

The Impact of European Competition Law on new Programme and Service Strategies of Public Broadcasters

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I. What is at stake?

The relationship between European competition law and national broadcasting law has been under discussion since the European Commission (Commission) published its first Green Paper on the establishment of the common market for broadcasting in 1984.¹ In the last decade, a number of political interventions in favour of public service broadcasting have been important to the development of this relationship, namely the introduction of Article 151 EC Treaty through the Treaty of Maastricht (1991), the Amsterdam Protocol (1997)² and the Council's follow-up Resolution (1999).³ On the other hand, the Commission and the European Court (EJC) during the same time have stressed the necessity of "full compliance" of public broadcasters' activities with the common market rules, both in general statements and in individual cases.⁴ In the end this "full compliance-line" has provoked several conflicts between European competition law and public service broadcasting. Probably the most important recent conflict relates to the question of whether the funding of public broadcasters is compatible with Article 87 EC Treaty.⁵ In an investigation in which the two German public broadcasters have been involved, the Commission finally has approved the funding of two special interest channels (Phoenix and Kinderkanal), but has done without accepting the primary competence of the member states for regulatory and financing measures in broadcasting. Instead of this, the Commission not only insists that the funding of public service broadcasting should not distort the common interest of free trade, but also reminds the member states of what the Commission seems to believe is their obvious duty, namely "to define" the public service remit.⁶

In this recent case the relationship between European competition law and public service broadcasting is, for the first time, very closely linked with the drift towards an increasing diversification of public broadcasters' services on offer. One aspect of this tendency consists of the launching of special-interest channels like Phoenix or BBC-News. Another aspect involves creating special services outside traditional programming as, for instance, services on the web. In particular, the phenomenon of "convergence"⁷ - I use this term with the caution needed here - makes it more and more unclear in which way public service obligations ("the public remit") should be remodelled and adjusted to the conditions and prerequisites of a novel multimedia environment. The novel multimedia environment which itself is an environment of permanent change, and the possibilities and opportunities it offers for public broadcasters forces the former, as much as its private competitors, to constantly rethink and rearrange their own programming strategies and service policies.

The assumption this paper starts from is that the diversification of programming and the expansion of the services of public broadcasters present a big challenge for traditional public service obligations. In all European countries public broadcasters are, as organisations, subject to specific public interest obligations that often derive from the national constitution or, more precisely, from the jurisprudence of national constitutional courts. However, the new multimedia environment and the highly competitive media-markets compel public broadcasters to perform in new fields of (audio-visual) business. As a consequence of this expansion strategy, the legal obligations imposed on public broadcasters (regularly embodied in a set of regulatory values and policy objectives) are set under pressure. This tendency ultimately calls into question the binding effect of national broadcasting law. At the least it de-stabilises boundaries which had

been relatively fixed through previous decades. The issue at stake, therefore, may be circumscribed as a problem of fixing the scope of autonomy public broadcasters are subject to in the new multimedia world of dynamic markets and growing scarcity of attention. This is primarily a challenge to be coped with on the level of national broadcasting law. In addition, it forces us to re-examine the relationship between European competition law and national broadcasting law.

This paper presents a first attempt to deal with these challenges. It stresses two main aspects. First, the focus is on a reconstruction of the relation of European competition law and national broadcasting law as a non-hierarchical conflict of concurring legal orders (“diagonal competence conflict”). The paper refers to the programming-autonomy of public broadcasters that is (not only in the German case) based on constitutional law, and particularly to their freedom to produce new programmes and new services. Against this background, the paper emphasises that European competition law has to take this autonomy of national broadcasting law more into account than it hitherto has (II - IV). In a second step the paper elaborates some considerations on the causes of the erosion of public service broadcasting obligations. It sketches some ideas on the way in which European competition policy in the audio-visual sector ought to be remodelled in order to grasp the new information-economy and its network-effects better than in recent years. This also involves a new role for European competition law in monitoring both public broadcasters programming strategies and also their new service policies (V).

II. Conflicts between European competition law and national broadcasting law

1. Public broadcasters between “free economy” and “regulated culture” (Art. 49 EC Treaty)

The conflicts between European competition law and national broadcasting law started with the issue whether the legal framework of the EC Treaty provides a sufficient legal basis for autonomous regulatory activities of the European Community in the media. The question whether the Community has the competence to establish specific regulations on national media systems and, similarly, to apply European competition law to public broadcasters has for long time been refused as an illegitimate extension of Community activity from the economic field to “culture”. In the legal debates of the 1970s and 1980s lawyers (and politicians) in many European member states (e.g. UK, Germany, Denmark, Belgium) rejected such a competence and particularly stressed the argument that public broadcasters belong to the realm of “culture”.⁸ However, as we all know, the ECJ had already judged in the Sacchi Case that the (trans-border) transmission of television signals involves the Treaty rules and that, thus, the media would fall within the provisions of the Treaty concerned with free movement of services (Article 49 EC Treaty).⁹ This judgement has been affirmed in several other rulings drawing no specific distinction between public and private media organisations. Whenever a measure or regulatory policy of a member state provides economic implications on market integration the general sphere of application of European competition law is open.¹⁰

Nevertheless, this jurisprudence does not imply that European competition law contains an absolute prohibition on restrictions on competition in inter-state trade. In several cases the ECJ has judged that member states are allowed to ensure pluralism in the media through specific national broadcasting regulation as far as these measures are compatible with the proportionate principle.¹¹ These reflections could be read as a contribution to the development of a legal regime of collision rules, but without going into details here, this jurisprudence does not seem quite clear in its doctrinal structures, in particular in the construction of the proportionate principle. Leaving these uncertainties beside, the assumption may be acceptable that the ECJ follows a “liberal model” of negative freedoms. This reading of the basic rights of the EC Treaty is very close to the concept of freedom of expression and information as promoted in the jurisprudence of the European Court, a jurisprudence, which the ECJ explicitly refers to in its own judgments.¹² As a consequence of this jurisprudence, the securing of pluralism in the media by member states through specific public service obligations have to be classified as a restriction of the free flow of information guaranteed by the EC Treaty. This is, on the side, also valid for the binding effect public service broadcasting obligations have on commercial broadcasters.

