

Public Service Media and Its Future: Legitimacy in the Digital Age

The case of public service media in Germany

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Introduction

Our democratic constitution requires a system of public service media (PSM) that is clearly differentiated from private services and that is simultaneously a tool of and a service provider for democracy.

Digitalisation and the technological convergence of media have given television viewers a new power: programmes can now be received irrespective of time and place. Broadcasters are afraid of losing control as new smart TV systems reduce ordinary television to one of several options. Some experts even predict that broadcasting will completely disappear in the future; video services available worldwide will gradually replace it. But what role should the public service media play in this scenario? Will it be reduced to an insignificant niche or will it be completely written out of the future?

From the viewpoint of public service media, the goal must be to remain in the 'relevant set'. According to the so-called development guarantee¹ one of the tasks of public service media is to adapt to the changing viewing habits of users.

The first media 'big bang' 30 years ago brought a fundamental change to public service media with the introduction of the dual system (see also next section). The change was far from damaging, if one compares the German TV landscape internationally. Similarly, the second major 'big bang' in the form of media digitalisation can help public service media benefit and avoid becoming a victim of the digital transformation. The transformation must not be obstructed by

¹ 6th Broadcasting Ruling - German Federal Constitutional Court ruling (BVerfGE 83, 238), <http://www.servat.unibe.ch/dfr/bv083238.html>.

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regulatory media policy, however. On the contrary, regulators must promote the necessary reforms, in fact they must demand and shape them.

The history of public service media in Germany

As a response to Germany's Nazi past, control of media and cultural policy in Germany is decentralised: responsibility is vested with the federal states as opposed to the federal republic. Each federal state enacts its own laws regulating media and cultural matters. The legal basis for broadcasting is the so-called German Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag), a contract entered into by all sixteen federal states. The Treaty provides for state public media agencies part of the ARD, the ZDF and other broadcasters. As a result, the legal structure of the contract is shaped by a variety of laws and treaties.²

As part of Germany's democratisation after World War II, public service media were introduced on the basis of, among others, the British model (BBC). To protect broadcasting media from renewed authoritarian intervention³, public broadcasting was established in 1949 with a government-mediated guarantee intended to ensure political independence. In 1950, broadcasters established the Association of Public Service Broadcasters of the Federal Republic of Germany (ARD). This was followed by the establishment of the Second German Television (ZDF) in 1961. These broadcasters are constituted as corporations under public law and financed by licence fees (more on this in the third section). Private broadcasters were established starting in the 1980s. Since then public service media have been one of the two branches of the so-called 'dual broadcasting system' of the German media landscape. However, public service media retain special importance in this constellation. The foundation of the dual broadcasting system was laid by the Fourth Broadcasting Decision of the Federal Constitutional Court⁴, a ruling that declared private commercial broadcasting programmes to be constitutional. While private sector providers are subject only to limited regulation, public service media are required to offer comprehensive public service. It is precisely this requirement that justifies

² Peter Raue, Jan Hegemann (ed.) (2017) *Münchener Anwaltshandbuch Medien- und Urheberrecht*, p. 467, para. 17, 18.

³ *Ibid.*, p. 461, para. 5.

⁴ 4th Broadcasting Ruling of German Federal Constitutional Court ruling (BVerfG 73, 118), <http://www.servat.unibe.ch/dfr/bv073118.html>.

public service media and its unique character. The Federal Constitutional Court has held that the collection of broadcasting fees (licence fee) is permissible in view of the public service provided by these broadcasters.

