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NEW CHALLENGES: CONVERGENCE OF MARKETS, DIVERGENCE OF THE LAWS?

QUESTIONS REGARDING THE FUTURE COMMUNICATIONS REGULATION

by

Prof. Dr. Bernd Holznagel, LL.M. *

A. Convergence of networks and consumer electronics

The future of the media is digital. It is a known fact that data reduction and data compression lead to a multiplication of transmission capacities.[1] Also, new forms of programming and marketing such as teleservices and media services or video-on-demand are developed. Another effect of the digitalization is compatibility of transmission methods as well as compatibility of the equipment. Digitalization makes it possible to overcome the separation between different networks. For instance, already today the so-called ADSL-technology allows the transmission of full-length movies to your computer monitor at home over ordinary telephone networks. On the other hand, it is possible to transact phone conversations and to use Internet applications over broad band cable networks. For the user of the new media it seems possible that phone, TV and PC could soon melt into one single multimedia-terminal, which unites all the aforementioned forms of communications into itself. With "Web-TV", which lets you access the Internet through an ordinary television set, the first step into this direction has already been made.

So digitalization allows accessing multimedia networks with multifunctional terminals. This technical process of integration of different forms of communication, which used to be separated from each other to the uniform concept of "multimedia", is called *convergence*. The already recognizable trend towards convergence will be considerably reinforced, when the EU – like the USA[2] - decides to have an analog switch-off in the year 2006. In Germany the transition to the digital world is planned for the year 2010.[3] It can be expected, that then approximately 50 percent of the spectrum of the frequencies will be freed up for new multimedia uses.

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* Director of the Institute for Information Technology, Telecommunications and Media Law, University of Muenster (Germany), Administrative Law Department.

1 The effects of digitalisation are analysed in detail in Squire, Sanders & Dempsey, Adapting the EU Telecommunications regulatory Framework to developing multimedia environment, A Study for the European Commission, DG XIII, Contract No. 48415, 1998; KPMG, Public Policy Issues Arising from Telecommunications and Audiovisual Convergence, London 1996.

2 Concerning the developments in the USA see recently G. Bender, Regulierungskonzepte zum digitalen Fernsehen in den USA, ZUM 1998, 38 (44 ff.); J. Brinkley, Definig Vision - San Diego/New York/London 1997.

3 Bundesministerium für Wirtschaft und Technologie, Initiative "Digitaler Rundfunk" der Bundesregierung, Bonn, BMWi Nr. 451, 1998.

I. Significance for the existing media order

In Germany, the technical phenomenon of convergence is in a stark contrast to a growing split-up of the law into a large number of different "media statutes". For TV and radio programs, we have the "Rundfunkstaatsvertrag der Länder" (Broadcasting State Treaty)[4], a state treaty between the German states concerning all broadcasting services. For telephone services, we have the federal republic's "Telecommunications Act"[5], and when it comes to print media there exist individual press laws in every single German state. In the area of online services and Internet, the newly created "Information and Communication Services Act"[6] of the Federal Republic is applied for the so-called teleservices, while the so-called media services are regulated by the new "Media Services State Treaty"[7] of the German states.

This distinction results from German constitutional law, according to which the Federal Republic has the power to regulate telecommunications, while the states have the power to regulate broadcasting services and the press.[8] To crown it all, this division of competences between the Federal Republic and the states also leads to a split in the area of supervisory institutions. Here we have the "state media institutions" of the states for the area of broadcasting services and the new "regulatory authority" of the Federal Republic for the sector of telecommunications.

This complex system of media regulation and supervision seems even more confusing and impracticable, the more the different media technically and economically converge. And that is also why meanwhile, many agree that only a far-reaching structural reform of the media law can solve the growing tensions between life's reality on the one hand and legal regulation practice on the other hand.