The ECJ jurisprudence on the freedom of services might be acceptable all in all. A stable boundary between economy and culture is hard to define in the media and therefore, with regard to the potential economic and cultural implications of public broadcasters’ activities, the application of the European competition law in general may be acceptable. But one has to take into account that the ECJ concept of the freedom of services fundamentally differs from the national broadcasting law of most European member states. In the UK, France, Italy and Germany, to mention but a few, specific

legal obligations of public service broadcasting and the existence of public broadcasters have never been seen as the exception to the rule, i.e. as the exception to “free” media-markets.¹³ On the contrary, public service broadcasting had for a long time been considered as a very legitimate political form of organising broadcasting markets. This involves consequences for law as well. In Germany, and I will particularly refer to German law, broadcasting law is closely linked with constitutional law. Even more, the “dual” broadcasting system that has been established during the Europe-wide trend toward the abolition of the traditional public service broadcasting monopoly is, to a large extent, the result of the case law of the German federal constitutional court.¹⁴ However, from the viewpoint of the German federal court, there are not, firstly, given media markets and quasi-natural negative economic freedoms nor, secondly, a regulation which restricts and limits these freedoms. In fact, it is the exact opposite. The state and, particularly, the parliament are obliged to provide a pluralistic programme offer. This obligation has not only to be fulfilled by generating effective substantial law, e.g. programme-obligations, but also the court emphasises especially the significant role of procedural law in the sense of creating well functioning organisational models and, related to them, workable legal procedural solutions.¹⁵ Public broadcasters are at the centre of this entire concept. According to German law, public broadcasters are required to be the “fundamental provider” of the freedom of broadcasting (Article 5 (1) GG).¹⁶ Only if public broadcasters are able to efficiently produce a wide diversity and variety in their TV and radio programmes can it be justified in not requiring the same obligation from private broadcasters.¹⁷ Therefore public broadcasters are entitled to have their existence and future development guaranteed.

2. Exceptions within European competition law for public broadcasters - the example of Article 81 EC Treaty

Another field of conflict between the competition goals underlying the EC Treaty and public broadcasting has arisen in the domain of acquisition of programme-rights within the European Broadcasting Union (EBU). The EBU had originally been established to facilitate solutions to common legal and technical problems and to exchange (news) programmes,¹⁸ but in the last decade its framework has also been used to set up special agreements to co-ordinate programme-acquisition activities. Public broadcasters from different member states partially co-ordinate their purchasing of, especially the exclusive rights of (Hollywood) movies and big sport events (e.g. Olympic Games, Formula 1, football) through the EBU. The ECJ has indicated that such common activities could be assigned to the public service remit. Although Article 81 (1) EC Treaty contains an absolute prohibition on restrictions of competition within the common market, the ECJ discussed whether EBU programme activities could grant a “cultural exception” and could therefore be declared inapplicable to European cartel law in the sense of paragraph 3. At first the Commission seemed to share this opinion. Common activities of EBU members would then have been granted a limitation on competition rules as far these undertakings are within the public service remit (and the obligation of “fundamental provision”). But beside this the commission also asked whether such an exception from the basic market and competition orientation of the EC Treaty could be acceptable. The Court in First Instance (EFI) went even further. It decided that the construction of competition law is not open for cultural considerations and exceptions because that

would destroy the rationale of competition law. Cultural aspects may be respected in a proportionality reasoning, but only if this reasoning allows the translation of cultural values like diversity in economic terms.¹⁹

Here we are again confronted with a collision between provisions of European competition law and national broadcasting law. And again it is notably a conflict of very different constitutional concepts underlying and pre-figuring the meaning and the goals of either one. Seen from the view of German constitutional law, Cartel law is based, broadly speaking, on a limitation of individual property rights as negative basic rights. This restriction is legitimate because the goal of cartel law is to secure and stabilise the rationale of competition as a permanent process of seeking dispersed information²⁰; and this is a non-dispensable prerequisite both for well functioning markets and also for individual rights. Contrary to this concept, the “dual” broadcasting system and the obligations deriving from here are related to a concept of positive basic rights. It is settled case-law that the “dual system”, and the diversity-orientated public service broadcasting obligations fixed in its legal statutes, have to be qualified as an expression of a “positive order” which itself is grounded in the German constitution. Therefore the public service broadcasting obligations are not a limitation of negative freedoms, but a generation of “real” freedom through legislative and legal means which are primarily based on procedural and organisational law. The legal conflict between European cartel law and national broadcasting law, therefore, could not be constructed, from the outset, as a vertical conflict on the basis of a common framework of evaluation (the case of subsidiarity). Instead, it is a conflict of different concepts of law on the same policy field, on the one hand, from the viewpoint of Cartel law, steered by competition goals, and, on the

other hand, from the viewpoint of national broadcasting-law that rests on political and cultural diversity obligations.

3. The qualification of national public service-funding as state aid (Article 87, 88 EC-Treaty)

An equivalent problem arises in the context of state aid in the meaning of Article 87 EC Treaty. In this context the Commission again tends towards an extensive interpretation. In the above-mentioned investigation procedure on “Phoenix” and the “Kinderkanal”, the Commission in the end approved the funding solely by a licence fee, but it still regards licence fees as state aid. At least as ambivalent is the jurisprudence of the CFI. Although the CFI in several judgements ruled against the Commission for failing to fulfil different (procedural) EC Law obligations, it decided that the Commission has exclusive jurisdiction to assess the compatibility of state aid with the common market.²¹ In case of the Portuguese public broadcaster, the CFI recently decided that the fact that a financial advantage is granted to an undertaking by public authorities in order to offset the cost of public service obligations has no bearing on the classification of that measure as state aid. However, it admitted that this aspect might be taken into account under Article 86 (2) EC Treaty.²²

This ruling again evokes a conflict between European competition law and national broadcasting law. Here the collision lies in the fact that it is not compatible with constitutional law of different European member states to solely review whether *certain channels* of a public broadcaster are compatible with the state aid provisions. This may

be made clear again with reference to German constitutional law. In German broadcasting law the structure of the public service remit is of a highly complex character. Firstly, there exists a constitutional law obligation on state authorities to provide the public remit, but the remit itself is assigned to the broadcaster and its autonomy and independence from the state. Secondly, the state not only has the duty to ensure the existence of public broadcasting but also to finance its development and adjustment to new technological and economic environments, primarily through licence fees. Although the launching of the new nationwide TV Channels has been accompanied by legislative acts entrusting them it is not completely natural that every new programme has to be allowed by an “official act” of state authorities (as the Commission seems to believe). This would be an unacceptable narrowing down of the programming and financial autonomy of public broadcasters.²³

III. The political conception of the European Community and the nature of EC Law

It is widely accepted in current legal debates that the nature of EC law is, to a great extent, dependent on the political conception one has of the European Community or, more generally, on certain ideologies of the final destination of the European “integration-process”.²⁴ A mutual dependence between law and ideologies comes to the fore especially if the legal order is opened for purpose-orientated programmes, and legal reasoning has to adjust to this new style of political meaning-offers. For European law as well as European competition law are widely build on such offers, both the “applica-

tion” and also the more creative and self-productive tendencies towards an extensive interpretation by EC-authorities might legitimise the assumption of a pre-figuring of law by non-legal presuppositions. At least, this assumption may be considered as adequate for the “judicial activism” of the European Court and the processes of forming specific European legal doctrines in legal scholarship. So, for example, the European Court’s construction of the “effet util”²⁵ hitherto has been a form of legal reasoning closely linked with the political idea of a European Federal State. This means that the core element of the Court’s approach, the way it is treating substantive obligations contained in the Treaty, is more or less motivated by a specific vision of the evolution of the European Community and the Common Market.²⁶ Although the European Court might adjust this concept to make it inherent in EC law, this form of judicial pronouncement might quickly cause a lack of authority and legitimacy, in particular when such judicial activism is not accompanied by a wide consensus in the political sphere. This does not imply a general criticism of the Court’s judicial policy.²⁷ I only want to emphasise that the price for the progressive introduction of politics into the concept of law brings an increase of meaning-possibilities and uncertainty of the latter. Thus, a mere “materialisation” of European Law (in the form of a close coupling between law and politics) is an insufficient answer to the orientation-problems of EC law.