Today, around 38 million television households can receive the main programmes of ARD and ZDF via satellite, cable or digital terrestrial transmission. This represents 98 percent of the reception potential of German TV households.⁵

The structure of public service media in Germany

Public service media broadcasting is organised as follows: the ARD is an association of nine state-level broadcasters that have joined together to offer programmes via television and radio broadcasting as well as via the internet. A tenth member of the ARD is the Deutsche Welle, Germany's public international broadcaster. Together with the ZDF, the ARD also operates 'funk', an online distribution channel and content network marketed to adolescents and young adults, KiKA, a children's channel, and PHOENIX, a documentary channel. It is also involved in operating 3sat, a German-language culture TV channel run in cooperation with partners from Austria and Switzerland, and ARTE, a European culture TV channel run in partnership with France. Deutschlandradio offers a national radio programme for citizens in all sixteen federal states.

These institutions act through their bodies, the Broadcasting Council, the Administrative Board and their Directors. The Broadcasting Council is the highest body and represents the interests of the general public. It also has decision-making and supervisory powers (see section 4 for council structure). The Administrative Board supervises and advises the management and reports to the Director-General who manages the affairs of the broadcaster and is responsible for business and programme design.

The Federal Constitutional Court has repeatedly and clearly articulated the special role of public service media for our society: According to the Federal Constitutional Court public service media are intended to guarantee the basic supply of information, education, culture and entertainment to the

⁵ MEDIA Perspektiven (2019) Basisdaten 2018, p. 4, https://www.ard-werbung.de/fileadmin/user_upload/media-perspektiven/Basisdaten/Basisdaten_2018_Internet_mit_Verknuepfung.pdf.

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population.⁶ This mandate of public service also requires that PSM fulfil their multifaceted task, only if the content is technically available to everyone. In order to carry out this task independently of any state and economic interest, public service media are financed by contributions from all citizens, companies and institutions. There are clear rules for the licence fees, which are payable by all citizens above the age of 18 years of age in accordance with the principle 'one apartment – one fee' (currently 17.50 Euro per month). The number of broadcasting devices and persons per apartment does not matter. If several people live together, only one licence fee is paid.

However, such a financing model must also be accepted by citizens. In the context of the financial independence secured by licence fees, public service media have a duty to distinguish themselves even more clearly from private providers by maintaining a distinct profile. Most funding is sourced from licence fees but a small part of income is raised from advertising, sponsorship and the exploitation of productions.

In its ruling on 18 March 2016, the Federal Administrative Court⁷ *inter alia* decided and confirmed that the levying of licence fees constitutes financing that is appropriate to public service media. This enables the relevant broadcasters to fulfil their mandate according to the dual broadcasting system while avoiding dependency on advertising or state funding which may jeopardise diversity.

Since broadcasting is subject to permanent change due to developments in the digital arena, the Federal Constitutional Court developed the 'dynamic broadcasting' concept. According to the concept in question it must be possible for PSM to also fulfil its task in the future by relying on modern technology.⁸

The market shares in terms of audience (total, from three-year old viewers) for 2018 stood at 11.5 percent for ARD (das Erste⁹) and 13.9 percent for ZDF. The broadcasters are followed, at a distance, by the private broadcasters RTL, Sat.1 and ProSieben with market shares ranging between 8 and 4 percent.¹⁰ However,

⁶ *inter alia*, 4th Broadcasting Ruling of German Federal Constitutional Court ruling (BVerfG 73, 157), <http://www.servat.unibe.ch/dfr/bv073118.html>.

⁷ Decision of the Federal Administrative Court (BVerwG 6 C6, 15).

⁸ 5th Broadcasting Ruling of German Federal Constitutional Court ruling (BVerfG 74, 297, 351), <http://www.servat.unibe.ch/dfr/bv074297.html>.

⁹ First channel to launch in Germany and is operated by all broadcaster part of ARD.

¹⁰ AGF (2018) Marktanteile der AGF- und Lizenzsender im Tagesdurchschnitt 2018, in Zusammenarbeit mit GfK, <https://www.agf.de/daten/tvdaten/marktanteile/?name=marktanteile>.

looking at the market shares of younger target groups, the PSM are clearly becoming less relevant: in the so-called 'advertising-relevant' target group (14-49 year olds) the private broadcaster RTL is the market leader with 12.2 percent, ahead of ARD (7 percent) and ZDF (6.8 percent).¹¹

How is the independence of broadcasting ensured?

