formerly just seen as service providers transmitting the broadcasting signals. Thus state Media Authorities have been empowered, backed by state media laws, to define according to legal criteria at hand, the programmes which have to be carried by a cable operator. The system still

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<sup>44</sup> The changed rules came into force on 1<sup>st</sup> July 2002; texts of the actual acts can be found at <<http://attorney.bei.t-online.de/060028.htm>> (MDStV, german) and <[http://www.iid.de/iukdg/aktuelles/fassung\\_tdg\\_eng.pdf](http://www.iid.de/iukdg/aktuelles/fassung_tdg_eng.pdf)> (TDG).

<sup>45</sup> <<http://www.iuscomp.org/gla/statutes/TKG.htm>>.

<sup>46</sup> <<http://www.regtp.de>>.

applies to analogue cable systems and to radio programming. Art. 52 RStV lays down a must-carry-model as regards digital cable systems. The law designates a number of programmes which every digital cable operator must carry: Some programmes of the public broadcasters, local channels and so-called open channels (“Offene Kanäle”)<sup>47</sup>. Another part of the capacity of the cable has to be allocated according to criteria laid down by law (like diversity of programming). The remaining capacity can be used by the cable operator without any specific legal obligations. The new model serves both, the objectives of broadcasting regulation and the possibility for cable operators to use the cable according to their own business models (e.g. broadband internet, telephony).

Furthermore, the Interstate Treaty on Broadcasting provides regulation for services with relevance to broadcasting, such as conditional access systems, programme guides and programme-bundling (art. 53 RStV). Conditional access services have to be offered on non-discriminatory basis and under fair and reasonable conditions to stay in line with the Access Directive 2002/19/EC. The same applies to basic programme guides which can give access to all services offered on a platform. Services, which have considerable market power as far as bundling of programmes is concerned have to abstain from discriminatory practices. Interfaces have to comply with European standards and have to be state-of-the-art. Whether the only application programming interface (API) standard (European standard: multimedia home platform, MHP<sup>48</sup>) meets this requirements has caused legal debates.

Companies offering these kinds of services have to file an application at the respective state Media Authority in charge, which then registers the service if it complies with the legal requirements. The state Media Authority is given the power to decree special regulation as far as these services are concerned.

#### 5.2.2.7 Supervision

The state Media Authorities (“Landesmedienanstalten”)<sup>49</sup> are responsible for regulating broadcasting services.<sup>50</sup> They are not part of the state administration, but independent agencies; therefore, they have internal bodies consisting of representatives of socially relevant groups (like the internal supervisory councils of the public broadcasters, see p. 5) or they are made up of experts. The administrative director of the authority prepares and carries out the decisions taken by the internal body. First and foremost they are responsible for licensing broadcasters, furthermore for supervision in view of all above-mentioned fields of regulation (protecting of minors, advertising, programme guidelines). Moreover, they take part in the frequency management.

State Media Authorities can use several instruments as sanctions, starting with the formal statement that there has been a breach of licence conditions or legal requirements by the

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<sup>47</sup> Publicly funded channels to which anybody has access to cast his self-produced programmes.

<sup>48</sup> <<http://www.mhp.org>>.

<sup>49</sup> List of all Media Authorities available at <<http://www.alm.de/mitglieder/mitglied.htm>>.

<sup>50</sup> Baden-Württemberg : <<http://www.lfk.de>>; Bavaria: <<http://www.blm.de>>; Berlin/ Brandenburg: <<http://www.mabb.de>>; Bremen: <<http://www.bremische-landesmedienanstalt.de>>; Hamburg: <<http://www.ham-online.de>>; Hessen: <<http://www.lpr-hessen.de>>; Mecklenburg-West Pomerania : <<http://www.lrz-mv.de>>; Lower Saxony: <<http://www.nlm.de>>; North Rhine-Westphalia: <<http://www.lfr.de>>; Rhineland-Palatinate: <<http://www.lpr-online.de>>; Saarland: <<http://www.lmsaar.de>>; Saxony: <<http://www.slm-online.de>>; Saxony-Anhalt: <<http://www.msa-online.de>>; Schleswig-Holstein: <<http://www.ulr.de>>; Thuringia: <<http://www.tlm.de>>.

broadcaster, the prohibition of further breaches of the requirements, fines, and, finally, the revocation of the licence. In case of a breach in fields of the protection of minors, the Media Authority has to report it to the KJM or the self regulatory bodies (see p.8). However, the broadcasting regulation in Germany is facing general problems, which can be found in other countries as well, as regards an effective implementation of the rules. Additionally, German broadcasting regulation has to cope with the federal system, which enables broadcasters, to some extent, to choose a state Media Authority, which leads to a kind of “forum shopping”.<sup>51</sup>

In order to evade the regulatory problems the state Media Authorities have tried to establish informal instruments of regulation, the so-called “regulation by raised eyebrows”, i.e. co-operating with the broadcasters, and furthering public awareness for problems of the broadcasting systems and stimulating research in this area.

The state Media Authorities have formed a nation-wide association, the ALM<sup>52</sup>, which has set up working groups on different subjects.

In respect of Media Services, the responsibility for regulation has been given to different administrative bodies by the states, and to the KJM and self regulatory bodies as regards the protection of minors. The different state authorities responsible for youth have formed the Jugendschutz.net<sup>53</sup> to co-operate with the KJM. The KJM and the self regulatory bodies are empowered by law to take appropriate measures (including interdiction and the order to block content) if there is a breach of legal requirements. They also can fine providers in the case of any breach of legal requirements. There is no specific regulatory body as regards Tele Services, except for the supervision in the field of protecting minors, which is within the responsibility of the KJM and self regulatory bodies.

## 6 Outlook: Foreseeable Changes

The States and the federal Government have agreed on establishing a coherent framework for protecting minors as regards all services. It will come into effect on 1st of April 2003. This article is already based on the new framework (see above p. 5.2.2.2).

Amendments are scheduled for the TKG (Summer 2003) and parts of the Interstate treaty on Broadcasting (time of enactment still unclear).

## 7 Further Materials

### 7.1 Offline

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<sup>51</sup> See *Hoffmann-Riem*, *Regulating Media*, p. 137, 144.

<sup>52</sup> Association of State Media Authorities (Arbeitsgemeinschaft der Landesmedienanstalten, ALM, <http://www.alm.de> providing some information in English)

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