However, a convincingly developed concept for a "digital media framework" is not in sight. There is, though, an intensively ongoing discussion about the basic options to act. The European Commission dealt thoroughly with the legal implications of the convergence development in its "Green Paper" from November 1997,[9] without finding a final decision on a standpoint, though.

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4 See http://www.alm.de/rfstvert.htm

5 See http://www.regtp.de/Rechtsgrundlagen/tkgglie.htm

6 See http://www.iid.de/iukdg/iukdg.html

7 See http://www.iid.de/iukdg/mdstv.html

8 See Bundesverfassungsgericht, E 12, 205: for an English version of this decision see Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany, Volume 2, Part I: Freedom of Speech, Baden-Baden 1998, 31-70.

9 European Commission, Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation, COM (97) 623, 1997; for a critical commentary on this paper see W. Sauter, EU Regulation for the Convergence of Media, Telecommunications and Information Technology: Arguments for a Constitutional Approach? ZERP-Diskussionspapier 1/98, Bremen 1998.

The Green Paper basically sees two alternative options to act:[10] Either the vertical regulatory models for broadcasting services and telecommunication remain – eventually also for the new services – and the existing law is successively adapted and modernized as needed (first option). Or, a new and uniform regulatory model is introduced immediately or very soon (second option).

The second option is promoted especially by those in the "DG 13" of the European Commission who are responsible for telecommunications on the EC-level. The DG 13 purchased a study from a British consulting firm, which basically calls for an abolishment of all existing media law. According to this study, the perspective is to replace telecommunications law with antitrust law. This, however, raises constitutional law concerns in Germany since the German "Bundesverfassungsgericht" (Federal Constitutional Court) has issued several verdicts in which the German legislation is called upon to devise a specific regulatory framework for each different sector. For instance, the Court demands a "positive regulatory framework for broadcasting services" to guarantee pluralism and a diversity of opinions in the media.[11]

To avoid these struggles, it would be necessary to develop the new uniform regulatory framework for the media "from scratch". After the sad experiences we made with the "planning euphoria" during the seventies, however, we should be skeptical looking at a concept like that. A study by the German "Association for Private Broadcasting and Telecommunication" (VPRT) called "Media Regulation 2000 plus"[12] shows how grave the difficulties with this concept "from scratch" would be. This study also supports the exclusive use of antitrust law for media regulation, but at the same time it mentions and justifies several goals of regulation, which should be pursued by media specific regulation. Thus, if you want to interpret it this way, you could even integrate the whole existing broadcasting law into this so-called "Media Regulation 2000 plus" - a result which the VPRT did certainly not have on their minds.

Looking at those difficulties, maybe it is not so bad that the German Federal Republic with their "Teleservices Act" and the German states with their "Media Services State Treaty" decided to uphold the existing system of separate regulation for different parts of the media for now – according to the first aforementioned option - while carefully continuing to develop this system. For it is expressly stated in the reasons accompanying the new statutes that these are to be adapted further.

However, the unification of the regulatory system cannot be stopped. This is due to the pace of the "growing together" of the different media. So how could the future development look in times of convergence?

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10 European Commission, Convergence Green Paper, 40 ff.

11 Bundesverfassungsgericht, E 57, 295; for an English translation see Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany, Volume 2, Part I: Freedom of Speech, Baden-Baden 1998, 199-219.

12 Verband Privater Rundfunk und Telekommunikation (VPRT), "Rahmenkonzept für eine Medienordnung 2000 plus", 1997.

In practice, the process of convergence has proceeded most in the areas of Internet and digital TV. While, not more than a year ago, we were expecting that the whole new media world would shift to the Internet, now it seems as if the new services will first and foremost conquer the TV world. Television sets are to be expanded to a "mini computer" using a set-top-box, as it is already marketed by WebTV, a subdivision of Microsoft. With this "mini computer", effortless electronic commerce, homeshopping and homebanking will become possible. I have to admit that for me the perspective of watching a movie at my desk – my workplace – seems less appealing than the perspective of homebanking from my sofa using the TV. In addition, this would save me the expensive European phone costs, which are currently incurred when you surf the Internet.