Public service media have several defining features such as being independent of the state and internally controlled through largely sovereign supervisory bodies (internal pluralism) comprising the Broadcasting Council and the Administrative Board.

The Federal Constitutional Court ruling on the ZDF Interstate Treaty¹² showed a need for rethinking this arrangement, including in terms of programme content. Alongside the programme being diversified and kept independent from the government, the different boards are also required to be independent of the state and internally pluralistic. In the interest of fulfilling this mandate, the Federal Constitutional Court stipulated that public service media may not come under the influence of any interest group. It should be able to fulfil its mandate independently, especially with regard to political and economic interests. The supervision of public service media must therefore be organised in a manner that it represents the most diverse image of society, without any group being able to dominate others. In order to ensure this, as many different perspectives of society as possible must be taken into account.

The functioning of the state and politics alike involves of a large part of our society whose representatives have a mandate from citizens that is given legitimacy through elections. According to the judgment of the Federal Constitutional Court it therefore seems appropriate that politicians as well as representatives of society from diverse areas such as business, religion, sports, environment, minorities, customs, etc. are represented on the boards of public broadcasters. To ensure that politicians do not dominate the boards, the court

¹¹ AGF; GfK; Media Control, Horizont (2019) *Zuschauermarktanteile (14 bis 49 Jahre) der größten Sender in Deutschland in den Jahren 2017 und 2018*, Statista, Statista GmbH, <https://de.statista.com/statistik/daten/studie/653812/umfrage/zuschauermarktanteile-14-bis-49-jahre-der-groessten-sendergruppen>.

¹² Ruling of the First Senate of Federal Constitutional Court from 25 March 2014, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/03/fs20140325_1bvf000111.html.

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has specified that their share may not make up more than one-third of the seats and that they cannot make or block a decision with the number of votes they hold. Furthermore, board members may not represent the interests of the organisation to which they belong but must explicitly represent the interests of society. Unlike the members of supervisory boards of private companies, the prime concern of board members is not the economic success of the broadcaster but the interests of society.

The involvement of private individuals in the boards is now being tested.¹³ As such, the State Parliament of North Rhine-Westphalia has decreed that citizens may apply for two Broadcasting Council posts in the West German Broadcasting Corporation (WDR) as well as for two deputy posts. The selection of suitable and competent candidates is the responsibility of the WDR Broadcasting Council. If this model proves sensible and feasible, the federal states will have to consider whether to pursue the principle on a broader scale.

In any case, it must be ensured that the choice of citizens does not result in a political grouping appropriating supervisory control. This could for instance occur, if board elections are used by one party to attract as many people as possible who share their specific political convictions and act according to those convictions on the board. The current model does not allow this.

Unlike other countries, for instance from the immediate surroundings of the European Union, Germany consistently follows the path of the state independent public broadcasting. This path must continue to be pursued as the only way to guarantee diversity of opinion and freedom of expression.

Adapting to the digital age

How important are public service media in terms of social communication in the age of digitalisation? Journalism at public service media is inescapably affected by digitalisation. The new technologies could mean a golden age for research, preparation and marketing. A failure to seize this opportunity would mean that public service media will become a remnant of the online economy.

¹³ Volker Nünning (2016) Der Rundfunkrat des WDR wird von 49 auf 60 Mitglieder vergrößert, Medienkorrespondenz, 12 February, <https://www.medienkorrespondenz.de/politik/artikel/der-rundfunkrat-des-wdr-wird-vonnbsp49-auf-60nbspmglieder-vergroessert.html>.

There is no longer a separation between different media types. Due to the internet, the 'dual broadcasting system' is no longer dual, but a multipolar system.

