

## Identity and Diversity of Europe

### EU integration in the cross-media public service perspective

Torino – September 21<sup>st</sup>, 2010

**Workshop 1:** *The Transformation of society, the requirements and the remit of Public Service in the Information and Knowledge Society.*

**Presentation:** *Public Service Media in Germany: normative framework and current technical developments.*

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### 1. The situation of public service media in Germany: legal framework and conjuncture.

Freedom of expression and the right to carry out broadcasting activities, together with the right to receive information, are recognized in the article 5 of the German Constitution (*Grundgesetz*). This fact points out the relevance attributed to the media in Germany. Its role to ensure the freedom of opinion is considered a basic element of democracy.

Moreover, in order to understand the structure and operational logics of the German media system, the rulings by the Constitutional Court (*Bundesverfassungsgericht*) should be taken into account. Its interpretations of the Constitution are the basis for the definition of a dual television system where public and commercial offers co-exist. This is a result of considering that freedom of expression and the right to receive information should be not only subjective but also objective guarantees. Therefore, the existence of public service broadcasters, which will ensure the provision of a universal, basic, diverse, plural and quality offer, is a pre-requisite for the development of private commercial channels.

It is also important to keep in mind that broadcasting is not an issue within the competences of the Federal Government but of the *Länder* (German States). Each State has autonomy to pass its own media regulation and to grant broadcasting licenses for public and commercial services. This has several consequences. First of all, there is not a federal public broadcaster. Each State (*Land*) (or in occasions some of them work together) has its own public broadcaster, which operates a regional television channel as well as regional radio offers. Together, they constitute the ARD (*Arbeitsgemeinschaft der Rundfunkanstalten Deutschland*), which operates several nationally distributed television channels: Das Erste, the most important one, and EinsExtra, EinsPlus and EinsFestival, which were developed during the digitalization process. Besides the ARD, as a result of an agreement among the governments of the *Länder*, there is a second public broadcaster: ZDF (*Zweites Deutsches Fernsehen*). It operates four national channels: ZDF, the main one, and ZDFinfokanal, ZDFkulturkanal and ZDF-Familienkanal, which also appeared during the digitalization. Moreover, the ARD and the ZDF jointly produce the following national thematic channels: 3sat (culture), Arte (culture, in collaboration with other European public broadcasters), Phoenix (information and documentaries) and KIKA (children). Altogether, the German citizens have access to 12 nationally distributed public television channels plus an extra regional channel.

The second consequence of the development of public service on a regional basis and the fact that the regional governments can pass their own media law is the need for coordination among the *Länder*. With that purpose, an Interstate Treaty on Broadcasting was approved in 1991. Due to the constant evolution of the media system, the treaty has been frequently amended and now

it also covers the telemedia services<sup>1</sup> (*Staatsvertrag für Rundfunk und Telemedien – RStV*). The last version (13<sup>th</sup>) entered into force on April 1<sup>st</sup> 2010.

The RStV establishes that the existence and development of Public Service Broadcasting should be guaranteed. This means that it can be distributed by using any transmission technology. Concerning innovation, public service must also be active in the field of telemedia (RStV, art. 11a). Moreover, its funding, based on a public service fee, should be maintained and ensured.

In addition, the RStV points out the main goals of public service, which include its contribution to the formation of free individual and public opinion and serving the democratic, social and cultural needs of society. In order to do so, public broadcasters should provide the citizens with an offer including educational and cultural content, information, public consultations and entertainment (RStV, art. 11(1)). Moreover, the treaty states that objectivity, impartiality, balance and plurality of opinion should be the guiding values of public service offers (RStV, art. 11(2)).

Concerning the current situation of the German public broadcasters, the following figures and facts can provide a general picture of their conjuncture:

- In 2009, the public fee collecting organization (GEZ) provided the German public broadcasters with 7.6 billions €, the highest public service budget in the world.
- ARD-Dritte, the regional (state) public channels were the most viewed channels in Germany, with 13.5% of the share.
- Das Erste and ZDF also had good results, with 12.7% and 12.5% respectively.
- During 2009, the public service offer (all its channels) was the leader of the German market with an average aggregated daily audience share between 41.5% and 45.3%.
- The public service thematic channels obtained more discrete viewing figures (between 0.7% and 1.4%), but they were also leaders in that market segment.

