

Past, present and future of Public Service Broadcasting in Germany



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ABSTRACT: Based on the dimensions of state interference proposed by Blumler and Gurevitch (1995), this paper follows their approach from an economic perspective. Therefore three alternative ways to provide broadcasting goods (the market, the state and the voluntary sector) are introduced. Next a historical overview of the German public service broadcasting is provided. Main legal provisions are described in theoretical remarks with focus on constitution of supervisory bodies of public service broadcasters. Ways and cases of political interventions are discussed there. The funding of public service broadcasters is depicted. Some recent developments are presented, related to the so-called “three step test” for new or changed online offerings of public service broadcasters. The German public service broadcasting sector is evaluated and visualized by means of the paradigm. Although different possibilities of state influence exist, German public service broadcasting can be characterized all in all as rather state-distant. New challenges arise, however, from the transformation process in public service media.

KEYWORDS: license fee, three step test, broadcasting council, administrative council, state interference



THEORETICAL REMARKS ON STATE INTERFERENCE FROM AN ECONOMIC PERSPECTIVE

Based on the dimensions of state interference proposed by Blumler and Gurevitch, 1995 (pp. 61–64; control over media finance, appointments and content), this paper follows their approach from an economic perspective. The dimension of “control over media finance” shall be used as the main factor for further research. With its help other types of state interferences, interpreted as non-monetary media finance, shall be described and involved in the analysis. The author thereby relies strongly on Kops (2007).

According to general economic theory, there are three alternative ways to provide goods: the market (the commercial sector), the state (the governmental sector) and the voluntary (non-governmental, non-profit) sector. Each of them has certain advantages and disadvantages, which establish certain incentives for the recipients of

those revenues at the same time. With regard to the broadcasting sector they can be described as follows (for details see Kops, 2007, pp. 7–16):

a) The provision of goods by the **market** relies on profit-making incentives. It is a cost efficient and dynamic method to satisfy human needs, as well as to ensure consumer sovereignty. However, this form of provision may suffer from numerous market failures, which can cause monopolization/oligopolization in the broadcasting market, accompanied with low program diversity (“more of the same”) and low quality, politically biased reports etc. In the market of advertising-based television programs competition for cost reduction of programs can prevail rather than competition for a rise in quality (Heinrich, 1999, pp. 537–538). Also manipulation of the audience by order of political sponsors can become a disadvantageous part of the business model of commercial broadcasters.

b) The provision of goods by the **state** relies on mandatory regulation and centralized decision rules. The state can correct some of the market failures. A benevolent state broadcaster has the ability to prevent disadvantages relating to commercial and voluntary broadcasters. It can supply non-profitable programs (e.g. educational programs for poor), programs with high positive external benefits (e.g. programs which foster cultural heritage) and reflect views of all strata of society, regardless of their motivation and material basis. “However, these theoretical capabilities hardly are relevant, as state broadcasters are never benevolent” (Kops, 2007, p. 12). Predominantly state financed broadcasters cannot usually escape from political control and are abused to disseminate the government’s/ruling party’s views with the objective of ensuring or extending political power. Simultaneously, oppositional views are suppressed. In addition, state broadcasters usually lack cost efficiency and dynamics in adjusting to new or changed consumer needs.

c) Provision of goods by the **voluntary** sector relies on intrinsic motives, e.g. altruistic motives and motives that derive from the desire for acknowledgement (e.g. scientists); they are neither driven by profit-making nor oriented at gaining political power. In order to function properly, the voluntary sector needs a strong and diverse civil society, but also a continuous financial support (usually provided by the state) because most NGOs lack financial resources. Another requirement for expansion of the voluntary sector noted by Kops, 2007 (p. 14) is “a government that does not abuse its role as a sponsor of civil society to influence the (political) opinions of the institutions of civil society.” Indeed, state financing of civil society institutions opens the floodgates to its indirect manipulation.

Thus, funding in general determines program output, as certain programs will be broadcasted in exchange for revenues from a provider of funds. However, there are numerous non-monetary factors that influence the revenue structure, which can be of economic, legal, political, societal and technical origin. For instance, the autonomy of a broadcaster being financed from state funds strongly depends on whether such funds will be allocated by “discretionary decision, enabling administrators to discriminate between different media outlets, or by more automatically

applicable objective criteria" (Blumler and Gurevitch, 1995, p. 64). Control over content can also be interpreted with the same perspective (*ibid.*). Governments with adequate power competencies can force the broadcaster to act in a politically biased fashion. Otherwise the broadcaster may experience sanctions that influence its revenues (e.g. withdrawal of broadcasting license).