The digital transformation of the media raises a number of questions about the trustworthiness of sources, the funding of quality journalism and the success of political communication in a fragmented public sphere. A large 'counter-public' has established itself on the internet and social networks. Many reports and posts shared quickly gain 'truth' status, although they are later disproved as rumours or intentionally spread *fake news from the outset*. But errors in mass media coverage are also quickly revealed and often mercilessly pilloried. In addition to this, algorithms are increasingly taking on the role of journalists in selecting news based on their relevance and classifying their content.

In these frantic times, there is a need for *trusted content* like never before. Albeit a great challenge, this is also an opportunity for shaping the content profile of public service media. Where public discourse derails repeatedly, public service media must guarantee that it remains democratic and cannot be controlled by any party, thereby preventing the emergence of media segregation.¹⁴

Internally, institutions have already self-critically stated that the legitimacy of younger audiences is increasingly being lost in the areas of information and entertainment. Global online providers such as YouTube or Netflix are also in the process of conquering the German video market. Especially for younger age groups, the internet is becoming increasingly relevant as a source of news.¹⁵ The experts have no doubts – the generations to come will get their information and entertainment from the internet. The next TV generation dwells online. The analogue media system, where there is a good balance between public media and the private press, has been eroded by digitalisation, and the internet in particular. It would, however, be far from realistic to prohibit public service media from fulfilling their public service mandate on the internet. Younger viewers or users of information content are more often online than in front of the TV screen. They also pay the licence fee and have a right to consume the public content.

¹⁴ Karin Frick, Jakub Samochowiec, Detlef Gürtler (2016) Öffentlichkeit 4.0, GDI Gottlieb Duttweiler Institute, p. 19.

¹⁵ Sascha Hölig, Uwe Hasebrink (2018) Nachrichtennutzung und soziale Medien, Media Perspektiven 12/2018, p. 574, https://www.ard-werbung.de/fileadmin/user_upload/media-perspektiven/pdf/2018/1218_Hoellig_Hasebrink_2019-01-08.pdf.

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In 2016, the prime ministers of the federal states unanimously decided to develop a youth programme for ARD and ZDF, which is exclusively available on the internet. 'Funk'¹⁶ is available on smartphone, tablet and PC. The aim is to provide the majority of the population with adequate information and meet media users on an equal footing.

Media and democracy only work with independent professional journalism: in order to have an open opinion and enable the decision-making process, society needs media that are capable of credibly conveying, explaining and classifying facts and values from reliable sources. The subversive effect of widespread disinformation campaigns should not be underestimated: by unsettling trust in information in general, such campaigns can also compromise the credibility of trusted sources. As a result, disinformation may undermine the ability and mission of journalists, which is to ensure reliability and transparency in society.

Public service media in particular must fulfil its role as quality media. This is an enormous challenge – but equally an opportunity – to shape the content profile of public service media. The broadcasters should aspire to an ambitious broadcasting mission. Independent, professional journalism is indispensable for democratic control. Consequently, it also needs to be secured and preserved in the form of public service media.

Current discussions: mandate and structure of reform

The aim of the federal states is to deliver a reform of the mandate and structure of public service media, adapting the Interstate Treaty accordingly and making the profile of broadcasters more professional. In the future, the content available from the profiles of public service media, without following economic market incentives but contributing to the variety of content that cannot be guaranteed by the free market alone, should be featured more strongly as a counterweight to the content available from private broadcasters in all areas.

Individual actors, associations and currently even a political party¹⁷ are calling for the abolition of the licence fee and thus a radical change in the dual broadcasting system. Viewed as a whole, the demands of the 'licence fee

¹⁶ Website Funk, www.funk.net.