However, in our context, it may be legitimate to reduce the debate about the just or “genuine” political and ideological concept underlying various interpretations of EC law to a core distinction and present only a “big picture”. From this perspective we may identify a concept which refers to the nation-state in the sense of an impermeable hierarchically structured, sovereign political body, and another concept which focuses on the nation-state also. However, the latter wishes to apply this top-down model on a

higher level of institutionalisation: on the level of the European Super-State. The entire discussion on the final destination of the European Community, which has just been renewed by different political statements²⁸, is still, to my mind, narrowed down to these two alternatives. But these argumentation-patterns may be a little too short-sighted because they ignore that the concept of the nation-state (as mentioned above) itself is, for various reasons, an outlet-model.²⁹ This does not assert that we already live in an age beyond the nation-state or that the state would sooner or later disappear. But it does mean that the nation-state itself is going through a fundamental transformation-process (globalisation, privatisation, new technologies etc.) and that this transformation-process cannot be bypassed by merely lifting the implementation-level of the *same* model higher. For this reason a “third way” might be acceptable which would stress rather more the openness and unknown future of the European Community than its final destinations, integration-objectives and ends. The starting point of this approach would be a network-concept, i.e. to think about the European Community as an autonomous organisation, embedded in neighbourhood-like heterarchical, horizontal, co-operative relationships to other organisations in various regulatory fields and on various levels (national, international, world-wide etc.).³⁰ One substantial consequence of such an approach would be to emphasise more the specifics and novelty of the European Community than to focus on the tradition of the nation-state and the political forms and institutions related to it.

Applied to European competition law a network-concept would, thus, endeavour to start a learning process in the self-description of European competition law. This learning-process would be primarily addressed to legal scholarship and it ought to be based on the starting point of bypassing both the preservation of a closed national legal

order as well as the establishment of a relatively homogenous supranational legal order. Instead of this the network-concept would call into question the (continental) tradition of a close link between state and law. It would shift the focus more towards processes of mutual co-ordination and even mutual “irritation” within a plurality of legal orders and a multiplicity of doctrinal-infrastructures. It would place itself within a world of legal pluralism, a plurality of legal cultures, divergent case law generated memory-capacities and a plurality of different traditions of conventions, social norms and practical knowledge.³¹ The end of EC law and European competition law would then become a reflexive one. EC law, not being subject to any final destination policy, would try to develop productive co-operative, horizontal forms of relationships between a plurality of legal orders.³² It would, on the one hand, try to keep national law sensitive to European competition law influences, but, on the other hand, preserve the knowledge and convention base accumulated in national legal orders and doctrines. Such a network-concept would not challenge both the idea of an autonomous legal order as well as legal integration and the necessity of “systematicity”.³³ However, the network-concept would insist on the very precondition that EC Law is linked to the traditions of the member states (it cannot be imported from nowhere); and, furthermore, that even when it evolves out of these traditions (in the sense of leaving them behind and fusing from them *new* doctrines), EC law still has to reflect its own adaptation-capacity. This capacity that is primarily (and still will be for a foreseeable time) linked to national law and administrations and the divergent networks of infrastructures related to them will hardly be replaceable by EC law itself. Therefore EC law should be regarded more as a result of the emergence of new trans-national rather than supranational forms of law.³⁴

IV. Forms of co-operation and co-ordination between European competition law and national broadcasting law

1. The conflict between European competition law and national broadcasting law as a “diagonal competence conflict”

If we now ask for normative conclusions of the network-concept a re-examination of the conflicts between EC competition law and national broadcasting law must start from the point of constructing the relation between European and national law in a neighbourhood-like, heterarchical way. European competition law is not linked with a hierarchical understanding of supra-nationalism in European law and the political concept of a European Federal State. European Law is not, as would be the case in a federal state, built on a hierarchical structured top-down model integrated through a relatively strict homogenisation of the member states' legal orders, especially in basic legal issues (fundamental rights, civil law, corporate law etc.). It follows that the supremacy of European competition law over concurring regulations is not a given normative prerequisite. The latter is not even the case in a Federal State in which – Germany as an example again – federal law only displaces state law (Länderrecht) when the conflict of concurring legal rules and regulations share the same subject matter.³⁵ But broadcasting law and European competition law are committed to different goals and policy objectives. Thus, according to a distinction Ch. Joerges and Ch. Schmidt have drawn attention to, the conflict between national broadcasting and European competition law has to be regarded as a “diagonal competence conflict”.³⁶

A diagonal competence conflict has to be solved by other legal means than the EJC and the Commission have established hitherto. The jurisprudence of the ECJ tries to solve the diagonal competence conflict with a legal argumentation mainly based on proportionate aspects. The ECJ weights the advantages of media-diversity goals with its disadvantages and distorting effects on the common market and the restrictions imposed on basic freedoms. This is a highly flexible scheme that allows qualifying the public interest as compatible or incompatible with the integration requirement of competition law, dependent on the given context and the objectives of the rules or legislation of a member state. Beside the fact that such a form of purpose orientated flexibility is for various reasons not an ideal way to compensate the limits of traditional forms of legal reasoning (“deduction” and “application”), this concept is inappropriate because it ignores the autonomy and independence of national broadcasting law. Instead of taking national broadcasting law seriously, the consequence of the EJC reasoning is that broadcasting diversity has always to be granted as an exception to competition rules - although it is a non-economic objective.

However, this argumentation is not persuasive at all. Firstly, it overlooks that by Article 151 (4) EC Treaty the Community is explicitly bounded “to take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures”. Therefore, it should be clear that EC authorities are not only obliged to respect the cultural implications of broadcasting (on the common market). They are also committed to respect the autonomy of the member states’ broadcasting regulations and, in particular, to respect their margins of appreciation in implementing cultural interests in national broadcasting regulatory regimes. As the wording “respect” and “promote” proves Article 154 (4) EC Treaty nei-

ther opens a legislative competence for the Community nor commits the EC even to respect national cultural diversity in competition law. Article 154 (4) EC Treaty is not only a conflict rule within EC Law, but also “a *renvoi* to national culture”³⁷, a rule that refers to “diversity as distinctiveness”.³⁸ It is an explicit mandate of the EC Treaty that the Community is bound to solve the conflict between European competitive law and national broadcasting law, as one form of cultural diversity, in a concept of mutual co-operation and co-ordination in the sense shown above. Further, the prevailing argumentation of the ECJ needs to be re-modelled because the Amsterdam Protocol upholds this explicit mandate of Article 154 (4) EC Treaty. According to the Amsterdam Protocol this mandate includes as well the obligation of EC authorities to respect the public service remit “as conferred, defined and organised by each Member State”.³⁹