In turn, the monetary and non-monetary funding structure determines the incentives for the staff. Indeed, there are intermediary factors, which can encourage the journalists (staff) and the management board of a broadcasting company to produce a certain output that may be quite contrary to the incentives set by funding. One such factor is journalists' behavior, which can be described in four spheres (Donsbach, 2003, pp. 108–110): subject (journalist as a person, e.g. political ideas, professional motives), profession (common values of the journalists, e.g. ethical values), institution (characteristics of the broadcasters, e.g. economic structure, freedom of speech at work), and society (political culture, freedom of speech in the country). According to this model, the higher the professionalism of a journalist (person), the stronger the compliance to the code of conduct among journalists (profession), the more independent a journalist is in his work (institution), and the stronger the freedom of speech exists in the country (society), so much the lesser the impact of state interferences (see also Dubina, 2009, pp. 24–25).

The conditions of the higher-level sphere can then affect “subordinated” spheres. This means that rules prevailing in a broadcasting organization can determine the journalists’ behavior or (in the terminology of Kops, 2007, pp. 19–22) internal gratification rules can set incentives for the staff deviating from or corresponding to that of the funding structure. Rule setters are normally management and supervisory bodies (the latter represent the interests of shareholders). For example, the management of a state funded and therefore state influenced broadcaster decides to broadcast impartial reports, but faces resistance from journalists. The management can censor the programs or dismiss some of the less compliant journalists. The impact of these sanctions will depend on the factors of journalists’ behavior described above. However, as management is in a controlling position, it is to be expected that its efforts will ultimately succeed. Hence the “control over appointments,” the third dimension of state interference on media proposed by Blumler and Gurevitch, 1995 (p. 63), is crucial for keeping the broadcaster’s internal gratification rules in check. Supervisory bodies may play an important role at this juncture, especially in organizations where society is the shareholder.

THE HISTORY OF GERMAN PUBLIC SERVICE BROADCASTING

In Germany the state played a leading role in the development of broadcasting from its inception. Before World War II, in the Weimar Republic, radio stations were established under the substantial technical and economic control of top executives of the Ministries of Post and Interior Affairs, in circumvention of the parliaments

and the federal states (Länder). For example, only news produced by a company under control of the Ministry of the Interior Affairs were allowed to broadcast. State influence became even more intense subsequent to the broadcasting reform of 1932, which squeezed out private investors from the “Imperial Broadcasting Company.” The latter reform prepared the way for the “Gleichschaltung” (i.e. the enforced political conformity) of broadcasting by the Nazi regime in 1933. Broadcasting became the most important propaganda instrument of this regime (Kapust, 1981, pp. 34–36; Humphreys, 1994, pp. 124–127).

The reconstruction of broadcasting in West Germany after World War II was strongly influenced by the occupying powers who sought to decentralize the state structure. Their efforts were hence directed at establishing broadcasting in a federal organization, free of dominance by any governmental, political, economical, religious or other group of the society. Although the newly established broadcasters in different zones varied somewhat from each other, they all adopted the British model, an organization formed as a legally autonomous “corporation under public law” (Humphreys, 1994, pp. 128–129).

In the early years of their existence the six newly founded public service broadcasters faced similar problems, so that cooperation became inevitable. In June 1950 the “Association of German Public Service Broadcasting Corporations” (ARD) was founded. In 1953 Association’s members agreed to broadcast a nationwide conjoint channel under the ARD brand. Every broadcaster committed to produce certain program contributions, but was also free to complement or even substitute the ARD transmissions with their own regional programs.

In 1960 the federal government made an attempt to establish a second television channel in form of a commercial company. As a reaction, federal states saw their legislative competence violated and complained before the Federal Constitutional Court. The latter attested in a ruling from 1961 (“first broadcasting ruling”) the exclusive legislative jurisdiction of the federal states in the broadcasting policy field. With regard to the commercial form of broadcasting the Court judged that broadcasting must remain organized under public law to avoid domination by the state or particular interest groups, since there were not enough frequencies available to maintain a plurality comparable to that in the press sector.