Besides their television offer, the German public broadcasters that participate in the ARD also distribute several radio channels at regional level. In addition, there is a nation-wide public radio operator (Deutschlandradio) that distributes 3 channels: Deutschlandfunk, Deutschlandradio Kultur and DRadio Wissen. The latter is exclusively distributed on the Internet.

Finally, it is necessary to mention the online activities of the German public broadcasters (telemedia), which include a wide variety of contents and services (see point 4).

## **2. State aid and ex-ante evaluation of public service**

The strong position of the German public broadcasters within the media system has been a frequent source of conflict and debate. The commercial players of the market consider that, due to its funding mechanism, public broadcasters' offer distorts free competition. Consequently, between 2002 and 2004, several market players, and especially the VPRT – the association of the commercial broadcasters –, filed several complaints in front of the European Commission. They argued that the Public Service Fee was a State Aid mechanism contrary to the articles 86 and 87 of the EC Treaty. Moreover, the complaints also focused on the intense activity of the public broadcasters in the Internet, which was not considered within the public service remit by the commercial operators.

After carrying out the necessary investigations during 2005, the European Commission decided to open an infringement procedure against Germany in the field of competition policy. That led to intense negotiations during 2006. Finally, in the end of that year, an agreement between the Commission and the German government was reached (*Beihilfekompromiss*). It included the

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<sup>1</sup> Telemedia services are all electronic information and communication services, as far they are not telecommunication services pursuant to art. 3(24) of the Telecommunications Act (Telekommunikationsgesetz – TKG -, July 25<sup>th</sup> 1996).

commitment of Germany to provide a better definition of the public service remit and to implement an ex-ante evaluation procedure in order to assess any new online public service (telemédia).

This issue has become a major turmoil for the German media system. It has resulted in a heated public debate as well as in a long, complex and expensive regulatory and bureaucratic process.<sup>2</sup> The final result is the evaluation procedure known as the 'Dreistufentest' (DST) (Three-Steps-Test). It was introduced in the 12<sup>th</sup> amendment of the *Rundfunk und Telemedien Staatsvertrag* (art. 11f), which entered into force in June 2009. In addition, a 'negative list' including all those services that public broadcasters will not be able to offer was attached as an annex to the Treaty. Finally, it is also relevant to point out the limitations regarding the duration of telemédia services: On demand content related to major events or sports can be available only up to 24 hours. Telemédia services related to other broadcasted programmes can be available up to 7 days. The inclusion of the online content on the broadcaster's archive and its unlimited availability are subjected to the 'telemédia concept' defined for each service (see below) and to the positive result of the *Dreistufentest*.

As its name indicates, the DST is a procedure that evaluates three questions:

1. To what degree does the offer conform to the democratic, social and cultural needs of society?
2. To what degree does the offer contribute to editorial competition in a qualitative manner?
3. What financial expenditure is required for the implementing the offer?

The introduction of the DST has had the following consequences:

- The public broadcasters must develop a 'telemédia concept' (definition) for each online service detailing its target group, aim and goals, content and duration.
- The internal council of each broadcaster, its governing body, has to define the public service remit and to determine criteria for carrying out the evaluation of its fulfilment.
- The economic assessment of the proposals has to be carried out by an external agent.
- Since a significant part of the members of the television councils did not have the necessary skills to participate in the assessment procedure, especial workshops and training actions had to be arranged.
- Extra budget as well as an administrative task force to assist each television council have been necessary.
- The participation of third parties, like market players or citizens, whose opinions were also considered, together with the complexity of the process and the amount of tests carried out implied that the whole assessment procedure took a year, from June 2009 to August 2010.
- Each member of the ARD was responsible for the evaluation of its own telemédia services. The evaluation of the joint ARD services was distributed among the members of the network.
- ZDF was in charge of the evaluation of its own services.
- The assessment of the services jointly operated by ARD and ZDF was distributed among the ZDF and the members of the ARD.
- Since the television councils are the only bodies with the competence to define the public service remit and to assess the performance of the broadcaster, the market players complained about the transparency of the process. However, the independence guarantees ensured by the German law do not allow the intervention of neither the federal nor the regional governments or the independent regulatory authorities of each *Land*.