So let us now have a look at the development of media law by examining the questions of fair and nondiscriminatory access to digital television services. These questions are exemplary for what is called "network regulation" in anglo-american countries – the regulation of the ways of transmission and distribution. Following this, I want to examine the question how it can be assured that certain standards as regards content in the program are kept up – e.g. in the fields of protection of the youth and keeping of program principles. This is what the English call "content regulation".

II. Network Regulation: Provision of fair and nondiscriminatory access

An analog TV program takes a relatively short way before it gets from the producer's studio to the viewer's TV screen. First, it is produced in analog form, then it is directly transmitted by the producer, and finally, it is received by the recipient's equipment or a cable or satellite station.

With digital TV, the chain of services from the producer to the recipient is considerably longer because first, the program needs to be converted into a digital form of transmission.[13] This happens in the so-called multiplexing process. At this stage, the analogue signal is compressed and converted into a series of ones and zeros, so that it eventually becomes a digital signal that is ready for transmission. However, as soon as the signal reaches the consumer end of the transmission process, it has to be re-converted into analogue form again, as traditional television sets are unable to display digital picture data. Therefore, the consumer will need either a completely new (digital) television set, or simply a so-called set-top-box, that includes a digital/analogue converter.

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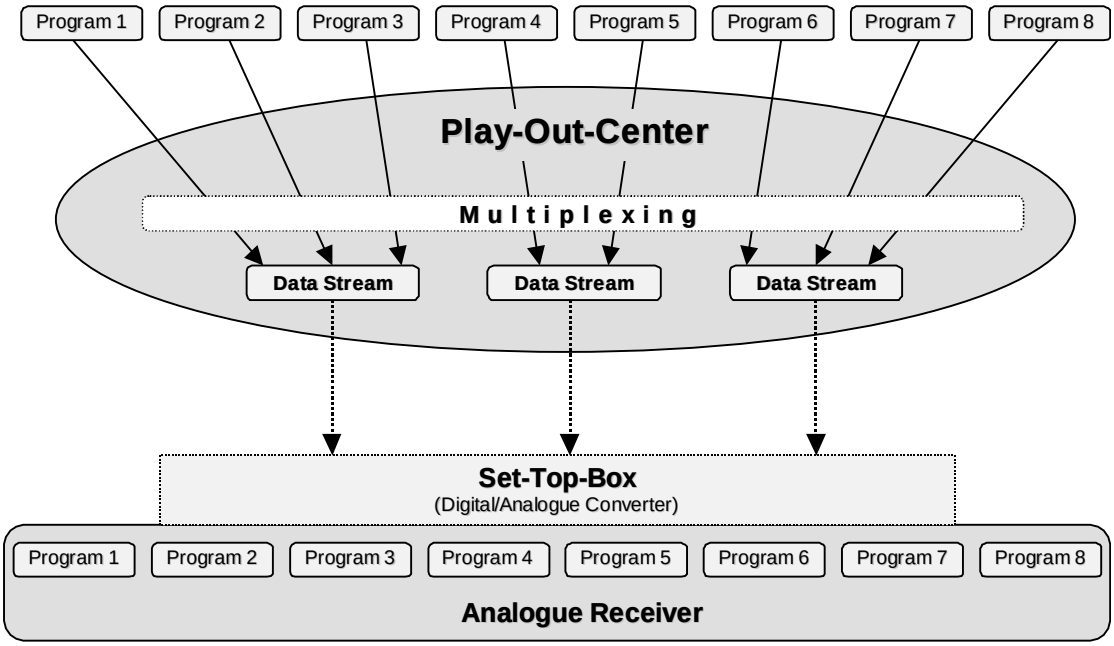
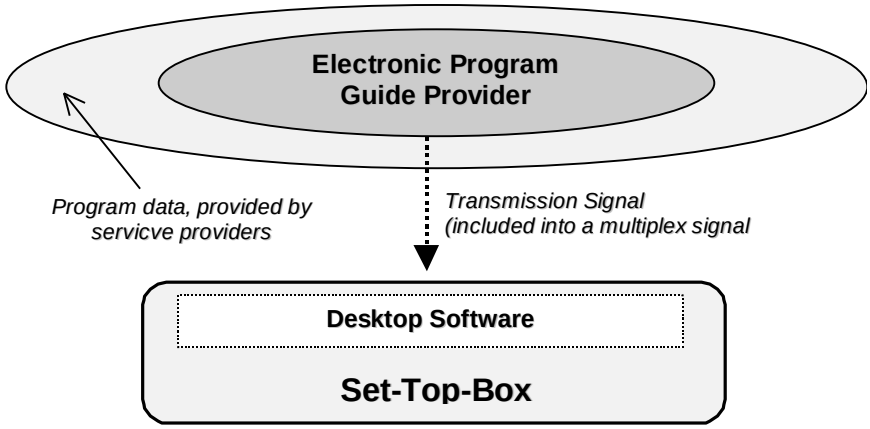
13 For a detailed analysis of the transmission and marketing of digital broadcasting see C. Cowie / C. Marsden, Convergence, Competition and Regulation, IJCLP Web-Doc 6-1-1998 (http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_6_1_1998.html).