Encouraged by this ruling the federal states established the “Second German Television” (ZDF). In contrast to the decentralized structure of the ARD, the ZDF was organized centrally; it was obliged to broadcast only nationwide television programs and was controlled by similar supervisory bodies as the ARD broadcasters. Nevertheless, in the course of time the stronger dependence from the political powers became obvious (see Humphreys, 1994, pp. 167–168; Section 3.1). In return, the ARD-broadcasters were allowed to establish regional “third channels” (Kapust, 1981, pp. 36–45; Humphreys, 1994, pp. 128–169).

The introduction of commercial broadcasting, which was formally admitted by the “third broadcasting ruling” of the Federal Constitutional Court in 1981,

brought new challenges to the broadcasting sector. The Court saw that similar to the press sector, commercial broadcasting now had the ability to develop an “external plurality” by means of modified technical and economical conditions. By comparison, public service broadcasting should provide “internal plurality” maintained through its internal organizational structure (supervision bodies, pursuit of mission’s objectives).

In its following rulings the Federal Constitutional Court emphasized the importance of public service broadcasting (Seidel, Libertus, 1993, pp. 2–8). The latter was committed to guarantee an “indispensable fundamental provision for all” in the new dual broadcasting order (“fourth broadcasting ruling” in 1986). As long as public service broadcasting was able to fulfill its tasks, private broadcasting should be granted lower program requirements (“fifth broadcasting ruling” in 1987). Furthermore, public service broadcasting was also given the opportunity to adapt to new developments (“sixth broadcasting ruling” in 1991). The Court also pronounced judgments on the procedure of determining broadcasting fees, which had to be organized in a state distant manner in order to prevent a backdoor program control and media policy (“eighth broadcasting ruling” in 1994). In the “twelfth broadcasting ruling” (2007) the competence of the federal state parliaments in this procedure was restricted again – they were forbidden to deviate from the fee level recommended by the independent commission for reasons of media policy. From that perspective, the Federal Constitutional Court provided legal preconditions that are very important for independent public service broadcasting in Germany.

CURRENT OUTLINES OF PUBLIC SERVICE BROADCASTING IN GERMANY

Legal and institutional framework

Article 5, Paragraph 1 of the German Constitution (“Basic Law”) ensures “the right to freely express and disseminate one’s opinion in the form of speech, writing and pictures, and to inform oneself freely by using generally accessible sources. Freedom of press and freedom of reporting through the mediums of broadcasting and film are guaranteed. There shall be no censorship.” Because of the brevity of this provision a lack of legal guidelines on broadcasting ensued, which the Federal Constitutional Court had to fill. Its rulings strongly influenced broadcasting legislation. Due to the fact that media policy pertains exclusively to the legislative competence of the federal states, legislation for public service broadcasting can be found in the “Interstate Treaty on Broadcasting and Telemedia,” and the related interstate treaties and federal state laws (“Landesgesetze”).

According to the definition in the "Interstate Treaty on Broadcasting and Telemedia," the mandate of public service broadcasting is "to act as a medium and a factor of the process of shaping free individual and public opinion by producing and broadcasting their offerings and to thereby satisfy the democratic, social and cul-

tural needs of society. In its offerings public service broadcasting must provide 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. In particular, it must offer cultural contributions. Entertainment programs shall correlate to a public service product profile. In fulfilling its mandate, public service broadcasting must take the principles of objectivity and impartiality in reporting into consideration, as well as the plurality of opinion and the balance of offerings and programming” (§ 11, Interstate Treaty on Broadcasting and Telemedia). Public service broadcaster may offer broadcasting (television and radio) channels, and under certain requirements, “telemedia” (“electronic information and communication services”). Provisions on “telemedia” were fundamentally revised recently.

There are nine regional public service broadcasters (“Landesrundfunkanstalten”), which shape the ARD, together with the “Deutsche Welle,” which is responsible for foreign programs. Non-members of the ARD are merely the nationwide radio broadcaster “Deutschlandradio” and the nationwide television broadcaster “ZDF.” The organizational structure of public service broadcasters is similar; it consists of a broadcasting council (“Rundfunkrat”/“Fernsehrat”/“Hörfunkrat”), an administrative council (“Verwaltungsrat”) and a Director General (“Intendant”). For each regional ARD broadcaster a corresponding federal state law contains special provisions (Deutschlandradio and ZDF are regulated by separate treaties, Deutsche Welle by federal law).