¹⁷ Manifesto of the AfD, available at <https://www.afd.de/grundsatzprogramm/#kurzversion>.

opponents' contradict the underlying idea of public service media, which is to ensure that the entire population has access to high-quality information, education, cultural and entertainment and for PSM to mediate public opinion-making. The abolition of licence fees and a simultaneous switch to a pay TV model would *de facto* be the end of the dual broadcasting system. This would be impossible with a pay TV proposition, which would exclude large parts of society for various reasons. If public service media in a pay model were to concentrate on exclusively offering expensive information, education and cultural programmes, it can be assumed that this would soon result in social selection among users. Since the considerable costs for preparing the offers would have to be borne by a smaller group of viewers, the public service offers would inevitably become more expensive for the individual user. In the context of rising prices, the likely outcome will be fewer and fewer subscribers, making public service media become a proposition for the elites, provided that it continues to exist. It would no longer be able to fulfil its social mandate.

However, while criticism and demands are exaggerated, a reform for the future viability of public service media is long overdue and existential.

On their own initiative the ARD¹⁸ and ZDF¹⁹ have issued two expert opinions on legitimacy and future viability. However, these proposals, along with the drive for savings or other structural considerations, do not go far enough from the point of view of politicians.

Unfortunately, the issues of fee stability and structural reform have pushed aside the important question of mandate, a constituent element of the public service system. But what are the questions that must be asked in today's disruptive media environment: How can public service media respond to the increasing competition, especially online? Which functions they should and should not fulfil in the future? What kind of broadcasting does society need?

So, what is it that should specifically change?

¹⁸ Rafael Aigner, Lars Handrich, Anselm Mattes, Ferdinand Pavel (2017) Öffentlich-rechtlicher Rundfunk in einer konvergerten Medienwelt, Politikberatung kompakt 119, Deutsches Institut für Wirtschaftsforschung, https://www.diw.de/documents/publikationen/73/diw_01.c.553625.de/diwkompakt_2017-119.pdf.

¹⁹ Dieter Dörr, Bernd Holznagel, Arnold Picot (2016) Legitimation und Auftrag des öffentlich-rechtlichen Fernsehens in Zeiten der Cloud (Studien zum deutschen und europäischen Medienrecht, Band 62), Peter Lang GmbH, Internationaler Verlag der Wissenschaften; Auflage: New, <https://www.zdf.de/assets/161007-gutachten-doerr-holznagel-picot-100-original>.

Clear distinction to private sector offers:

The pillars of public service media are independence, credibility, relevance and transparency. Without independent reporting, there is no credibility – and without credibility, viewers turn away from coverage. Currently, the debate about the current structural reform almost completely revolves around the vague notion of fee stability. The focus is therefore on the licence fee, on an appropriate financing model and the associated structural changes with potential for savings. But this must not be the sole focus: The central question should rather revolve around the content and profiles of the broadcasters ARD and ZDF.

A substantive and quantitative definition of the public service mandate and a clear distinction from the commercial offers are long overdue. Media politicians of the CDU/CSU-Union have been calling for time to allow ARD and ZDF to reflect on their mandate. As a result, it is now necessary to work together with all stakeholders concerned on the design of a contemporary mandate and develop television programmes accordingly. This being said, a popular demand among critics to restrict public service media to the areas of information, education and culture fails to recognise that entertainment programmes are also relevant to opinion-making. Relevant social, political or historical contexts are taken up in fictional programmes and their background is explained and discussed. Historical films or series on current affairs deal with important social issues and explore key social questions. Not only has news a socio-political function, its fictional content is also relevant to opinion and thus belongs to the public service mandate.

According to an analysis of programme orientation²⁰ the share of information content in ARD and ZDF ranks 8 out of 9 in European-wide comparison of public service media. The emphasis on information offers and its transmission time should be considered as part of the reform of structure and mandate.

