

The public service broadcasting mandate seen as the process of its justification

Some suggestions on the implementation of
the three-step test to make the remit of public service
broadcasters in Germany more precise

Wolfgang Schulz

MEDIEN-UND TECHNOLOGIEPOLITIK

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Vorschläge zu Verfahren und Organisation des
»Drei-Stufen-Tests« zur Selbstkonkretisierung des Funktions-
auftrags öffentlich-rechtlicher Rundfunkanstalten«

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Introduction

The fact that much thought is being given currently to the precision of the mission of public service broadcasting in Germany was triggered by a decision of the European Commission in spring 2007, on the basis of an agreement reached between Germany and the Commission (*Beihilfekompromiss*, state aid compromise)¹. The Commission required a more precise definition of the public service mission in Germany, in particular with respect to so-called new services such as services based on the Internet Protocol standard and special services for mobile use such as DVB-H (mobile TV).

The decision triggered the deliberations, but did not cause them. Completely independently of European requirements – which some would call unreasonable – there is a need to strike a balance between two different principles, even in times of convergent complexity: state-free organisation of public service broadcasting while tying the service to the needs of society. The so-called three-step test is the core element in the precision efforts for the mission of public service broadcasting in the field of new services as outlined in the *Beihilfekompromiss*, and was established in order to make the two principles compatible with one another².

¹ See: K(2007) 1761 endg. in the procedure E3/2005; Press Release IP/07/543, Brussels, 24th April 2007.

² Bauer/Bienefeld, Der Public Value Test, Ein Vergleich zwischen dem BBC-Modell und dem geplanten Verfahren beim ZDF, Funkkorrespondenz (49)2007, pp.3 et seqq.; Hasebrink, »Public Value«: Leitbegriff oder Nebelkerze in der Diskussion um den öffentlich-rechtlichen Rundfunk?, Rundfunk und Geschichte 1/2 2007, pp. 38 et seq.; Held, Online-Angebote öffentlich-rechtlicher Rundfunkanstalten, Baden-Baden 2008, pp. 140 et seqq.; Held, Öffentlich-rechtlicher Rundfunk und neue Dienste, Berlin 2006, pp. 25 et seqq.; For a better understanding of Pub-

European law

The European Commission assumes that according to Article 87 para 1 EC, the German financing regime of public service broadcasting by fees is a case of state aid³. On the basis of this interpretation, such a financing regime is only justified in the presence of the preconditions pursuant to Article 86 para 2 EC; a clear remit must exist.

In view of applicable legislation at the time when the decision was taken, the Commission understands that there is a general and broad definition of the mission in § 11 para 1 of the *Rundfunkstaatsvertrag* (RStV, Interstate Treaty on Broadcasting) which is specified by the broadcasters themselves with legally binding effect.⁴ By and large, this process is considered to be in compliance with European legislation. With respect to the definition of the mission for additional digital channels and media services, however, the Commission sees deficits in the precision of the definition. The *Beihilfekompromiss* and, in particular the three-step-test, aim at eliminating these deficits.

Germany takes an essentially different legal viewpoint.⁵ Germany – rightly – assumes that this in fact is not a case of state

lic Value in the British discussion see Collins, The BBC and »public value«, M&K 2007, pp. 164 et seqq.

³ Vgl. K (2007) 1761 endg. recital 74 et seqq.; in the same direction pointing: Thum, Gebührenfinanzierung und EG-Beihilferecht, NVwZ 2007, pp. 521 seq.; see also about the issue: Stulz-Herrnstadt, Nationale Rundfunkfinanzierung und europäische Beihilfenaufsicht im Lichte des Amsterdamer Rundfunkprotokolls, Berlin 2004.

⁴ K (2007) 1761 endg. recital 224.

⁵ See notification of the Federal Government, printed in Funkkorrespondenz (6)2007, pp.28 et seqq.; see also to this legal viewpoint: Wiedemann, Public Service Broadcasting, State Aid, and the Internet: Emerging EU Law, European State Aid Law Quarterly 4/2004, pp. 595 et seqq.

aid as defined in Article 87 para 1 EC. Firstly, there is no «favouring», since the criteria identified by the European Court of Justice in the *Altmark-Trans* ruling are complied with. The public service broadcasters only receive the net costs for fulfilling their public service mission.⁶ Germany also holds that the financing regime for public service broadcasting is not a state measure nor uses state funds.