2. Consequences for public service obligations

More concretely these considerations may be useful to underpin a reading which constructs national public service obligations as an “immanent” limitation of European competition law and especially as a limitation within the freedom of services.⁴⁰ Since European competition law is related “next” to the public service remit (and not “above” it) EC authorities are obliged to systematically seek possibilities of providing compatibility with national public service obligations in broadcasting. In the above discussed context of Article 81 EC Treaty this would imply that the Commission is not assigned to estimate EBU-agreements as a “prevention, restriction or distortion of competition” within the common market. Instead of this, it must be taken into account that the Europe-wide acquisition-policy of public broadcasters is a form of compensation, a way

to counteract economic disadvantages under the condition of rising prices for attractive programme-rights. The EBU-agreements help public broadcasters to simplify their programme-rights distribution among themselves; and this has to be regarded as a reaction to their limited financial possibilities that do not allow them to compete on the same level as commercial broadcasters. This must, at least, indicate a wide reading of the exemption provision of Article 81 (3).⁴¹ It might also have procedural consequences. As far as it is obvious that such activities are within the public remit (here: improvement of competitiveness in entertainment and sport-programming on the screens) in the way the member states define, organise and practise it, the Commission may be responsible for a constructive co-operation among institutions with inherent procedural obligations. The latter may include the rule that, due to the lack of supremacy between the concurring legal matters, “neither party is assigned the burden of argumentation and proof with respect to the requirements of Art 81 (3) EC Treaty”.⁴²

In the context of state aid under Article 87 EC Treaty the Commission has to respect the broadcasting regulatory body of the member states and the constitutional law that supports it. German constitutional law, for example, requires licence fee funding of public broadcasters without qualifying these fees as state aid, distortion of competition rules or as restrictions on fundamental rights of competing commercial broadcasters. In the framework established by the constitutional court there is neither a competence to abandon state funding nor even an autonomous role for the state in estimating and fixing the level of fees. Quite on the contrary, the state is bound by constitutional law to secure a well functioning funding-system that enables the existence and future development of public broadcasting. Community authorities have to respect this initial situation in member states broadcasting law instead of defining their funding-systems solely in eco-

nomic terms and values excluding the cultural dimension of broadcasting. Against this background one might accept the classification of licence fees as state aid under Article 87 (1) EC Treaty although there are numerous arguments against this classification.⁴³ But, finally, the constitutional based structure of the member states' financing systems have to be taken into account by EC authorities. This has to lead to a justification within European competition law. This "immanent justification" is to be based on Article 86 (2) EC Treaty. Public broadcasters are entrusted with the operation of cultural services that also have economic components and effects. It follows that the classification of "services of general economic interest" is applicable to them and that the "particular tasks assigned to them" have to be respected. This classification has repercussions for the framework of Article 87 EC Treaty of which the substantial one is that the national public interest, inherent public broadcasting funding systems, is not fully open for proportionate reasoning aspects on the level of European competition law.

This restricted control-capacity of European competition law also generates consequences for the scope of the public service remit. The Commission, in particular, has no competence to divide public broadcasters programmes into diverse components and then, for instance, ask whether the launching of a new TV channel is compatible with the common market. This has to be regarded as an intervention in national broadcasting law that ignores the constitutional law-based programming autonomy of public broadcasters. It is this programming-autonomy that also makes it impossible for the Commission to refer solely to the necessity of a "definition" of the public remit by the member state. Instead of this, European competition law must respect the legal relationships and infrastructures developed in the Member States to cope with the public remit under conditions of complexity; that is why the Amsterdam Protocol does not only speak of "de-

fining” the public remit by the Member States but also of “conferring” and “organising” it. This does not exclude the limited competence the Community may have to observe and promote the member states’ efficiency in providing new controlling-architectures, particularly in the fields of an eroding public service remit. But this kind of “second-order” observation through European competition law, taking shelter behind the given institutional framework, always has to hold a limited competence. However, this raises the question whether a new productive role for European competition law in new frameworks is imaginable.

V. The erosion of the public remit as a challenge for European competition law in the audio-visual sector

1. The German “dual” broadcasting system and its political references

In which way the new multi-media environment affects traditional public service broadcasting obligations may in our context again be demonstrated at the German “dual” broadcasting system. As mentioned above, the legal structure of the “dual” system is, to a great extent, the result of the case law of the Federal Constitutional Court. The Constitutional Court particularly structured the transformation of the traditional public monopoly into a more competitive order by using a specific *political* concept of the function of public broadcasters in a pluralistic mass democracy (“society of organisations”).⁴⁴ More precisely the court’s basic premises of public service obligations in broadcasting had been, and are still today, closely linked to a state centred model of the process of the

formation of political demands and objectives. In this concept of the formation of the political will the media plays an important integrative role linked to the integrative function of political parties. The political parties are “connection links” between the citizen and the state.⁴⁵ They fulfil significant tasks in pre-forming political and social cohesion. Political parties reduce complexity by creating alternatives out of the variety and diversity of political and social movements found in society. Political parties, therefore, develop a considerable contribution in keeping the political decision-making process running. The ruling government can refer to this institutionalised reduction of alternatives and exactly this, the capacity of a ruling power to generate collective binding decisions, guarantees the “unity” of the state. This is remarkable because it ensures this “unity” even after the transformation of the “homogenous” liberal democracy into a pluralistic mass democracy, i.e. a democracy based on parties and other associations who tend to cumulate particular interests and present them as the general will.

Television and radio (as substantial elements of the media) have to be located at the bottom of this top-down model. Broadcasting organisations are comparable to political parties as they also have to be considered as “connection links” between the people and its representatives elected to parliament and government. Therefore, the media system is part of the components that pre-structure the formation of the (general) political will. To circumscribe this pre-structuring work for stabilising the political system and the state the Federal Constitutional Court uses the notion of “free formation of opinion” (freie Meinungsbildung), a notion that finally refers to the tradition and social function of “public opinion”. In the Constitutional Court’s conception, the public sphere, in which the free formation of opinion is taking place, forms a hinge between the political state and the institutions of civil society (associations, firms, family, neighbourhood,

friends etc.). The public has, in other words, to be located underneath the government, as the decision-making centre of the state, but superior to society and its inherent processes of self-organisation and self-regulation. Once located here, it is almost natural to then enrich this conception by the expectation that opinions formed in the public sphere have better chances to be reasonable. This expectation ends up in a boost of the rationale of the public sphere and, at the same time, makes it impossible to think about the public sphere in terms of dispersed, fragmented, scattered etc. The concept of a public that would be fragmented into versions would destroy the presupposition of a homogeneous public sphere or a unitary public. But this presupposition is essential to the entire conception because the unitary public has constitutive functions for the formation of the general political will and, finally, the ability of the government to produce collective binding decisions. From another point of view, it is the construction of a hierarchical relationship in which the public sphere is valued higher than processes of private law based relationships that enables the concept of public opinion to have exclusive constitutive functions for democracy and the “unity” of the state. This also means that media law and the specific obligations public broadcasters are subject to are built on a state centred model and its political references.