Tasks and competences of the public service broadcasters’ bodies shall be exemplified by means of the biggest regional public broadcaster WDR. According to the federal state “Law Regarding the Westdeutscher Rundfunk (WDR)” persons cannot be members of broadcasting and administrative councils simultaneously. To exclude conflicts of interest, the following people shall not belong to councils: members of the federal or state governments, staff of the top-level federal or state authorities, public officers that may be placed on interim retired status at any time, elected municipal public officers (e.g. city majors), employees of the WDR (except employee representatives), employees of an affiliated company or of a company controlled by an affiliated company as well as members of supervisory bodies and employees of other public service broadcasters, of commercial broadcasters and of commercial broadcasting regulating authorities. In addition, members of supervisory bodies are neither directly nor indirectly allowed to transact business with the WDR (even by order of a charitable organization) (§ 13, Par. 2–5, Law Regarding the WDR). The broadcasting council consists of 43 members: 13 members are appointed from the federal state parliament (maximally 9 of them can be members of the European, the federal and federal state parliaments), 17 members from different societal groups and institutions (churches, trade unions, communal representation, different social welfare organizations, etc.), 10 members from the sectors of journal-

ism, culture, arts and science, and 3 members representing the elderly, disabled, and people of immigrant origin. Two employee representatives may also take part in the meetings of the broadcasting council. For every member a deputy must be delegated (§ 15, *ibid.*).

The broadcasting council advises and decides on all questions of fundamental importance for the broadcaster, especially programming. In particular it performs the following tasks: issuance of statutes of the WDR, election and dismissal of the Director General and the directors (the latter only upon the Director General's suggestion!), decision-making on medium-term financial planning, program guidelines, budget, annual statements of the WDR, acquisition and realization of holdings, adoption of the annual report. The broadcasting council can declare in written form violations of program principles in programs, although pre-control of programs by broadcasting council before transmission is not permitted (except in the case of "telemedia"). It decides on approval of activities of the Director General, which are significant for the program and the development of the WDR, especially in the case of cooperation with other broadcasters that are of considerable relevance for program, budget or personnel. The federal state government has the right to delegate a representative to all meetings of the broadcasting council except to the meetings of the program committee (§ 16, *ibid.*). It also should be mentioned that the federal state government exercises a narrow "legal supervision" ("Rechtsaufsicht") over the public service broadcaster, which, however, excludes the programming issues. The measures of "legal supervision" may only concern infringements that were not removed or perceived by broadcaster's supervisory bodies on time (§ 54, *ibid.*).

The administrative council consists of nine members; seven of them are elected by the broadcasting council (a maximum of two of them may be members of the European, the federal or state parliaments), two are employee representatives. The administrative council monitors the Director General in all management activities except programming decisions. It can demand reports from the Director General, inspect accounts, calculations and writings, equipment and transactions, and it analyzes and comments about medium-term financial planning, budget, annual statements and the annual report on behalf of the broadcasting council. Acceptance of the administrative council is required in cases of labor contract conclusions with directors and the Director General, acquisitions and sales of companies, shares, major transactions, demands of bank loans, changes in the organizational structure of the corporation, extraordinary expenses etc. (§ 20, 21, *ibid.*).

The Director General governs the WDR independently. He is solely responsible for the programming organization and operations of the broadcaster; as well as ensuring that the programs comply with legal requirements. He has the sole right to propose candidates for election as directors through the broadcasting council (§ 25, *ibid.*). Decision-making in the board of directors does not underlie the principle of collective responsibility, but is subordinated to the Director General. The

Director General is relatively free to make programming decisions; he is more dependent with regard to economic and technical decisions. The power balance in the WDR is clearly distributed in favor of the Director General, thus such governance structure is called the “Director General’s Corporate Governance” (“Intendantenverfassung”).