The compromise between the Commission and Germany was brought about not least, in order to avoid having to carry out this fundamental dispute.

Constitutional law

In its latest decision on the financing regime for public service broadcasters, the Federal Constitutional Court (*Bundesverfassungsgericht*) reaffirmed the special significance of public service broadcasting and its production logic for the objective laid down in Article 5 para 1 Basic Law which provides for free public and individual opinion making.⁷

Whereas the legislator, as a consequence, is not entitled to specify the mandate by determining the amount of broadcasting fees, the German constitutional law does entitle the legislator to stipulate the quantity and the structure of the mission of

⁶ For the criteria see: Case C-280/00 *Altmark-Trans*, European Court reports 2003, I-7747, recital. 88 et seqq.; Held/Schulz, Europarechtliche Beurteilung von Online-Angeboten öffentlich-rechtlicher Rundfunkanstalten, Berlin 2004, pp.31 et seqq.

⁷ See BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no.120 et seqq. It, thereby, ties up to its previous jurisdiction according to art.5 para 1 sentence 2 Basic Law, which ensures the public broadcasters to design their programmes free from any state influence.

public service broadcasters⁸. There are, however, restrictions to the legislator with respect to the precision of the mission, because this could have an impact on the broadcasters' freedom to make their programmes. In principle, the broadcasters are independently responsible for the number and extent of necessary programmes and, above all, for their media orientation.⁹ However, the Constitutional Court of Justice does not rule out programme restrictions by law altogether.¹⁰

The contrast between the *Beihilfekompromiss* and constitutional requirements which is highlighted in the debate time and again, is basically there. The European laws require a remit as precise as possible by a Member State. In Germany, an autonomous precision of the definition by the broadcasters themselves would be the most constitutionally-friendly option. This, however, is not a fundamental contradiction, because the Commission has confirmed that the procedural approach provided by § 11 RStV is in compliance with European legislation.

On the other hand, in the interpretation by the Federal Constitutional Court, Article 5 para 1 sentence 2 Basic Law by no means excludes an abstract remit by the state and laws prescribing the procedures to arrive at a precision of its definition and making the broadcasters commit to self-restrictions. Quite to the contrary: the system set up by the Basic Law allows for privileges such as fees only in combination with a defined mission and requires justification.

⁸ See BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no. 132; BVerfGE 90, 60, 95.

⁹ See BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no. 124 with referral to BVerfGE 87, 181, 201; 90, 60, 91 et seqq.

¹⁰ See BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no. 125.

Structural diversification within the dual system

According to the Constitution, the relationship between private broadcasting and public service broadcasting does not imply a division of labour within the so-called dual broadcasting system, in which public service broadcasting would be limited to filling the gaps in communication goods that the market cannot provide for. Hoffmann-Riem's so-called structural diversification that takes place in a dual broadcasting system helps to correctly understand what the relationship of the two pillars is like.¹¹ The structure of the broadcasting system is supposed to gain stability by outbalancing the weaknesses of one pillar through strengths of the other and vice versa.

The market deficits¹² as identified by the Federal Constitutional Court¹³ lead to structural effects for the programmes which make private broadcasting appear to be less than ideal with respect to the communicative objectives that Article 5 para 1, sentence 2 wishes to protect, namely the freedom of reporting by means of broadcasting. Professional journalistic services can fall victim to commercialisation and risky formats could be abandoned for the benefit of tried and tested formulas and performers. On the other hand, private broadcasting has an efficient sensor in its commercial tie to at least short-term inter-

¹¹ Hoffmann-Riem, *Regulierung der dualen Rundfunkordnung*, Baden-Baden 2000, pp. 292 et seqq.

¹² For more information about market deficits see Heinrich, *Medienökonomie*, Bd. 2, Opladen 1999, pp. 24 et seqq.; For conflicting preferences of the audience see Schulz/Held/Kops, *Perspektiven der Gewährleistung öffentlicher Kommunikation*, Baden-Baden 2002, pp. 58 et seqq.