2. The origins of the state centred model

From the viewpoint of constitutional theory, the starting point of this state centred model of media law is a strong idea of “political unity” which is rooted in remaining stocks of the pre-modern teleological conception of politics (and society). For in the same way it is in the civic virtue tradition from Aristotle to Hannah Arendt the objective

end of man to become a real self through being a “zoon politikon”, it is the destiny of the public sphere to end up in the unity of a collective will. And moreover, this collective will has to be separated sharply from “Economic man” and the infrastructure of conventions, trust and “social capital” which are generated through the networks of relationship related to autonomous decisions of individuals and organisations. This may be an overstatement, but at least the Federal Court’s model of society is closer to the tradition of Rousseau (or Hobbes in some points) than to the other main line of European political thought for which John Locke or Adam Smith may be significant examples.⁴⁶

In Rousseau’s *Contract Social* the “volonté générale” is, of course, not any more linked to the factually given tradition of the old civil society (*societas civilis*) and its concept of virtue⁴⁷, but a result of free born individuals and their general will. Nevertheless, Rousseau’s understanding of the social contract is still patterned on the conception of absolute monarchy and therefore, from the outset, a *public* one.⁴⁸ Thus, he constructs the “volonté générale” as a form of the unity of a “corporate and collective body”⁴⁹ in which the individual must transcend its distinctive personality through identification with the “general will” located in the public sphere.⁵⁰ It is just a variation on this theme of the European civic virtue tradition of the classical age when the German Federal Constitutional Court judges in the Lüth-case, commonly considered to be the ruling case of the Court’s settled case law, that under the German Constitution “the citizen” is free, but nevertheless is bound to “the community” and its basic values.⁵¹

In any case, the court’s conception of public opinion does not rest on the Locke/Smith line of European political thinking, on individual responsibility and a more pragmatic orientation to the necessity of reaching common decisions on common matters from time to time. On the contrary, it is based on the prerequisite of a constitutive

weight of a public realm in which the formation of a general will takes place without being disturbed by mere economic “individual” interests. To put it even on a higher level of abstraction: in its perspective terms like virtue, morality and legitimacy belong to the public and can only be reproduced in the public. In other words, a well functioning public sphere is an irreplaceable pre-condition not only of the “unity” of the state, but also for the “unity” of society. The question how the state can produce unity under the condition of a state/society distinction (and other distinctions like state/media, state/religion, state/science etc.) is answered from a state-centred perspective: the state is the unity of this distinction! The paradox that the state makes the difference and, at the same time, appears as the *unifying force* of the state/society distinction can be solved in the reality of the political process. The political process is embodied in the flow of time. Yet, the flow of time enables the state to produce and reproduce his own unity (and that of society) by the given constitutional means and institutions of a mass democracy, in particular, by a government that is based on (parliamentary) parties, social associations linked with them and a public sphere that is completely orientated towards this process of political decision-making. And for structuring and stabilising the latter public service broadcasting is, in a time where the significance of mass media can no longer be denied, not the last important mean.

3. The deficits of the state-centred conception when applied to dynamic markets

If we, for a moment, turn back to the point where our reflections have been starting, we might now realise better which significant role public service obligations do play for

Germany's "dual" broadcasting system. The public sphere in the state centred model of the federal court and the political framework of the "dual system" is not just public sphere in the meaning of bringing something to public attention or familiarity. Quite contrary, the public sphere is a constitutive component of political democracy. Not only public but also private broadcasters, therefore, are bound to legal obligations and requirements that derive from an understanding of media law closely linked to this political conception which itself is determined by the requirements of setting up and reproducing a collective order as the Constitutional Court sees it. But that means, at the same time, that the basic regulatory values and policy objectives the court has established hitherto are references to this state centred model of the unitary public. This is, in particular, true for public service obligations. And today's problem is that these obligations loose their evidence when this unitary public dissolves itself into a multiplicity of fragmented public spheres under the conditions of a "post-modern society", i. e. a society following a new "networking logic" based on horizontal relationships without center and peak.

This argument may be made clear on the example of the objective of "diversity of opinions" which, in the courts' view, has to be provided and maintained by the "dual system".⁵² The idea of a diversity of opinions may be evident as long as the idea refers to a political system based on the traditional left/right distinction and a society built upon social classes and milieus closely connected with the world of politics. Under these preconditions it may be interpreted in the sense that all major political trends found in society must have the chance to be represented in TV programmes or that these programmes, therefore, shall be diverse. But what does diversity of opinions mean in the age of multi-channel broadcasting and programme-bouquets? What is diversity of opinions on special-interest channels, like movie- or children-channels? What is diversity of

opinion in public service prime time programmes like, for instance, the big Saturday-night show. The election of Miss Italia still may function as a forum of exchanging diverse opinions on the best looking Italian girl, but this has no longer anything to do with the classical concept of the “free formation of opinion”. This does not assert that this classical idea is vanishing completely. But the traditional policy objectives of public service broadcasting and with them, the shape and the scope of the public service remit, loose the evidence they had as long as the state centred broadcasting law model could claim a quasi-natural plausibility and legitimacy for itself.

Although it was never fully convincing to politically functionalise media law and the autonomy of public broadcasters, a sober analysis might show that the conception of public service broadcasting, the conception of building a state independent organisation and to finance it through license fees, had been a persuasive solutions in times of the traditional monopoly. But this entire framework had to get under enormous pressure once it was opened for competition with commercial broadcasters. After this had happened it became clear very fast that it was no more the general political will which provided the rules and distinctions public broadcasters are subject to, but the dynamics of network economics and the ever seeking process for attention and audiences. In the new framework public and private broadcasters are more or less driven by a novel “Economy of attention”⁵³ that is closely linked to the “economics of networks”⁵⁴, i.e. that media markets are in a considerable extent driven by “informational cascades”⁵⁵ and other forms of positive feedbacks, by “winner-take-all” markets and path-dependencies. Given these facts, it is surprising that the Federal Constitutional Court proceeded with his traditional state centred conception and applied it to the new competitive order of the “dual system”. It has only corrected this model marginally so that, for instance,

commercial broadcasters are, in general, subject to the same pluralism and quality standard obligations. But the same legal standards, obligations and requirements now refer to fundamentally changed pre-conditions. The new network driven economy and the new rules of attracting audiences in times of information overload force public broadcasters to new policies that are often described as a form of “self-commercialisation”. I cannot go into a more detailed analysis here⁵⁶, but this is true in some respect. Due to the growing scarcity of attention in the new multimedia environment, public broadcasters at least feel themselves to be forced to make their programming more attractive, e.g. by investing huge amounts of money in big (commercial) events like football world championships or formula 1. Otherwise they fear to be found at the periphery of public attention one day. But high ratings and more of the same cannot be adequate answers of public broadcasters to the challenges of the new multimedia conditions because this would, in a long term, undermine their own legitimacy.