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<sup>2</sup> It is important to note that, in the end, not only the new telemédia services but also the already running one have been assessed.

- In order to adapt their services to the 'telemedia concept' defined, so the DST would have a positive outcome, the public broadcasters carried out a massive process of "*De-publizierung*", which consisted of deleting thousands of pages of their websites, especially those not related to their programmes and those that could be considered 'press-like' services. As those contents had been paid with public money, the action was highly controversial.

As a final remark, it is worthy pointing out that all the tests carried out had a positive outcome, so the German public broadcasters were not forced to remove any of their telemedia services. The commercial broadcasters as well as the press editors are not happy about this result and it is expected that they will take legal actions against it.

### 3. The funding of public service media

Together with the ex-ante evaluation of the public service, the modification of its funding mechanism is one of the main debate topics. Currently, the discussion is focused on the concept upon which it should be implemented. Until now, the fee has been charged as a result of the ownership of a radio or television receiver. However, the technological development and the convergence make it difficult to define what a receiver is. Nowadays, many different types of electronic equipment are capable of receiving radio or television signals. Therefore, beyond 2013 the fee will be charged to every residence (house/flat) as well as to enterprises.

This change might imply the need to reconsider the structure and the size of the institution in charge of collecting the fee (GEZ). Moreover, the amount of the fee, its several forms and the exemption criteria are also issues to be reconsidered.

### 4. Technical developments and innovation

The German public broadcasters are among the most innovative ones in Europe. Their involvement in the most relevant technical improvements within the broadcasting market is a proof of that. First of all, it is important to point out their leading role during the analogue to digital transition at the terrestrial platform, which was completed between 2003 and 2008. Currently, they are also main partners of an initiative dealing with the switch-off of analogue satellite broadcasting in Germany, which will take place in April 2012. In both processes of technical migration, the public broadcasters have been pioneers in offering digital offers and a trusted reference of information for the citizenship.

Secondly, the German public broadcasters are developing multiplatform strategies in order to maximize the benefits of convergence. Consequently, their channels are available not only at the satellite, cable and terrestrial platforms but they are also part of IPTV offers. Moreover, ARD and ZDF are also present in WebTv initiatives like Zattoo.

In addition, the German public broadcasters are very active in the online sphere. They have developed their own web portals, where a wide and diverse range of services are offered. Especial attention should be paid to their *Mediatheken* (archives), which allow the users to have on-demand access to the programmes offered at the public channels. Moreover, podcasts, rss services and newsletters linked to the broadcasted contents are also available. Furthermore, the German public broadcasters are very active in the field of online social networking. They have developed their own Facebook pages and their Youtube channels. Finally, it is also important to mention the public service activities with regard to the design of applications for smart-phones and tablets. After obtaining a positive result at the 'Three-steps-test', ARD is working on an app connected to its news program '*Tagesschau*'.

Concerning technical innovation, ARD and ZDF are associated of the Institut für Rundfunktechnik (IRT), one of the European leading research institutions in the field of media and telecommunications technology. In that sense, they are active partners of the HbbTV

project (Hybrid broadband broadcast television), which is a main initiative in the development of hybrid television services. In the recent IFA 2010 celebrated in Berlin, the hybrid services of the

German public broadcasters were presented. They include not only improved electronic program guides (EPG) but also on-demand content access and interactive applications.

Moreover, ARD and ZDF are also active in the field of High Definition (HD) and both broadcasters are already offering their main channels in that format via satellite.

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