¹³ See BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no. 118 et seqq.; Wiedemann, *Der Programmauftrag des öffentlich-rechtlichen Rundfunks in der digitalen Ära in Deutschland und Europa*, ZUM 2007, pp. 800 et seqq.

ests of the audience. In addition, private broadcasting is largely free of any state influence due to its autonomous financing.

The production in public service broadcasting has its weaknesses too. Despite all the constitutional efforts to support freedom from the state, the state would be more easily able to exert influence in public service broadcasting than in private broadcasting. Another weakness is the disadvantage that lies in the seeming advantage of financial independence, because autonomous financing could lead to a detachment from society's communication needs which in turn would have to be prevented by other mechanisms. Public service broadcasting with guaranteed funding and no controls could run the risk of making its programmes for itself or some (other) educated elite only.

Communicative venture capital

The fact that public service broadcasting is largely funded by the social economy is also its biggest strength. The negative structural effects of the markets as described above can be prevented and a counterbalance can be created against potential opinion monopolies of private broadcasters, and professional journalistic standards can be adhered to. Additionally, such a financing regime allows for innovative programmes and can be seen as communicative venture capital.¹⁴

However, the special production logic¹⁵ of public service broadcasters plays an important role here. It needs to be pointed out that funding through the social economy combined with a

funding guarantee on the basis of the Constitution, offers free space that can be filled in different ways. There is of course funding through commercials in public service broadcasting too which can control it – in a good as well as bad sense – but if we leave that aspect out, we see the need for alternative control mechanisms for programme production in this free space.

Current mission

For all the reasons mentioned above, the current control system is very concise. There is a remit for broadcasting services (currently also including printed media and telemedia with programme-related content) in Article 11 para 1 RStV, and some specific missions such as «TV programme» for the *ZDF*, the second channel in public television in Germany. The objectives to be reached by the programmes are given in the law only in very abstract terms. The mission defined in § 11 para 2 RStV mentions above all information, education, advice, and entertainment. Cultural contributions (sentence 4) and reporting at all regional levels (sentence 1) are explicit parts of the mission. The difficulty alone to define what makes culture different from anything else makes it hard to derive any restrictions from this provision.

Due to the abstract nature of material provisions, the procedural and organisational safeguards have a special role to play. Traditionally, the *Rundfunkrat* (Broadcasting Council, respectively the Radio or the TV Council) is the central body to make sure that the programme is geared towards the needs of society. The bodies are composed in a pluralist way and are not meant

¹⁴ Vgl. Held, Online-Angebote öffentlich-rechtlicher Rundfunkanstalten, Baden-Baden 2008, pp. 198 et seqq.

¹⁵ About this term see Held, Online-Angebote öffentlich-rechtlicher Rundfunkanstalten, Baden-Baden 2008, p. 364, as well as about the char-

acteristics of the public broadcasting programme development, l.c. pp. 154 et seqq.

to have a repressive control function. By means of their crucial competences in decisions on staff (particularly when appointing or voting out the chairpersons of broadcasting stations) and the effective advisory competences they have because of that, they exert their influence.

According to the ideas of the Constitution, the people in the councils do not represent any interest groups, but the public in general. It is helpful for the system that the members bring along the perspectives of their seconding institutions and are accountable to a certain extent to them for their activities within the council.¹⁶ Despite all the frequent criticism of the supervisory body, there has not yet been a systematic proposal offering a better alternative.

Previous Experience

The legislator's method consisting of abstract and broad definitions of the public service mission and provisions for further specification by the broadcasters themselves in the Interstate Treaty on Broadcasting makes sense in control theory¹⁷, but to date has not fully brought about the desired results. Looking at the published measures taken by the broadcasters, you cannot always see what objectives the broadcasters derive from

¹⁶ For the composition of the council see Eifert, Konkretisierung des Programmauftrages des öffentlich-rechtlichen Rundfunks, Baden-Baden 2002, pp. 39 et seqq.