4. Intermediate remark

To avoid misunderstandings it should be, at this present point, remarked again that these new complex problems primarily have to be tackled within the legal orders of the member states. New solutions have to be found and, according to the network concept sketched above, the focus on law has to be shifted from decision-making to a more procedural approach, to an approach which lays emphasis on structuring and binding co-operative learning capacities within new (hybrid) forms of law. Under the condition of dynamic and intensely competitive markets, and given the speed of change in information technology, it is at least predictable that it will not be sufficient to refer on a more

concise description of the public service remit; this would cause unacceptable inflexibility for public broadcasters. But it does not seem to be very prolific either to produce long lists of purpose-orientated programmes circumscribing the “mission” of public broadcasters in the “digital age”.⁵⁷ This does not mean that such policy programmes are senseless at all or not applicable to the meaning structures of the political system (they fit, needless to say, perfectly). But it does mean that highly fuzzy sets of regulatory values are an inappropriate *legal* answer under conditions of rapid change. Under conditions of a still unknown future purpose orientated programmes will only bring about good intentions without any institutionalised legal capability to control them. Therefore new forms of self-regulation and self-control have to be introduced, but also new forms of mutual observation, co-regulation and controlling through parliaments and through (novel) external institutions like private monitoring agencies.⁵⁸

5. Towards a new role of EC competition law in the audio-visual sector

Despite these efforts on the level of national law, the tendencies of the erosion of the public service remit may also foster the acceptance to seek for a new and productive role of European competition law. In a new framework European competition law should primarily concentrate on creating new relationships of mutual observation and co-operation between national public broadcasters and European institutions. Such an approach might start from the assumption that European competition law should not be built on a general idea of *the* common market as such. This is a necessity because of the distinctive nature of media markets that are, as noted above, driven more or less by a novel “economy of attention”. For this new cultural-economy differs significantly from

the old industrial economy, European competition law has to adjust to the new rules of this economy more than it has done hitherto. That involves that European competition law has to re-examine and specify its underlying competition policies in the audio-visual sector. At least it should be possible to develop an understanding of the autonomy of national public broadcasters as an ongoing institutional experiment to interrupt the economic constraints of the new network-economy, especially its tendencies to produce self-blocking “informational cascades” and “winner-take-all” market phenomenons.

In such a framework new possibilities for European competition law may come to the fore, especially in the sense of stabilising the capacity of media markets to renew themselves. With the transformation of the traditional public broadcasting monopoly to competitive “dual” systems it becomes clear that even public broadcasters are, to some extent, forced to follow the rationale and rules of a new economy of attention. This has consequences for the binding effect of broadcasting law and the obligations of the public remit. In particular, it becomes much more difficult at this point to evaluate the public interest of public broadcasters’ activities. If, for example, the ZDF, a German public broadcaster, plans to build a “media park” close to its administrative-headquarter, can one argue that such an undertaking will necessarily be motivated by the promotion of its “brand”.⁵⁹ Such an argumentation may not be totally wrong, but this example shows at the same time that it cannot be an appropriate answer to the challenges of the new multimedia environment to cover every activity under the term of public interest if it is only good for attracting attention in times of information overload and fragmented audiences. Under this assumption finally every activity of public broadcasters would *per se* be a fulfilment of public interest obligations. In the logic of this reasoning public broadcasters one day might legitimise the establishment of their own motor company by the ar-

gument that in a society in which the distinction between the media and the reality becomes fuzzy public broadcasters have not only to be present on the screens, but also in the streets.

Of course, this intellectual pastime may be an overstatement again. But it reveals again that in the future it will not be sufficient to create “definitions” of the public service remit. European competition law has to be based on a more procedural rationality, it should concentrate on the argumentation and reasoning with which public broadcasters legitimise their strategies of expanding in new fields of audio-visual business. If national public broadcasters are working on activities that are obviously not within the public remit, as the member states have hitherto been organising and practising it, the Commission should have the capability to force public broadcaster to disclose these plans to broader audiences and explain the internal strategy lying behind them; this might be qualified as a form of “disclosure requirement”.⁶⁰ The state funding by licence fees, for example, in my view has to be understood as a form of “risk-capital” that allows public broadcasters to some extent to step aside from the constraints of (advertising) market forces and to counteract short-term-interests. It could be a purpose of a renewed European competition law to observe whether public broadcasters use this “risk-capital” for innovations and high quality programming related to specific public interest production values. Such a burden of proof may include the duty of European institutions to co-operate on such issues with national parliamentary bodies and courts to increase the opportunities of mutual irritation of public institutions on various levels. This strategy should be orientated towards the aim to strengthen the capability of public broadcasters to define and assess their own development under conditions of dynamic markets. But this strategy has to be institutionalised on a European *and* a national level and

that means that it has to be built on new forms of co-operation and co-ordination among national and European institutions. This might have institutional consequences on the European level as well. In particular, it might be a point of further debates whether the EC media policy, now strewn vertical in different departments (DG X competition/DG XIII technology), should not be tied closer towards a more integrated form of institutionalisation. At least one should examine the possibility of legal obligations to closer co-operation and co-ordination between various departments.

1 COM (84) 300 final.

2 Protocol on The System of Public Broadcasting in The Member States, 1997, OJ C 340, 10 November 1997, at 109.

3 Resolution of the Council and of the Representatives of the Governments of the Member States, meeting with the Council of 25 January 1999 concerning public service broadcasting, C 020, 5 February 1999, at 0001.

4 See e.g. COM (2000) 580 final, at 40; European Commission, XXIXth Report on Competition Policy, 1999, at 104; D Frey, "Das öffentlich-rechtliche Fernsehen im Wettbewerbsrecht der EG", ZUM 1999, 528-542.

5 See for an overview European Commission, XXIXth Report on Competition Policy 1999, at 85; COM (2000) 580 final, at 40.

6 This is stressed particularly in English versions of Commission papers. See e.g. European Commission, XXIXth Report on Competition Policy 1999, at 86; for further details see R Craufurd Smith, "State Support for Public Service Broadcasting: The Position under European Community Law" in this publication; I van de Gejuchte, "The European Community's Attempt to Set Up Guidelines for the PSB Remit" in this publication.

7 On "Convergence" see e.g. K-H Ladeur, "Die Regulierung von Telekommunikation und Medien im Zeitalter ihrer Konvergenz", RTkom 1999, 68 at 74; T Vesting, "Das Internet als Herausforderung des „dualen Rundfunksystems“ in M Kops/W Schulz/T Held (eds.), *Von der dualen Rundfunkordnung zur*

dienstespezifisch diversifizierten Rundfunkordnung? (Baden-Baden, Nomos, 2001), 275-306; European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society, COM (97) 623; see also W Sauter, “The Role of European Economic Law in the Information Society” in P Nihoul (ed.), *Telecommunications and Broadcasting Networks under EC Law* (Köln, Bund-Verlag, 2000), 287-309; see also the reader published by C Marden/S Verhulst, *Convergence in European Digital TV Regulation* (London, Blackstone Press, 1999).