In spite of the strong similarities in the organizational structure and allocation of tasks of the supervisory bodies of public service broadcasters, there are a few subtle distinctions. One important one is the number of broadcasting council members, which can differ from 17 (Deutsche Welle) to 77 (ZDF). Another important aspect is the proportion of state representatives in the councils, which can be distinguished by direct (federal and federal state bodies) and indirect (municipality, chambers, university etc.) state representatives. The highest state quota can be found at Deutschlandradio (50%), Deutsche Welle (47%) and ZDF (44%).¹

Besides this, ZDF has also interesting provisions on the election of the representatives of societal groups: 11 of them will be elected by federal state premiers from three possible candidates proposed by the delegating organization. Other 16 members will be appointed directly by the federal state premiers from the circle of members of defined societal organizations (§ 21, ZDF Interstate Treaty). As a result the potential state quota increases to a whopping 79%! Additionally, the composition of the ZDF administrative council should be mentioned, where six (of 14) members are delegated by the federal states governments and the federal government and eight by the broadcasting council. As no limitations to the number of state officials on both councils are defined (§ 22, *ibid.*), their high number is not really surprising. The administrative council even has 5 premiers and 1 federal minister amongst its members. Administrative bodies of public service broadcasters, not only of the ZDF, are not pluralistically composed, the reason being that they do not decide about programming issues. However, their indirect influence is high, as their acceptance on all important economic and technical projects and in cases of labor contract conclusions with directors and the Director General is usually required. The ZDF’s administrative council even approves the programming director, the editor-in-chief and the administrative director (§ 27, *ibid.*).

The politically coined organization of ZDF can possibly be explained by the relics of the state political model in its supervisory councils. The state political model was also applied to the former WDR and NDR, but amended to the pluralistic model (which now dominates in public service broadcasters today) due to an impending verdict of unconstitutionality. Another alarming phenomenon is the existence of “circles of friends,” both in the ZDF and in other public service broadcasting councils, in which representatives of state and closely related interest/societal groups meet regularly to discuss broadcasting decisions before council meetings (see e.g.

¹ Overviews regarding the composition of broadcasting councils can be found in Schulz, 2002, pp. 30–32.

Humphreys, 1994, pp. 167–168; Stuiber, 1998, pp. 871–874). Although Verheugen (1998, pp. 118–120) reckons the state influence in the ZDF is not as dominant because of “federally broken state power,” the strongly politicized election process of the Director General in 2002 attests to the opposite (W.A., 2002). Recently, Roland Koch, member of the ZDF administrative council and Premier of Hessen, publicly demanded the dismissal of the editor-in-chief Nikolaus Brender due to reasons that did not seem to be of a professional nature (Schirmmacher, 2009).

There are dozens of other cases in which politicians tried to interfere in broadcasters' activities (see, e.g., Plog, 1981; Humphreys, 1994, pp. 167–168; Lucht, 2006, pp. 178–182). Meyn (1999, pp. 185–188) reports that personnel appointments normally take place according to the logic of proportional representation: if the Director General belongs to or sympathizes with a certain party, his deputy should be someone supported by the rival party. In the event of absolute political support, the Director General can even ensure that his followers are placed in different positions in top and middle management. However, it is false to conclude that journalists, who are party members, are not independent enough to criticize their own party. According to the model of journalists' spheres there is evidence that they can defend their independence regardless of any interference, as long as adhere to standards of the journalistic profession and the tenets of freedom of opinion. In Brender's case, some prominent ZDF journalists supported him in an open letter. The case, however, has not been concluded yet.

Funding

The “Interstate Treaty on Broadcasting and Telemedia” prescribes that “funding must enable public service broadcasting to meet its constitutional and statutory mandate. In particular, it shall guarantee the existence and development of public service broadcasting” (§ 12). It shall be financed predominantly through a license fee. It is also allowed to generate revenues from advertising and other sources. However, broadcasters are prohibited from offering programs that are part of their mandate for special payments and from earning money by offering phone rate services (§ 13, *ibid.*).

The amount of the license fee shall be determined by the federal state governments and parliaments on the basis of recommendations of the “Commission for the Review and Determination of the Funding Requirements of Broadcasting Corporations” (“KEF”). The latter examines the funding requirements for public service broadcasting. The KEF was originally founded in 1975 as an assisting institution purely to make recommendations to the federal state premiers about the amount of the license fee. However, since the “eighth broadcasting ruling” of the Federal Constitutional Court in 1994, it was assigned more power and independence to guarantee the state-distant determination procedure of the license fee. The Commission analyzes the funding requirements reported by the public service broadcasters even-

ry two years with regard to the legitimacy of programming decisions in relation to the PSB mandate and consequent funding requirements. However, it must preserve the programming autonomy of the broadcasters (§1, 3, “Broadcast Services Finance Interstate Treaty”).