¹⁷ For suggestions already targeting on this issue see Bullinger, Die Aufgaben des öffentlichen Rundfunks, 2. Auflage, Gütersloh 1999, pp. 13 et seqq.; Eifert, Konkretisierung des Programmauftrages des öffentlich-rechtlichen Rundfunks, Baden-Baden 2002, pp. 122 et seqq.; Jarren/Donges/Held/Jürgens/Künzler/Schulz, Der öffentliche Rundfunk im Netzwerk von Politik, Wirtschaft und Gesellschaft, Baden-Baden 2001.

the mandate given to them in § 11 para 1 RStV or what control principles were taken into consideration and what the criteria were to determine the quality of the success.

The statutes and guidelines do not always qualify as substitutes for state standards as stipulated in § 11 RStV. They should provide the precision that the law itself cannot provide due to the principle of freedom from state influence. They should be worded in such a way as to also make clear what the broadcasters are not commissioned to do. Currently, there are partly superficial programming statements, for example on online presence: »It makes an important contribution to guaranteeing plurality of opinions in the new media and thus contributes to shaping opinion and will in the society. The younger generation in particular, growing up with the Internet, will be reached in this way« (quoted from the principles for the cooperation in the joint *ARD* (Association of Public Broadcasting Corporations in the Federal Republic of Germany) programmes). The texts partly consist of paraphrased content from the legal provisions.

Article 11 Mandate

(1) Public service broadcasting must, by producing and broadcasting radio and television channels, act as a medium and a factor in the process of shaping free individual and public opinion. Along with the channels it may offer printed material and telemedia with programming-related content.

(2) Public service broadcasting must provide in its offerings and in its programming a comprehensive over-

view of international, European, national and regional events in all major spheres of life. It should hereby promote international understanding, European integration and social cohesion on a regional and national level. Its programming must serve to inform, educate, advise and entertain. It must, in particular, offer cultural contributions.

(3) Public service broadcasting must in fulfilling its mandate take into

consideration the principles of objectivity and impartiality of reporting, plurality of opinion and the balance of offerings and programming.

(4) The State Broadcasting Corporations which form the ARD, the ZDF, and »Deutschlandradio« shall in each case issue statutes or guidelines providing more detail regarding their respective mandates. The statutes and guidelines pursuant to in sentence 1 must be published in the Official Journals of the States. The Public Broadcasting Corporations which form the ARD, the ZDF, and »Deutschlandradio« shall publish every two years, the first time

being 1 October 2004, a report on the fulfilment of their respective mandates, on the quality and quantity of the offerings and channels and the planned focal points of the respective programme services on the agenda.

(5) Three years after the Seventh Interstate Treaty for Amending Interstate Treaties with regard to Broadcasting Law comes into force the States shall review the application of the provisions in paragraph 4.

(For an unofficial German translation of the Treaty on Broadcasting see <http://www.alm.de/366.html>.)

However, some highly important points are raised in the guidelines that have not yet been addressed by law. The ARD for instance commits itself to providing simple access without hindrance to its programmes and services for the whole population. The legal difficulties and uncertainties that the texts of the statutes and guidelines did not avoid, also exist with regard to the reports pursuant to § 11 para 4 sentence 3 RStV. The reports include some voluntary commitments that have not been provided by the legislator, but clearly serve the objectives of Article 5 para 1 Basic Law, e.g. the commitment to offer comprehensive and accessible services for people with disabilities.

Other parts of the guidelines bear more resemblance to PR communications (»Tatort (prime time crime series) was able to assert itself as the most successful crime series on German TV

[...]«) and do not provide quality criteria despite some efforts to do so.

The system for providing the required precision of the definition of the mission has not yet established itself well. In this light, the legislator indeed runs a risk when it basically renounces making regulations by itself – as stipulated in the *Beihilfekompromiss* – for the precision of the mission as well as the organisation and procedure (such as the action levels for the three-step test) and material criteria. In this respect, the legislator is condemned to courage by the Constitution.