More independence from the market share:

The following question is considered at this time: How crucial is market share for public service media? The consequences today include fierce competition with private providers, 'fearful' programming of high-quality reports in programmes broadcast at night and justifications, where a programme fails

²⁰ McKinsey Analysis (2017) Die Rolle des Öffentlich-rechtlichen Rundfunks (ÖRR) in der heutigen Medienlandschaft, September, p. 62, https://www.mckinsey.de/~media/McKinsey/Locations/Europe%20and%20Middle%20East/Deutschland/News/Presse/2017-09-18/die_rolle_des_oerr_in_der_heutigen_medienlandschaft.ashx.

to attract an appropriate number of viewers. Content should naturally be acceptable to those paying the fees as public service media are dependent on this. But the focus should not be the interest of broadcasters but rather the interest of the public. Likewise, broadcasting financed by the general public should not only be convincing on account of independence, diversity and quality, but must reach all segments of the population.

The licence fee is justified solely by quality, and not by market share. The decisive factor is that it is possible for all sections of society to find and use public service content. Questions such as who watches, when and how much television are part of each individual's right to freedom of information.

The fact that younger viewers are watching less television is not an argument for abolishing the fee. It is important to give them access to new forms of public information and programme content. The newly established youth programme 'funk', which is broadcast exclusively online, is a sound approach. In order to produce content for the young, one needs a well-functioning youthful structure at editorial level. The ARD and ZDF should be allowed to experiment bravely in this area while, naturally, taking into account the issue of financing. Smart media specialists already recognise that it is interesting to know the answer to the question of what users see when they look at their smartphones: do you watch the news on Facebook, YouTube or Tagesschau24? Ultimately, it does not matter whether it is TV, radio or an internet post. From the point of view of public service media, however, it is important that their content is represented on these platforms and equal opportunities and accessibility are guaranteed.

Less advertising and sponsoring:

Broadcasters should be enabled to fulfil their mandate relying on their own funding, regardless of commercial revenues or government subsidies.

Transparency in commercial cooperation and a moderate reduction in advertising and sponsorship income are factors that could enhance quality. Much commercial cooperation is not transparent and it is not clear, for example, if whether a prize from a competition is financed by the cooperation partner or by the licence fee. This lack of transparency harms public service media, which should present and act independently, professionally and credibly. Reduced financing from advertising offers the opportunity to develop the programme independently of commercial interests and market shares. As a result, the often casually designated audience group '60 plus' could, for example, be served better. Just because this audience segment no longer

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belongs to the coveted advertising-relevant target group between 14 and 49 years, the ARD and ZDF should not neglect it in their programming and monothematically provide sports coverage and folk music. Current political broadcasts, satire and high-quality TV and cinematographic productions are in top demand even among older viewers.

The increasing population of baby boomers has a stronger orientation to digital opportunities. Year after year, these 'best agers' increasingly use online media²¹ and want a good internet service from the ARD and ZDF to view the requested broadcasts there.

Conclusion

For the future viability of public service media, legitimacy and the corresponding public service mandate are crucial. It is important for politicians to explicitly commit to a constitutionally guaranteed continuation and development at this time. In terms of regulation, there is a need for the introduction of a new form of commissioning. The importance of constitutional broadcasting freedom and its demand on public service media must be consistently observed.

Strengthening the profile and focusing on the public service mandate and core competencies are essential for the future viability and acceptance of public service media. Ultimately, this depends on the content, specifically on high quality public content. This must be the unique selling point which public service media rely on in order to be distinguished from the variety of offers and appeals in the digital world. This is the only way to justify the financial resources available to public service media. All age groups should benefit from some of the offers, regardless of the device they are using, their platform of preference and the time of content viewing. This will ensure that public service media stands a good chance of becoming indispensable and properly equipped for the future. This will certainly not happen without criticism of the public service media system, but this is consistent in the context of pluralism of opinion and needed in a democratic society.

²¹ MEDIA Perspektiven (2019) Basisdaten 2018, p. 81, https://www.ard-werbung.de/fileadmin/user_upload/media-perspektiven/Basisdaten/Basisdaten_2018_Internet_mit_Verknuepfung.pdf.

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