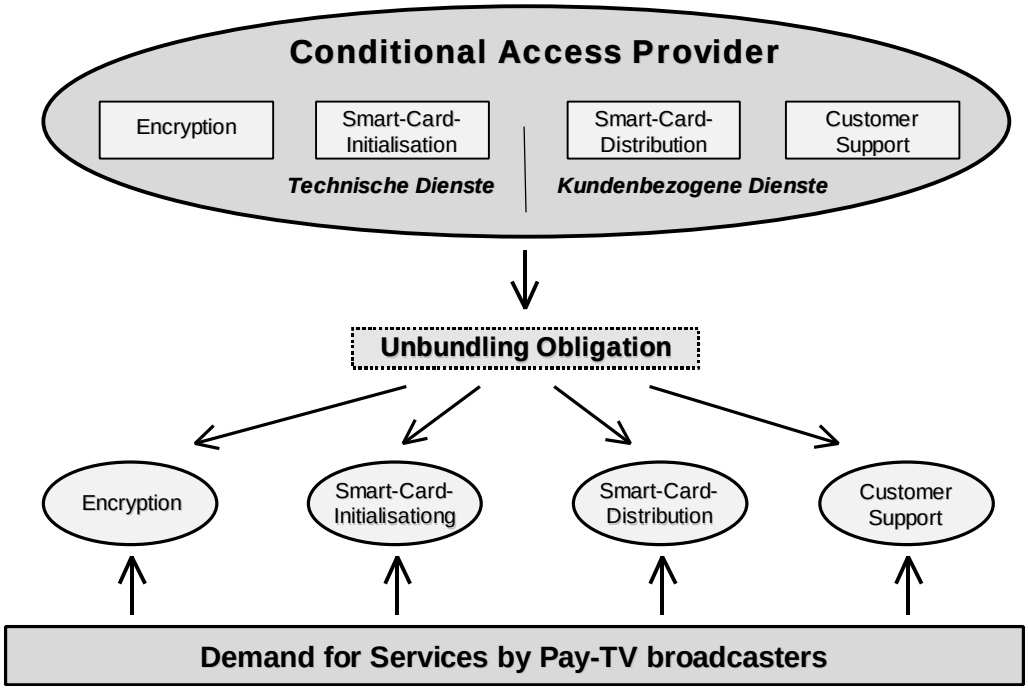
The much more efficient use of frequencies also leads to the recipient being confronted with a significantly increased number of programs. This, of course, increses the need for orientation as well. Since it is hardly possible to make a choice out of what the increased number of programs offers using traditional TV magazines, digital TV requires electronic program guides, the so-called navigation systems. These systems gather the relevant program information from various broadcasters and put them together onto a single screen, that can be navigated and which is comparable to a Windows desktop or to an internet search engine like Yahoo, for example.[14]