The design of the three steps

The material provisions for the remit which result from the *Beihilfekompromiss* are the framework for the test. It is necessary to mention that a specific mandate should be arrived at for telemedia. This refers to journalistic editorial services and services on the basis of journalistic and editorial decisions. The Interstate Treaty on Broadcasting will name criteria for the precision describing objectives the services need to fulfil. The support of TV programmes will only be one feature among many. For the first time, there will be a genuine online remit for public service broadcasting, provided that the German *Länder* implement the compromise as planned.

European law would allow for deviations by the *Länder* to provide more legislation themselves, but this is restricted by German constitutional law. The three-step test will therefore be the most decisive element for the mission to establish new broadcasting and telemedia services. However, the *Länder* can specify individual remits themselves – while taking the freedom from state influence into consideration.

The test is described in the *Beihilfekompromiss* as follows:

In the Interstate Treaty on Broadcasting, the Länder are going to specify the procedures for the mission for all new services of public service broadcasting. The public service broadcasters are obliged to carry out a three-step test for all new digital services and all modified digital services. The steps will be outlined in the law. The broadcaster has to examine the following for each offer:

1. that it is part of the public service mission and thus corresponds to the democratic, social, and cultural needs of a society and
2. that it contributes to the quality of media competition
3. the expenditure planned for providing the service

The measures proposed in the Interstate Treaty on Broadcasting will be specified in the explanatory memorandum with respect to the definition of media competition.

The following points need to be included:

- quantity and quality of the existing freely accessible services and market-relevant impacts of the planned service

- function of the planned service (that may include entertainment) in shaping public opinion in view of existing services

Not every modification of an online service for instance can be a project for which the procedure described above applies. The Interstate Treaty on Broadcasting will therefore stipulate that the public service broadcasters set transparent and verifiable criteria to determine when there is a new service and the procedure applies. The broadcasters are required to take the following criteria into account:

- significance of the project for media competition – financial relevance of the project
- its planned duration
- analysis of possibly existing comparable services within the programme (the perspective of the user is essential: which media activities are replaceable from their perspective)

The three-step test and its function

Looking at the precision of a remit by the broadcasters themselves from a constitutional point of view, it becomes obvious that the broadcasters do what the legislator does in its own field, namely shaping the broadcasting structure. It is understood that the layout provided by law offers a broad scope and needs to do so because of multipolar interests.¹⁸

The legislator would violate the Constitution, if the objective, i.e. free shaping of public and individual opinion was lost out of sight or aimed at with inappropriate means or if individual interests were neglected in an unconstitutional way. A broad scope can only be granted to the legislator if the legislator can provide justifiable reasons for its options within the scope.¹⁹ This procedural element is of fundamental significance.

If the public service broadcasters implement this legal frame and specify what programmes and services they will offer in the future, similar structural methods apply. As outlined above, they will be given some scope for their decision that the legislator is not allowed to fully construct by itself due to the principle of freedom of broadcasting from state influence. For the broadcasters as for the legislator that means that they need to base their decisions for or against a service on the effect the service will have to optimising the shaping of public and individual opinion in Germany as a whole.²⁰

¹⁸ Hoffmann-Riem, *Regulierung der dualen Rundfunkordnung*, Baden-Baden 2000, pp. 107 et seqq.

¹⁹ The recent decision of the German Constitutional Court is highly based on these grounds, see BVerfG, 1 BvR 2270/05 from 11.9.2007, paragraph no. 155 et seqq.; For the obligation of justification by the legislator see Held, *Online-Angebote öffentlich-rechtlicher Rundfunkanstalten*, Baden-Baden 2008, pp. 38 et seqq., including further references.

²⁰ See Held, l. c., pp. 146 et seqq.

Unlike their private competitors, they are not participating in the market when taking their decisions. Private broadcasters might only focus on the expansion of their own media activities and could for example decide to adopt crowding-out strategies.

Justification requirements

Just like the legislator, the public service broadcasters need to justify their decisions to offer new media activities. This is not only obligatory in the political sense meaning that those who use privileges such as the privilege of the financing regime through fees owe society an explanation of how the funds are spent and what for, but it is also required by constitutional law.

Justification means everything that the word implies. First of all, the reasons for one's own action need to be given and then this action needs to be justified vis-à-vis third parties and finally be used as a basis for further action.

