

Broadcasting Law in Germany

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I. Definition of broadcasting

In the legal sense, "broadcasting" in Germany is the general term covering "radio" and "television", the classical electronic media which have emerged in the course of the 20th century to take their place alongside the "print media", especially the press, as the principal sources of information influencing public opinion. Radio broadcasting was the first to arrive on the scene, followed by television between the two world wars, when image signals were transmitted as well as sound signals.

The German constitution, the Basic Law, affords comprehensive protection to broadcasting (article 5 (1)) without actually defining the term in detail. The term is defined, however, in section 2 of the Agreement on Broadcasting between the Federal States in United Germany:

"Broadcasting is the provision and transmission for the general public of presentations of all kinds of speech, sound and picture, using electrical

oscillations without junction lines or along or by means of a conductor. The definition includes presentations transmitted in encoded form or receivable for a special payment, as well as broadcast videotext."

This definition clearly covers the usual ways of disseminating radio and television programmes, for instance the terrestrial transmission of radio programmes via long, medium, short and ultrashort waves (VHF) as well as the transmission of television programmes by terrestrial means, satellite or cable. The digital transmission of such programmes likewise falls within the meaning of "broadcasting". However, these clearly defined categories of "classical" programmes do not rule out the possibility of the boundaries of such a definition becoming blurred in view of the merging of electronic media with the world of computer-based information exchange and processing. This explains the current political debate in Germany on the definition of broadcasting, the results of which cannot yet be assessed. The debate came about largely because the legal categorisation of a new electronic service also raises the question whether regulatory responsibility lies with the Federal Government or the state concerned.

II. Legal foundations of broadcasting in Germany

A. Freedom of broadcasting as guaranteed by the constitution

The wording of the Basic Law of the Federal Republic of Germany was largely influenced by the country's experience under the Nazi regime. This explains why it gives pride of place to basic rights, which are binding on all organs of the state. Considering that the media during the Nazi era were brought into line by the government apparatus, it is not surprising that their freedom has since been protected by the constitution. Article 5 (1) and (2) of the Basic Law reads:

"(1) Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audio-visual media shall be guaranteed. There shall be no censorship

(2) These rights are subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen's right to personal respect."

Under German constitutional law, therefore, the media can broadcast and report freely. Indeed, if anything this protection goes beyond what article 10 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms guarantees throughout Europe, for the requirements of article 5 (2) of the Basic Law affecting the guarantee provided for in article 5 (1) are in some respects more demanding than the corresponding provisions of article 10 (2) of the European Convention.

B. Rulings of the Federal Constitutional Court

1. The role of the Federal Constitutional Court

Although the guarantee of free reporting by broadcasters contained in article 5 (1) of the Basic Law ensures comprehensive basic protection of broadcasting, it is not in itself a substantive framework for a broadcasting system at constitutional level. The development of today's broadcasting system was left to the Federal Constitutional Court, which in a series of decisions, generally known as the "broadcasting judgments", first of all outlined the constitutional principles under-lying broadcasting in Germany then provided more regulatory substance in recent judgements.

These matters fell within the purview of the Federal Constitutional Court because, being the guardian of the constitution and the supreme judicial authority in Germany, it is not only required to act as referee in disputes between the federal authorities established by the constitution, it also has to rule on constitutional arguments between the Federal Government and the state governments. Furthermore, it always has an opportunity to interpret the fundamental rights enshrined in the Basic Law whenever it rules on constitutional complaints by individual citizens who invoke those rights in challenging laws or specific decisions.

2. Essence of court rulings

One of the most important principles of broadcasting in Germany is that the media are free from interference. Thus government agencies may not exercise any direct or indirect influence on the contents of radio or television programmes. This obligation upon the state to maintain a neutral position goes much further than the censorship ban contained in article 5 (1) of the Basic Law. It not only means that the state may not prescribe any of the actual programme content but that certain desirable programmes or broadcasts may not be subsidised from public funds. Moreover, the freedom of the media has had a lasting influence on the structure of the public broadcasting corporations and broadcasting supervision. This principle also affects the financing of the public corporations. For instance, the Federal Constitutional Court has denounced the procedure for determining the broadcasting licence fee because it did not rule out with

sufficient certainty the possibility of the states exercising an indirect influence on programming.

The Federal Constitutional Court has also ruled on the basis of the principle of media freedom that broadcasting regulations must ensure a variety of opinion by virtue of the function of the media in a pluralist democratic society. In the early days of television in Germany the court referred to this principle in upholding the monopoly of public broadcasters with representative supervisory bodies ensuring "internal" plurality. The main arguments put forward were the scarcity of frequencies and the extremely high cost of producing television setting up and running a television channel.

The introduction of the dual system into the German broadcasting system meant that private broadcasters could operate alongside the public corporations. The court, in order to ensure diversity of opinion, also formulated certain principles which parliament has to observe in establishing the regulatory framework for private television broadcasters.

It had already ruled that many fundamental decisions in the field of broadcasting fell within the purview of parliament. According to the general principle which demarcates the functions of government and parliament, the basic features of the broadcasting system are likewise subject to statutory regulation. Thus, for instance, only parliament may decide whether and in what form private operators may be admitted alongside the public broadcasting corporations.