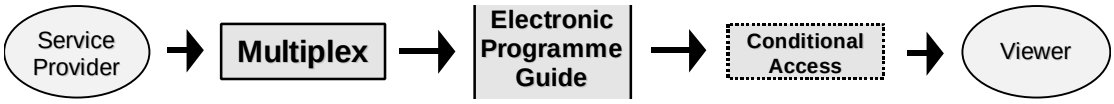
But the digital technology not only leads to a much more efficient use of the broadcasting spectrum, it also allows broadcasters to offer Pay-TV services. That means a separate billing per channel or per specifically chosen event in the form of a movie, show etc. Here, the ways of distribution reach from traditional "subscription channels" and Pay-per-view to Video-on-demand. However, all Pay-TV forms share the common feature that the spectator can only re-

[14] For a detailed analysis see A. Weiss / D. Wood, Difficult to be easy - The Electronic Programme Guide, Multimedia und Recht (MMR) 1998, 239 ff.; M. Wagner, The Legal Dimension of EPGs, MMR 1998, 243 ff.

ceive the program after prior authorization by the provider. Digital Pay-TV therefore works with a specific encryption technology, which is called "conditional access".



From the legal point of view, these three aspects of digital TV (multiplexing, navigation system and conditional access) share a common problem:[15] Anyone who has control over them can also determine which programs may pass the position he occupies on their way from the broadcaster to the recipient – and which programs may not pass this position. Thus, it is up to the multiplexing operator to decide which content he transforms into digital form. Without this transformation, the content is not even usable for digital TV. The operator of the navigation system determines which of those programs he makes accessible from his navigator, so that the recipient can actually find the amongst the large number of digital TV stations. And finally, the operator of the conditional access system decides which Pay-TV programs the spectator can decrypt and view.



It becomes apparent that the steps multiplexing, navigation system and conditional access contain a significant potential danger.[16] The danger lies in the fact that because of their decision-making competence, the operators can considerably influence the journalistic as well as the economic competition on the digital TV market. Thus, the most important goal of all regulatory efforts in the field of digital TV must be to overcome the above described "gatekeeper" or "bottleneck" problem by providing open access to these techniques.[17] Only if these key posi-

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15 See C.E. Eberle, "Digitale Rundfunkfreiheit: Rundfunk zwischen Couch-Viewing und Online-Nutzung, CR 1996, 193 (195); B. Holznagel, "Rundfunkrecht in Europa", Tübingen 1996, 363 ff.

16 B. Holznagel / A. Grünwald, Multimedia per Antenne, ZUM 1997, 417 (419).

17 See European Commission, Summary of the Results of the Public Consultation on the Green Paper Con-

tions are open to multiple providers, the demands for pluralism, a diversity of opinions and a fair competition can be achieved.

The means used to fulfill this task are derived from telecommunications law (like unbundling provisions or fee regulation) or from antitrust law (like the "essential facility doctrine" which is prevalent in European and American law). Only recently they have been transformed into broadcasting law to assure pluralism.

In general, I would like to reaffirm that the development towards a convergence of the laws concerning distribution of media services and network operation cannot be stopped. If one uses the general antitrust law or specific administrative law in this process, should not be an ideological question.[18] The sole basis for the choice should be the efficiency of the means used.[19] There will have to be an intensive discussion about this in the upcoming months, especially in connection with the scheduled review of the "Rundfunkstaatsvertrag" ("Broadcasting State Treaty"). In this field, legal experts in the field of Media, Telecommunications and Antitrust law can finally work together to make themselves heard against purely economic interests which are aimed at the construction of anti-competition monopolies and cartels.