Currently, the specific organisational structures and processes to fulfil this purpose are difficult to be identified by people outside the public service broadcasting system. The organisation alone shows that everything related to compliance with respect to the Interstate Treaty on Broadcasting functions lies in the hands of legal advisers and not the internal bodies that are primarily responsible for the strategies of the stations and the proliferation of their programmes.

In the future, the broadcasters will have to show their effectiveness in producing good ideas for programmes but also good justifications.

Function-compatible procedure

In order to be able to judge which procedure is appropriate and which organisation is best to fulfil the task, it is necessary to outline the function of the different test phases and the work packages involved as described above one more time. A distinction will be made between information as the basis for the decision-making process and criteria for controlling the decision.

Outline of the first step

A prior identification of the communicative need to which the broadcasters are reacting is essential for this step. A continuously updated overview of the developments of how the citizens use the media activities and what function they fulfil for them and society at large is required.

This would be the stage at which there would be explanations if and why there is a need for time-shifted use of TV content and whether it is different in the case of news programmes as opposed to music shows, purchased feature films as opposed to self-financed feature films. Further differentiations between linear and non-linear media activities are reasonable and, among the non-linear services again, whether they are audio-visual or textual etc.

For the evaluation, i.e. the response to the question whether the public broadcasters are responsible for fulfilling the identified need, criteria will be relevant that they developed in their statutes and guidelines pursuant to § 11 para 4 sentence 1 RStV. There is still room for improvement in these as outlined above. At this stage, the criteria that will be discussed later on in the second step in the framework of media competition are relevant too. These criteria deal with the particular strengths of the production method of public service broadcasting in re-

lation to the communicative need in question – a mere general reference to the particular strengths of the production method of public service broadcasting does not suffice.

Procedure

The *Beihilfekompromiss* does not contain provisions for the procedure. The broadcasters themselves are responsible for the procedure and they already have the expertise of how to gather the necessary information. It would not make much sense to fully leave the gathering of information to any external person or group at this level. This makes the respective broadcaster responsible for the procedure. Internally, the most purposeful way would be to leave this task to the executive level, the chairperson (*Intendant*) and the executive staff, since the councils (*Räte*) do not have sufficient administrative support structure at present. A dysfunctional assigning of tasks would not help to strengthen their position.

However, it may make sense to check the internal evaluations against external expertise, for example in cases of major trends in changed user behaviour or fundamental functional modifications such as a shift to online services. The councils too can consult external experts before they finally decide to provide a new media activity, which would put their decision-making process on a broader basis. The *Beihilfekompromiss* leaves the rules of the procedure also in the hands of the broadcasters. The statutes and guidelines could include provisions stating when external expertise needs to be included.

With regard to evaluation criteria, the broadcasting stations need to develop and update criteria for their compliance with the legal remit. The committees need to evaluate the concept in question with the help of the statutes and guidelines. A continuous internal optimisation process would be reasonable to

make sure that the statutes and guidelines are adapted to the results from the three-step tests of specific media activities.

Outline of the second step

This phase consists of different steps requiring different types of expertise. The first step to take would be to identify the competing media activities. In order to be able to assess the situation that will likely exist once the planned media activity is launched, it is necessary to analyse the commercial markets. Additionally, a prognosis must be prepared for the impact to be expected from the new media activity. This requires expertise in media economics.

The subsequent assessment needs to be geared towards the objective of optimising media competition. The projected future of media competition needs to be evaluated against the background of the existence or non-existence of the media activity in question. The special quality of media activities by public service broadcasters needs to be taken into account as well as the interaction among the media activities, such as a potential increase in quality once private offers compete with offers by public service broadcasting – and vice versa.