The KEF consists of 16 independent experts delegated by the federal states for five years. A delegation can be withdrawn for an important reason. However, members are not obliged to perform particular duties or follow certain instructions. Excluded from membership are members or employees of institutions of the European Union, of the federal or state legislative bodies, of councils' members and employees of public service broadcasters, of commercial broadcasters and corresponding regulatory authorities, as well as affiliated corporations. The law prescribes the appointment of certain number of experts from various sectors as members (§ 2, 4 *ibid.*). The KEF is financed from the broadcasting fee (§ 6, *ibid.*).

The KEF is considered to be independent. Its members are well-known experts, e.g. economists, lawyers, and heads of federal state audit courts. Most of them are probably not willing to put their reputation at stake. In 2005 for the first time the federal state governments deviated from the KEF recommendations, which approved an increase of only 0.88 € instead of 1.09 € that had been proposed by the KEF. This decision was justified by the general economic situation and the untapped potential for austerity.

This conflict resulted in a complaint of the public service broadcasters before the Federal Constitutional Court. In its “twelfth broadcasting ruling” in 2007 the Court confirmed its previous ruling on the importance of a state-distant license fee determination procedure (spoken in 1994) and once again restricted the competence of the federal state parliaments in this procedure. The federal state parliaments and governments were allowed to deviate from KEF recommendations only due to justified reasons regarding the prohibition of access to information and any undue financial burden to license fee payers. The argumentation of the governments about untapped austerity potentials was regarded as media-political intervention in programming autonomy and hence unconstitutional (W.A., 2007).

Since 1976 the license fee has been collected by the “license fee collecting agency” (“Gebühreneinzugszentrale/GEZ”), which is run jointly by all public service broadcasters. Formerly this task was fulfilled by the Federal Post, but changed to prevent state influence. According to the “Broadcasting Interstate Treaty on License Fees” every “broadcasting participant,” i.e. anyone who owns a device that can receive broadcasting programs, must pay a license fee (§ 1, 2). Such devices can be radio and television sets, video recorders, PCs and mobile phones with Internet access. There is a distinction between a radio fee (5.76 €) and a TV fee (12.22 €) (§ 6, Broadcast Services Finance Interstate Treaty). The radio fee must be paid by any “broadcasting participant” who possesses a (car) radio or a PC with internet access. In the case of a TV set, he is obliged to pay a full license fee of 17.98 €, even if he does not possess a radio device. Fees must be paid once for the whole household

and for all devices per domicile. This means that a device in a holiday flat has to be paid for additionally. The same applies to workrooms at home.

Advertising in public service programs is strongly limited. It is only permitted to be broadcast for ARD and ZDF nationwide TV programs, and only on workdays before 8 p.m. and on radio in certain time slots (Libertus, 2004). Hence it is not a surprise that ARD and ZDF receive only about 6% of the entire revenues from advertising. “Other revenues”, such as sponsoring and financial revenues come up to about 8%. The remaining revenues resulted from license fees amount to approximately 86% of the entire revenues (all numbers as average of the years 2005–2008; KEF, 2007).

In 2008, 7.26 billion € were collected for public service broadcasting. The revenues compared to the previous year declined by 0.38 billion €, even without inflation factored in.² Although 96% of all households possessing a broadcasting device are registered by the GEZ (incl. households exempt for social reasons), the number of registered devices liable to pay is decreasing because of demographic trends and an increasing amount of unlicensed viewers (W.A., 2008). Diminishing acceptance amongst citizens was encouraged by negative news coverage in the press. It should be mentioned that publishers seemed to fear for their own market shares on the internet, and therefore sought to restrict and to criticize the expansion of public service broadcasting on the Internet.

Recent developments: The three step test

The funding of German public service broadcasters is not only queried by domestic players. The European Commission regards the license fee as state aid as well. The strongly market-oriented media policy of the Commission can be explained by the fact that mostly DG Competition is in charge in this field. In its decision concerning German public service broadcasting in 2007 the Commission closed those proceedings, which were mainly concerned with the expansion of PSB into the new media services market. Commitments made by the German federal states to substantiate the public service broadcasting mandate with regard to “telemedia” and additional digital offerings were accepted by the Commission. These also involved establishing an evaluation procedure based on and triggered by binding criteria, however, it stipulated that it had to be carried out by the broadcasters and verified by the “legal supervision” of federal governments (Para. 327, European Commission, 2007).