III. Content Regulation

1. The changed regulatory framework for content regulation

Concerning the so-called content regulation, it will hardly be possible to avoid a separate regulation for the specific services as partial markets. Insofar, media specific regulation, which looks at the publicistic relevance of the content, appears as a step in the right direction. In spite of the unavoidable problems to make a clear distinction, I therefore approve the measure that a new vertical level of regulation has been introduced for online services, in addition to the already existing regulation of classic broadcasting and telecommunications. Insofar, the passing of the German "Teleservices Act" and the "Media Services State Treaty" points the way. In contrast to this, the regulatory plans of some in the EC-Commission, which intend to come to a unification of all areas of regulation, seem – at least for a foreseeable time – too unprecise and therefore inaccurate.

However, one has to bear in mind that the factual situation underlying content regulation will significantly be changed by the convergence developments. The current regulatory structure in the private broadcasting sector is based on the premise that supervising authorities control the access to the media markets. As sort of a consideration for the position they achieve

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vergence of the Telecommunications, Media and Information Technology Sectors; Areas for Further Reflection, SEC (98) 1284, Brussels 1998, 27 f.

18 See also R. Weisser, "Dienstleistungen zum Vertrieb digitaler Pay-TV-Angebote", ZUM 1997, 877 (895).

19 In Great Britain, which already has years of experience with the liberalisation of the telecommunication sector, there is currently a trend towards media specific regulation. See T. Prosser, "Law and the Regulators", 1997, 268 ff.; OFTEL, Beyond the Telephone, the Television and the PC – III, March 1998, http://www.oftel.gov.uk/broadcast/dcms398.htm.

through the broadcasting license, the commercial broadcasting providers have so far been willing and economically able to fulfill certain programming requirements. This becomes apparent especially in the UK, where with Channel 3, the license includes some kind of a right to a regional monopoly. This deal often gave the licenseholders a position that can be described as a "license to print money".

Anyway, in the process of overcoming the limitations concerning the number of available frequencies, the basis for such an exchange deal is no longer there.[20] Also, due to globalization it can be expected that potent American media companies will push into the European markets, which has so far been more or less prevented by national broadcasting laws. This intensified competition bears the tendency in itself, that programming requirements will be more and more difficult to be enforced. This will be the case no matter if these are of a positive kind like the requirement to provide certain program segments like content especially for children or of an especially high quality, or if the are of a negative kind, which means they are intended to prevent the violation of rights of third persons, e.g. through pornographic or excessively violent content.

2. Chances for negative regulation

To the extent to which the instruments of negative regulation lose their effectiveness, one has to search for alternatives. The goals of the protection of third persons, e.g. the protection from child- or youth-endangering programs, are undisputed in our society. However, already because of the large number of new providers, it will be impossible for the regulatory bodies to make effective use of their supervisory power. Therefore it seems logical to rely more on self-regulation of the content providers and on self-protection of the recipients.[21]

In the anglo-american legal systems, it has been successful to develop codes of conduct, which are then controlled by the broadcasting industry itself.[22] The supervisory authorities incorporate the code of conduct in the license they issue to the broadcaster or find another way to make them adhere to their duties. A possible way seems to be, for example, that in the future, similar to the area of telecommunications, broadcasters receive a general license which incorporates the codes of conduct by reference. This method has the advantage that the supervisory authorities can concentrate on the important cases only, which means cases of a general significance. The administration would thereby be relieved by regaining more freedom from unnecessary proceedings.

Furthermore, the users should get more and more possibilites to protect themselves. In this context one has to think of filtering methods and rating systems. However, the use of these new methods of youth protection and data privacy requires a high level of competence in dealing with these means. Also, these systems are not yet fully technically developed. Considering

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20 See OFTEL, Beyond the Telephone, the Television and the PC – III, 3.5.

21 Protokoll der europäischen Konferenz über audiovisuelle Medien, Birmingham, April 6-8, 1998, Working Group III: Der richtige Rahmen für den Bereich der kreativen Medien in einer demokratischen Gesellschaft, 1998.