If there are different options, quality criteria are necessary for the selection and decision-making processes. This is the core of the requirements for verifiable justification by the public service broadcasters for the special public value of their media activity. At this point, the procedure can be tied in with the general discussion on quality that is currently going on under the *Stiftung Medientest*²¹ headline (the idea of a »media testing

²¹ At an early stage already see Krotz, Zur Konzeption einer Stiftung Medientest, RuF 44(1996)2, pp.214 et seqq.; For the specific public broadcasting quality at present see Kammann/Jurkuhn/Wolf, Im Span-

foundation« as it has been debated time and again and now has become a focus of media policy once more). Even before that, there were numerous attempts by *ARD* and *ZDF* to specify quality requirements in such a way as to be able to use them for assessing individual projects.²²

Quality criteria

The core finding of the scientific discussion on quality is the understanding that quality cannot be a fixed goal to be broken down into measurable criteria. Quality is rather to be seen as a process which, however, runs more rationally the more criteria there are to guide the process.

Only preliminary examples for types of criteria can be given here.²³ Examining possible criteria, it quickly becomes evident that agreement can be more easily reached on structural criteria rather than on criteria relating to the product's features. In this sense, a broadcaster's own network of correspondents would undoubtedly be a quality attribute, as would be their special training and continuous training measures. It also becomes evident that criteria seem to be easier to develop for journalistic-editorial services than for entertainment programmes.

The uncertainty in expert discussions on what belongs to the journalistic production of content and which quality standards are applicable to »journalism« and »entertainment journal-

nungsfeld: zur Qualitätsdiskussion öffentlich-rechtlicher Fernsehprogramme, Studie im Auftrag der Friedrich-Ebert-Stiftung, Berlin 2007.

²² See Schatz/Schulz, Qualität von Fernsehprogrammen – Kriterien und Methoden zur Beurteilung von Programmqualität im dualen Fernsehsystem, *Media Perspektiven* 11/1992, pp. 690 et seqq.

²³ For characteristics of the development of public service broadcasting offers see Held, *Online-Angebote öffentlich-rechtlicher Rundfunkanstalten*, Baden-Baden 2008, pp. 154 et seqq.

ism«²⁴ shows in the specification procedure, but the expert discussions might benefit from it.

In-house productions and third-party productions would be another point of discussion. Their qualities in public service broadcasting would need to be assessed. Existing quality assurance systems would need to be identified (do they apply for some products in third-party productions as well as for in-house productions, but not for others?). The quality attribute »social relevance« creates scope for focusing on specific issues.

Media competition

Irrespective of the fact that public service broadcasting is entitled by the Constitution to be active in the entertainment sector, it will certainly be easier to justify the special public value of a news channel rather than purchased entertainment programmes. The legal framework conditions are based on the awareness that public service broadcasting can contribute to the quality of media competition in the journalistic-editorial field with respect to structure. This is the reason why the *Beihilfekompromiss* commissions public service broadcasting to provide journalistic-editorial telemedia and telemedia on the basis of journalistic-editorial decisions.

In general, it will be necessary to demonstrate the structural advantages of public service broadcasting for each project. The functions of broadcasting services that are relevant from a constitutional and legal point of view are ultimately decisive. In the best case, the quality attributes that prove to be suc-

²⁴ For the discussion see Klaus, *Der Gegensatz von Information ist Desinformation, der Gegensatz von Unterhaltung ist Langeweile*, *RuF* 44(1996)3, pp. 402 et seqq.; Ziemann, *Reflexionen der »Mediengesellschaft«*, in: Ziemann (Hrsg.), *Medien der Gesellschaft – Gesellschaft der Medien*, Konstanz 2006, pp. 183 et seqq.

cessful in the justification discussions would have an impact on the development of media activities by the broadcasters. This would make the procedure fulfil its actual function, i.e. the programme mission would turn into its own justification process.

The decision at this stage not only requires an evaluation of the public service broadcasting offers but also of the competition with others, including private offers. The quality of the media activity to be evaluated is not the only element, but the media activity also needs to be evaluated as to the extent to which it supplements or strengthens other offers and how it interacts with several other competing products. The analysis should cover the question whether competition works as a quality assurance tool and why therefore a range of media activities may be beneficial.

In view of the function of media activities for public communication under constitutional protection, an unrivalled service by a public service broadcaster may be better in some market segments than an unrivalled private one. The competition between a public service broadcaster and a private broadcaster could, however, be superior to a competition between two public broadcasters for reasons of structural diversification. Comparative heuristics need to be developed through the procedure.