The “negotiated” provisions were implemented through the Twelfth Interstate Treaty on Amendment of Broadcasting Interstate Treaties (in force since June 6, 2009). Paragraph 11d of the amended “Interstate Treaty on Broadcasting and Telemedia” states that ARD broadcasters, ZDF and Deutschlandradio, shall offer only journalistically editorially initiated and designed “telemedia” with the intent of

² See http://www.gez.de/gebuehren/gebuehreneinzug/index_ger.html; Retrieved: 04.08.2009.

enabling and supporting all social strata to participate in the information society. Since then television and radio programs on demand, as well as program-related “telemedia”, can be offered online for maximum seven days; sport events are even restricted to 24 hours. However, non-program-related press-similar offerings, nationwide regional reporting, price or insurance calculators, dating sites, etc. are completely prohibited.

Programs on demand and “telemedia” as described above (except sport events, prohibited telemedia and films produced by third parties), as well as non-program-related offerings including entertainment can be also offered for longer than seven days on condition that they pass a “three step test.” The test is meant to reconcile the principle of a state-distant organization of public service broadcasting with the obligation of this type of broadcasting to satisfy the needs of society (public value). (Schulz, 2008, p. 5). The *first* step of the test consists of the offerings being examined for their consistency with the democratic, social and cultural needs of society. The *second* step evaluates to what extent the new offering contributes qualitatively to existing journalistic competition and how the latter will change after the offering enters the market. Therefore an independent expert is to be encharged with assessing the market impact, as well as third parties being given the possibility to respond. The *third* step takes the additional expenditures and consequently the costs of public value of the new offering into consideration. The responsibility for testing procedures was placed on the broadcasting councils, which shall also make the final decisions. However, before the results can be published, they shall be reviewed by “legal supervision” (§ 11f, Interstate Broadcasting Treaty; Schulz, 2008, pp. 31–34).

The three step test was critically deliberated upon by public service broadcasters. First of all, the procedure itself is not consistent enough to provide objective results. Supplementary costs arise from the expert market assessments and additional personnel capacities. Apparently, the duration of the test procedure is not under six months (without counting the review process through “legal supervision”), i.e. the offerings can only be placed on the market with a fairly long delay. After all, it is not clear how legal supervision will assess the results of the test either. An ex-ante program control, though without content implications, can open the back door to indirect state interference in programs and interfere with the well-proven “Director General’s Corporate Governance.”

On the other hand, commercial broadcasters are similarly dissatisfied with the procedural design of the three step test: they assume that broadcasters’ councils are not independent enough and will let all offerings pass the test. The European Commission, which prefers external control, raises similar concerns. Although the Commission accepted the internal control by broadcasting councils, it demanded the assurance that the supervisory bodies would function independently. These and other general provisions regarding online offerings of public service broadcasters from the revised Communication on the Application of State Aid Rules to Public

Service Broadcasting (Par. 50–55, European Commission, 2009, published July 2, 2009) seem to derive from the above-mentioned decision on the German PSB. The new provisions, however, apply not only to Germany, but to public service broadcasters in all 27 member countries of the European Union.

CONCLUSION AND OUTLOOK

In this section German public service broadcasting shall be evaluated and the results shall be visualized by means of the paradigm drawn earlier. A geometrical triangle model will be used thereby. Each vertex of the triangle represents one of the sectors considered above (state, market and voluntary). Broadcasters are placed in between based on their revenues, converted to ordinal graduation. In the second step, the varying qualitative impact of internal gratification rules and incentives on the broadcaster's staff are considered. It may therefore be necessary to correct the broadcaster's position in the triangle (for a detailed explanation of the geometrical exposition method see Kops, 2007, pp. 37–46).

The main point of our deliberations is funding. If the license fees were paid in an unsolicited manner, they could be regarded as pure revenues of civil society. However, this is not the case because legal enforcements by the state are necessary to make people pay. Therefore public service broadcasting in Germany is best to describe as a hybrid system between the state and civil society, where both sectors are almost equal partners (see Kops, 2007, pp. 34–36). Also internal gratification rules must be taken into account, set by the management and the supervisory bodies of broadcasters in compliance with interests of society and its representatives (civil society organizations and political parties).