- 8 More details on that discussion in D Goldberg/T Prosser/S Verhulst, *EC Media Law and Policy* (London, Longman, 1998), at 12; B Holznagel, *Rundfunkrecht in Europa* (Tübingen, Mohr Siebeck, 1996), at 123; T Vesting, *Prozedurales Rundfunkrecht. Grundlagen – Elemente – Perspektiven* (Baden-Baden, Nomos, 1997), at 256.
- 9 ECJ 30/7/1974 Case 155/73 (Sacchi), ECR 1974, 409 [428]; for more details see N Petersen, *Rundfunkfreiheit und EG-Vertrag* (Baden-Baden, Nomos, 1994), at 36; B. Holznagel, *supra* n.8, 123-166; D Goldberg/T Prosser/S Verhulst, *supra* n.8, at 13, 22.
- 10 See e.g. ECJ 05/10/1994 C-23/93 (TV 10 SA), ECR 1994 I-4824, I-4830; ECJ 03/02/1993 C-148/91 (Veronica), ECR 1993, 487 [519 f.]
- 11 Cf. ECJ 25/7/1991 C-288/89 (Stichting Collectieve), ECR 1991 I-4041; ECJ 26/04/1988 Case 352/85 (Bond van Adverteerders), ECR 1988, 2085; see e.g. H Gersdorf, “Funktionen der Gemeinschaftsgrundrechte im Lichte des Solange II-Beschlusses des Bundesverfassungsgerichts”, AÖR 1994, 400 at 411.
- 12 See e.g. ECJ 26/06/1997 C-368/95 (Familiapress), No. 24; ECJ 18/06/1991 C-260/89 (ERT), ECR 1991 I-2925, No. 43; on this relation see N Petersen, *supra* n.9, at 168; see also K-H Ladeur, “Die Kooperation von europäischen Kartellrecht und mitgliedstaatlichem Rundfunkrecht”, WuW 2000, 965 at 968.
- 13 See e.g. D Dörr, *Die Rolle des öffentlich-rechtlichen Rundfunks in Europa* (Baden-Baden, Nomos, 1997); see for an overview R Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford, Clarendon Press, 1997), W Hoffmann-Riem, *Regulating Media* (New York, Guilford Press, 1996).
- 14 See e.g. P Humphreys, “Germany’s ‘Dual’ Broadcasting System: Recipe for Pluralism in the Age of Multi-Channel Broadcasting”, New German Critique No. 78 (1999), 23 at 25.

- 15 BVerfGE 57, 295 (320); E 73, 118 (152 f., 160); E 83, 238 (296); E 87, 181 (198f.); E 90, 60 (88); for more details see T Vesting, *supra* n.8, at 150.
- 16 BVerfGE 73, 118 (158); E 74, 297 (324 f.), E 83, 238 (297 f.); E 87, 181 (198 f.); E 89, 144 (152 f.); E 90, 60 (90); M Libertus, *Grundversorgungsauftrag und Funktionsgarantie* (München, Beck, 1991), at 34; A Hesse, *Rundfunkrecht* (2.Aufl. München, Vahlen, 1999), at 118.
- 17 BVerfG 6 September 1999, epd medien 1999, Nr. 76, at 29, 31; critically M Eifert, “Die Zuordnung der Säulen des Dualen Rundfunksystems”, ZUM 1999, at 595; T Vesting, “Fortbestand des dualen Systems?”, K&R 2000, 161 at 163; K-H Ladeur, “Guaranteeing the programming mandate of public broadcasters and restraints on private broadcasters’ programmes in multimedia conditions” in this publication.
- 18 D Goldberg/T Prosser/S Verhulst, *supra* n.8, at 39; R Zeller, *Die EBU* (Baden-Baden, Nomos, 1999), at 21-71.
- 19 Cf. CFI 11/07/1996 T-528/93 (Métropole), ECR 1996 II-649; D Frey, *supra* n.4, at 528, 531; K-H Ladeur, *supra* n.12, at 970.
- 20 See e.g. U Gassner, *Grundzüge des Kartellrechts* (München, Vahlen, 1999), at 4, 8, who differentiates conceptually between the protection of the well-functioning of markets, their allocative efficiency and the aim of keeping markets open as objectives of competition law.
- 21 CFI 15/09/1998 T-95/96 *Gestevision Telecinco SA v. Commission*, ECR 1998 II-3407; CFI 13/06/1999 T-17/96 *Télévision Francaise 1 (TF 1) v. Commission*, ECR 1999 II-1757.
- 22 CFI 10/05/2000 T-46/97 PTP – *Radiotelevisao Portuguesa SA v. Commission*, ECR 2000 at 0000.
- 23 See e.g. W Hoffmann-Riem, *Regulierung der dualen Rundfunkordnung* (Baden-Baden, Nomos, 2000), at 201-226; B Holznagel/T Vesting, *Sparten- und Zielgruppenprogramme im öffentlich-rechtlichen Rundfunk, insbesondere im Hörfunk* (Baden-Baden, Nomos, 1999), at 42-74; see also M Bullinger, *Die Aufgaben des öffentlichen Rundfunks*, (Gütersloh, Bertelsmann-Stiftung, 1999), at 30.
- 24 See e.g. (for public law) T v Danwitz, *Verwaltungsrechtliches System und Europäische Integration* (Tübingen, Mohr Siebeck, 1996), at 143-150; C Joerges, “The impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective” in C Joerges/O Gerstenberg (eds.), *Private Governance, democratic constitutionalism and*

supranationalism (Luxembourg, Office for Official Publ. of the European Communities, 1998), at 69-99.

25 Settled practice, cf. ECJ 06/10/1970 Case 9/70 *Franz Grad v. Finanzamt Traunstein*, ECR 1970, 825;

ECJ 04/12/1974 Case 41/74 (Van Duyn), ECR 1974, 1337; ECJ 19/11/1991 C-6/90, C- 9/90 (Francovich), ECR 1991 I-5357; J Schwarze in J Schwarze (ed.), *EU-Kommentar* (Baden-Baden, Nomos, 2000), Art. 220 Rn. 29; I Pernice in E Grabitz/M Hilf (eds.), *Das Recht der Europäischen Union* (München, Beck, 1992, Std. 7/2000), Art. 164 EGV, Rn. 27.

26 See e.g. T v Danwitz, *supra* n.24, at 143-150.

27 See K-H Ladeur, “Richterrecht und Dogmatik- eine verfehlte Konfrontation?”, KritV 1996, at 77-98.

28 For an example see recently I Pernice, “Kompetenzabgrenzung im europäischen Verfassungsbund”, JZ 2000, at 866.

29 See e.g. N Luhmann, *Die Politik der Gesellschaft*, (Frankfurt a.M., Suhrkamp, 2000), at 189-227, 252; J-M Guéhenno, *The End of the Nation-State* (Minneapolis, University of Minnesota Press, 1995), at 1-34; M v Creveld, *The Rise and Decline of the State* (Cambridge, Cambridge University Press, 1999), at 336-414; K Ohmae, *The End of the Nation State* (New York, Free Press, 1995).