Through all this examination, the answer to the crucial question above – e.g. EinsExtra channel vs. n-tv/N24 – has been put on a rational basis. There is no abstractly preconceived legal path for the decision. While in the news sector, broadcasters may easily justify new programmes, this may be different in other sectors and under different competitive conditions.

Procedure

The *Beihilfekompromiss* does not contain any provisions for the assignment of responsibilities in this step. The broadcast-

ers undoubtedly have the information on media competition they need. With respect to media economics, however, it may make sense to include external expertise. The information to be expected from competing private broadcasters need to be evaluated in view of their interests. They cannot replace a neutral review which aims at making impacts transparent and if necessary may convince broadcasters to take media economic impacts more seriously.

The *Landesmedienanstalten* (state media authorities) that were mentioned in the debates as a parallel institution to OFCOM for the BBC, do not have any expertise that is superior to the expertise of the broadcasters themselves. This is why it seems favourable to seek advice from unbiased third-party experts. They can be contacted by the station's executive level or the committees or by both of them together, in order to provide further evidence for the evaluation of relevant projections. If the chairperson's projection is confronted with a differing projection which does not pursue obvious interests by a self-serving interpretation of data, a neutral expert report might be helpful.

The fact that the questions of media economy are similar in their structure would speak in favour of establishing a separate unit for dealing with this point – i.e. the expert reports, not the decision itself.

The criteria for the special public value, for a quality assessment of the options with and without the new media activity need to be seen separately. They need to be developed by the broadcaster and are the basis for the decisions by the committees. External advice might be useful here too, either in certain given intervals or in the case of neuralgic decisions. The establishment of new committees would, however, be against the intended aim of strengthening the already existing committees. A review is necessary to see what additional quali-

fications they would need in order to make an assessment by them appropriate.

Outline of the third step

The data necessary to establish the expenses for a media activity can be provided easily by the broadcaster concerned.

Evaluability and evaluation

Evaluability is a general quality feature of any regulation and calls for wording the quality criteria where necessary in a way that makes them evaluable. The evaluation does not need to be carried out by a third party. It can be done by the broadcasters themselves and made transparent, e.g. in the reports pursuant to § 11 para 4 RStV whose function would thereby be more clearly determined. The necessary provisions would not only need to contain evaluable criteria, but it would also be necessary to set up internal units responsible for quality control.

An additional external evaluation carried out on a case-by-case or periodic basis could increase the efficiency and operability of the system. Evaluation is a regular exercise in many publicly financed institutions, ranging from hospitals to universities. This is a neuralgic point as it is an indirect way of exerting influence on media decisions that are explicitly protected by the Constitution. As long as the decisions lie in the hands of the broadcasters themselves, only the reasoning for the decision and the justification requirement will be increased. In this respect, the broadcasters themselves might have an own interest in increasing the legitimising effect of the procedure.

If criteria are checked against external expertise, this should strengthen and not weaken the councils. However, a review of individual decisions would create a different situation.

Future prospects

During the current debates in Germany, the BBC is often mentioned – sometimes too often. One lesson to be indeed learned from the BBC is their attempt to simultaneously tackle corporate strategy and accountability, i.e. responsibility and justification vis-à-vis the society. In their case, it is easier to see that certain decisions such as the decision on time-shifted use of TV content were not based on the aim to be represented on any new platform, but was made for reasons of still being able to fulfil their well-defined mandate in view of a verifiable change in communication interests. The fact that the *Beihilfekompromiss* needs to be implemented within 2008, provides ground for leading the specific German path as defined by the Constitution to the same goal. The *Länder* and also the broadcasters may find it easier to leave as little as possible to the three-step test, but: The opportunity the *Beihilfekompromiss* offers would be missed once and for all.

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His work is concerned with legal regulations of media content – especially minor protection - questions regarding new media, particularly as regards digital television, and the legal foundations of journalistic work, but also the judicial-philosophic fundamentals of the freedom of communication and the systematic characterisation of journalistic systems. In addition, his work includes new forms of regulation, for example within the scope of concepts of »Regulative Self-Regulation« or »Co-Regulation«.