22 See W. Hoffmann-Riem, Regulating Media, New York/London 1996, passim.

that commands and prohibitions in global computer networks will never be 100 % effective, there are no real other options. Thus, it is recommended, that especially institutions like schools and universities use those systems and improve them step by step. This can be done in close cooperation with the software industry.

B. Chances for positive regulation

To produce high quality media content of, it is often proposed to use specifically targeted subsidies. This approach was taken in New Zealand, where public funding by fees for the public broadcasting services has been abolished. However, it is widely agreed that the results of this process are not very encouraging.[23] Once that the organisatory and personnel-oriented structures of a public broadcasters are destroyed, it is very difficult to achieve the desired effects only with subsidies. In addition to this, one has to see that the subsidy system opens the gate for attempts of political intrusion into journalistic work. The safeguards we know from our public broadcasting stations in Germany, such as pluralistic organs within the broadcasting stations, can hardly be transformed into a subsidy system. The main aspect, however, is that we lack the tradition to accept such safeguards in a subsidy system. After all, it took a while in the history of our public broadcasting services in Germany, until the basic notion of the program content being free from state influence was accepted by everyone.

Thus, it seems to be preferable to continue the enforcement of positive regulatory program requirements with the help of public broadcasting stations. There is nothing that could replace public broadcasting services to make sure that people in our society get certain basic desired program segments. The public broadcasting sector has the task to establish a quality standard, under which private broadcasters may not unjustifiedly offer their programs. In a regulatory system dealing with digital communications the public sector also must function as an information provider with increased credibility, which leads the spectators through the new wealth of knowledge and information. The funding system by fees and the aforementioned pluralistic safeguards within the public stations provide independence and long-term stability. Thereby the public broadcasting services can become islands of credibility and trustworthiness, which provide continuity and orientation in times of rapid social changes. And it is also in this context and for these reasons that I strongly object the latest upcomings from the Commission, trying to get public stations away from sports and entertainment broadcasting, because only a comprehensive public service broadcaster can fulfill the various tasks laid upon him.

C. Supervisory structures

Another key problem of the convergence development - and the final one to be mentioned on this occasion - is the confusing structure of the different supervisory authorities.[24] In

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23 K. Mattern et. al., Fernsehsysteme im internationalen Vergleich, in: I. Hamm (Ed.), Die Zukunft des dualen Systems, Bertelsmann Stiftung, Gütersloh 1998.

24 For the British perspective see R. Collins / C. Murroni, New Media, New Politics, Cambridge 1996, 158 ff.

Germany, the main reason for this problem is the current system of competences. For broadcasting, media, teleservices and telecommunications services we have different supervisory authorities, although the different services can, in the future, be transmitted through the same ways and received through the same equipment.[25] Furthermore, we have to see that the options the supervisory authorities have are limited by the fact that in times of global distribution providers can easily distribute their services from abroad.

It is definitely one of the most difficult tasks ahead of us, to adequately master this challenge. As an immediate measure, one could found a joint working group, in which the supervisory authorities for the media and the telecommunications sector on the federal and state level in Germany could co-ordinate their supervisory and regulatory work.

However, in view of the dynamic development of the media and telecommunications markets it is important that the regulatory framework is designed in a way that is open to new developments and willing to learn about them, no matter how the future supervisory structures may look. This means that not every goal that is desirable from the legal standpoint has to be "immortalized" in a formal statute.

Finally, a good way to deal with the development from a regulatory standpoint would be to pass rules which are to be valid only for a limited time or which are mandatorily evaluated in regular intervals. Again, the British approach as it is brought forward mainly by OFTEL may serve as a good example here.

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[25] C. Koenig / E. Röder, Converging Communications, Diverging Regulators?, IJCLP Web-Doc 1-1-1998 (http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_1_1_1998.html)