As illustrated above, the amount of the license fee in Germany is set by a relatively independent Commission (KEF). However, its members are appointed by premiers of federal states. Another interrelated problem is that federal state governments and parliaments can deviate from the recommendations pronounced by the Commission. Although this sovereignty of discretionary decision has been restricted by the Federal Constitutional Court twice already, it is likely that the state authorities will find ways to circumvent these rules in future. The current design of the license fee collecting procedure ensures complete independence from the state because it is conducted by the public service broadcasters themselves. A change in the collecting procedure of license fees that has been discussed for years could possibly intensify state interference in funding.

The extent of state sector interference in fund-raising can be regarded as less than equal compared to that of the voluntary sector. We estimate it as 60% of the voluntary sector compared to 40% of the state sector (only for license fee revenues; market revenues remain unaffected). However, the application of funds (and hence the staffs' incentives and internal gratification rules) will be influenced by the Director General and other directors, who will be appointed in turn by the broadcasters'

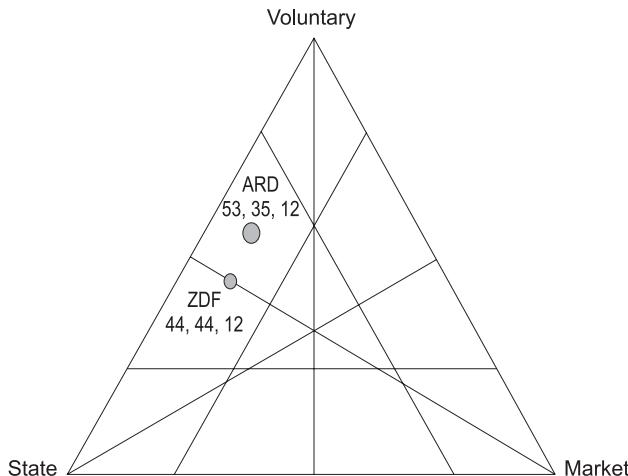


Fig. 1. Graphical exposition of ARD and ZDF

Source: Own calculations based on Kops, 2007, pp. 42–46; Kops, Khabyuk, 2007.

administrative and broadcasting councils. Regarding the explanation above, the assumption is that the influence on managerial appointments and administrative work by supervisory bodies of ARD broadcasters is weaker rather than stronger. Political interference is certainly apparent, but it cannot be assessed as significant. ZDF is deemed to be more politically controlled, although it is financed from the same source. Therefore we assume for the ZDF that 50% of the license fee stem from the voluntary sector and the other 50% from the state sector.

In Fig. 1, the positions of ARD and ZDF and the circle's sizes (latter represent the budgets of the broadcasters) are calculated in a simplified manner with regard to the broadcasters' revenue structures and the assumptions listed and conducted above. Revenues of ARD and ZDF consist of license fee (86%), advertising (6%) and other revenues (8%). For ARD 60% of revenues from license fee are assigned to the voluntary sector and 40% to the state sector; for ZDF such assumptions are made with regard to the stronger state influence 50% to 50%. Advertising and other revenues of both broadcasters are uniformly assumed as 100% market revenues. As a result, ARD and ZDF have a uniform market vector (12%), but different state and voluntary vectors (ARD: 53% voluntary, 35% state; ZDF: 44% voluntary, 44% state). ZDF is located nearer to the state pole than the ARD, although still far enough to escape state domination.

Regardless of all state interferences in the German public service broadcasting sector, control of content does not exist. The three step test as a new form of ex-ante program control is restricted by the fact that the broadcasting council may accept or refuse the offerings proposed by the Director General, but not amend them. The new restrictions can, however, lead to loosing of young audiences, whose consumer behavior shifts stronger and stronger from the TV and radio towards the Internet

(Friedrichsen, Mühl-Benninghaus, 2009). These and many other factors complicate the transformation process from public service broadcasting to public service media, denigrating the basis of support by the public (Jakubowicz, 2007; for the German broadcasting order see Kops, 2009). It seems that the struggle which commenced when commercial competitors entered the market in the 1980s is going into the next stage. The public service broadcasters have to meet these new challenges maneuvering once again between the state and the market.

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