30 See generally J-M Guéhenno, *supra* n.29; see also R Pitschas, “Europäische Integration als Netzwerkkoordination komplexer Staatsaufgaben”, Staatswissenschaft und Staatspraxis 5 (1994), at 503-540; W Kahl, “Europäisches und nationales Verwaltungsorganisationsrecht”, Die Verwaltung 1996, at 341-384.

31 K-H Ladeur, “Towards a Legal Theory of Supranationality – The Viability of the Network Concept”, European Law Journal, Vol. 3 (1997), at 33-54; K-H Ladeur, “Flexibility and ‘Co-operative Law’: The Co-ordination of European Member States’ Laws – The Example of Environmental Law” in G. de Búrca/J. Scott (eds.), *Constitutional Change in the EU* (Oxford, Hart, 2000), at 281-297.

32 See generally G Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society” in G Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth, 1997), at 3-28.

33 M van Hoecke/M Warrington, “Legal Cultures, Legal Paradigms, and Legal Doctrine: Towards a Model for Comparative Law”, The International Comparative Law Quarterly 1998, at 495.

34 G Teubner, *supra* n.32, at 3-28; K-H Ladeur, *supra* n.31.

35 See e.g. BVerfGE 26, 116 (135), E 36, 342 (363). H Dreier in H Dreier (ed.), *Grundgesetz Kommentar* (Tübingen, Mohr Siebeck, 1996), Art. 31 GG Rn. 36.

36 C Joerges, *supra* n.24, at 69, 90; C Schmidt, “Vertical and Diagonal Conflicts in the Europeanisation Process” in C Joerges/O Gerstenberg (eds.), *Private Governance, democratic constitutionalism and supranationalism* (Luxembourg, Office for Official Publ. of the European Communities, 1998), at 155, 185; K-H Ladeur, *supra* n.12, at 970.

37 C Schmidt, “Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws. Reconstruction of the Dispute on Book Price Fixing”, *European Review of Private Law* 1 (2000), 153 at 164; see also N Petersen, *supra* n.9, at 308.

38 B de Witte, “Public Service Broadcasting, Cultural Diversity and Cultural Integration in EC Law and Policy”, in this publication.

39 See also K-H Ladeur, *supra* n.12, at 970.

40 For more details see N Petersen, *supra* n.9, at 151-164.

41 See also K-H Ladeur, *supra* n. 12, at 968.

42 C Schmidt, *supra* n.37, at 170.

43 See e.g. T Oppermann, *Deutsche Rundfunkgebühren und europäisches Beihilferecht* (Berlin, Duncker & Humblot, 1997), at 33-58; B Holznagel/T Vesting, *supra* n.23, at 84-103; K-H Ladeur, *supra* n.12, at 970.

44 See also K-H Ladeur, *supra* n.17. Although I will concentrate on the German case, the same could be said about America. Most of the comments agree that the central purpose of the First Amendment is to ensure a well-functioning „democratic order“. See A Meiklejohn, *Free Speech and its Relation to Self-Government* (New York, Harper, 1948); recently C R Sunstein, “Television and the Public Interest”, *California Law Review* Vol. 88 March 2000, 501 at 524; C E Baker, “The Media that citizens need”, *Pennsylvania Law Review* 1998, 317-408.

45 See BVerfGE 44, 125 (126, 145).

46 For more details see A B Seligman, “Civil Society and its Unconditionalities: Public or Private Selves” in K-H Ladeur (ed.), *Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations* (Baden-Baden, Nomos, 1997), 69-82; A B Seligman, *The Idea of Civil Society* (New York, Free Press, 1992), at 21.

- 47 The general will in Rousseau becomes, as Ladeur writes, a normative force and shakes off the weight of tradition. K-H Ladeur, “Globalization and the conversion of democracy to polycentric networks – can democracy survive the end of the nation States?” in K-H Ladeur (ed.) *Globalization and Public Governance* (Cambridge 2001, forthcoming).
- 48 A B Seligman, *supra* n.46, at 71; see more generally F. Furet, “Der revolutionäre Katechismus” in E Schmitt (ed.), *Die französische Revolution* (Köln, Kiepenheuer & Witsch, 1976), at 46-88; M Gauchet, *Die Erklärung der Menschenrechte. Die Debatte um die bürgerlichen Freiheiten* (Reinbek, Rowohlt, 1991).
- 49 A B Seligman, *supra* n.46, at 73.
- 50 See. K-H Ladeur, “Discursive Ethics as Constitutional Theory. Neglecting the Creative Role of Economic Liberties?”, *Ratio Juris* No. 13 (1999), 94 at 97.
- 51 BVerfGE 7, 198 (205), where the German constitution is described as a “system of values, centring on the freedom of the human being to develop in society”.
- 52 BVerfGE 73, 118 (157); E 74, 297 (324 f.); E 83, 238 (296 f., 315); E 87, 181, (198 f.); E 89, 144 (152 f.); E 90, 60 (90).
- 53 G Franck, *Ökonomie der Aufmerksamkeit* (München, Hanser, 1998); F Rötzer, “Aufmerksamkeit als Medium der Öffentlichkeit” in R Maresch/N Werber (eds.), *Kommunikation, Medien, Macht* (Frankfurt a.M., Suhrkamp, 1999), at 35.; S J Schmidt, “Aufmerksamkeit als Leitwährung”, *epd medien* 2000, Nr. 84, 5-10.
- 54 C. Shapiro/H. Varian, *Information rules* (Boston, Harvard Business School Press, 1999), at 173; M Hutter, “The Commercialization of the Internet. A Progress Report” in C Engel/K Kellner (eds.), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Baden-Baden, Nomos, 2000), 73 at 76.
- 55 S Bikhchandani/D Hirshleifer/I Welch, “A Theory of Fads, Fashion, Custom and Cultural Change as Information Cascades”, *Journal of Political Economy* 1992, at 992; see also C R Sunstein, *supra* n.44, at 515.
- 56 K-H Ladeur, “Die vertikale Integration von Film-, Fernseh- und Video-Wirtschaft als Herausforderung der Medienregulierung”, *Rundfunk und Fernsehen (RuF)* 46 (1998), 5-23; see also T Vesting, “Zur Zukunft und Konstruktion des Medien- und Telekommunikationsrechts in den hybriden

Beziehungsnetzwerken der ‘Informationsgesellschaft’ ”, in: Helge Rossen-Stadtfeld/Joachim Wieland (Hrsg.), *Steuerung medienvermittelter Kommunikation – Theorie, Praxis, Perspektiven*, Baden-Baden 2001, S. 83-115.

57 B Holznagel, “The mission of public service broadcasters”, IJCLP 13/5/2000.

58 See K-H Ladeur, *supra* n.17; C R Sunstein, *supra* n.44, at 515; see also T Vesting, *supra* n.56; Th. Vesting, *supra* n.7.

59 Cf. LG Mainz, 26 May 2000, 11HK O 69/99, AfP 2000, 482-487.

60 See C R Sunstein, *supra* n. 44, at 531.