The status of the public corporations especially has been determined in considerable detail by the decisions of the Federal Constitutional Court. This not only applies to the justification of their monopoly in the initial phase. Equal importance was later attached to their mandate to "meet basic public requirements". In the opinion of the highest court in Germany the continued existence of the internally pluralistic public broadcasting corporations is essential for the admission of private broadcasters who, if only on account of their number, cannot yet ensure external plurality of opinion in the way the press does.

C. Separation of responsibilities in a federal state

The Federal Constitutional Court's very first judgment on broadcasting in 1961 clearly indicated how responsibilities for broadcasting should be separated in Germany with its federal structure. It ruled that broadcasting legislation in the narrower sense fell within the jurisdiction of the states (Länder). This covers fundamental decisions on the organisational structure

and financing of the public broadcasting corporations, the licensing of private television broadcasters, as well as fundamental directives on the content of programmes to be broadcast within the framework of the constitutional mandate. On the other hand, the Federal Government is responsible for all matters pertaining to telecommunications law, which also covers the technical transmission of television programmes, and for copyright.

D. The broadcasting system under state law

The state legislatures have made extensive use of their authority to regulate broadcasting. In view of the need for inter-state cooperation a second regulatory instrument has emerged alongside the laws passed by each individual state. It is the Inter-State Agreement on Broadcasting agreed between several states. Since the authority of the Land parliaments ends at the borders of the individual states, a system of arrangements between individual states has been created to establish binding arrangements. These inter-state agreements are, in certain respects, similar to bilateral or multilateral agreements under international law. These inter-state instruments have a similarity with bilateral or multilateral agreements under international law. They are drafted by the state governments concerned and subject to ratification by their respective parliaments. Some such agreements involve all the states, for instance the one establishing the Second German Television channel, ZDF, or the Inter-State Agreement on Broadcasting, the core element of the organisation of state broadcasting at federal level, while others have been signed only by the states affected, for instance those concerning the establishment of regional broadcasting corporations covering several States, such as Norddeutscher Rundfunk or Mitteldeutscher Rundfunk.

Those states that are not party to a multi-state broadcasting corporation like the ones just mentioned have all introduced their own legislation under which the state legislator defines the tasks and the legal structure of the regional broadcasting corporation. The state parliaments have also as a rule passed a second broadcasting law covering the licensing and programme requirements for private broadcasters as well as monitoring, which is the responsibility of the state supervisory authority.

E. Introduction of the "dual broadcasting system"

In the early 80s the states one after another opted for the "dual broadcasting system", meaning that private broadcasters would be able to operate alongside the long-established public broadcasting corporations.

1. Public corporations

The basic structure and functions of the public corporations were largely unaffected by the introduction of the new system. They are still required to produce and broadcast radio and television programmes in the territory of the state (or of several states where they have formed a joint corporation). Those corporations are: Bayerischer Rundfunk, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Ostdeutscher Rundfunk Brandenburg, Radio Bremen, Saarländischer Rundfunk, Sender Freies Berlin, Süddeutscher Rundfunk, Südwestfunk, Westdeutscher Rundfunk.

These corporations form a national association known as the Association of Public Broadcasting Corporations of Germany (ARD), which is responsible for Channel I programmes. The programmes are fed by all the corporations and broadcast both terrestrially and via cable throughout the country. The state corporations also provide a regional terrestrial television programme in their respective transmission areas. It is generally known as Channel III because Channel II programmes fall within the purview of the ZDF (Second German Television), which is a corporation established and run jointly by all the states. The ARD corporations also broadcast up to five radio programmes in their transmission area. Since it is now possible to retransmit programmes via cable, many of the productions broadcast by individual state corporations can also be received in other states. Furthermore, Channel I and Channel II as well as most of the Channel III programmes can also be received via satellite.

Whereas the state broadcasting corporations transmit television and radio programmes simultaneously, the ZDF, the joint corporation, transmits only Channel II television programmes nationwide, but it is also partly responsible for programmes broadcast by "Deutschlandradio". The corporation television programmes are mainly "full programmes". Since 1 April 1997 ARD and ZDF have been broadcasting joint specialised programmes on the "Children's Channel", and since 7 April 1997 on the "Phoenix Channel", which presents major events and programmes of a documentary nature.

The broadcasting corporations are established under public law, in other words they are organisations established by virtue of state law or an inter-state agreement determining their function and structure. They should therefore not be regarded as state-owned joint stock companies.

Whatever their minor distinctions, the public broadcasting corporations all have more or less the same structure. They are headed by a Director-

General, who has sole responsibility for the corporation's programmes. He is subject to control by two bodies, a management committee, usually called the Board of Administration, which oversees the corporation's administration and finance, and a programme monitoring committee, usually known as the Broadcasting Board. Since the latter's function is to ensure plurality of opinion it is composed of representatives of all "socially relevant" groups, such as political parties, trade unions, churches and religious communities, associations, etc. Its main responsibility is to ensure that the corporation's programmes do not present a one-sided picture of the views of a particular section of the population or political ideology.

The "Deutsche Welle" (Voice of Germany) is the only radio corporation governed by federal law. It is financed for the most part from Federal Government funds and its statutory responsibility is to produce radio programmes for listeners abroad in order to give them a comprehensive account of political, cultural and economic life in Germany and explain the German position on major issues.

2. Private broadcasters

As soon as private broadcasting was admitted two operators immediately entered the field. The first was SAT1, which began its nationwide transmissions in 1985, followed in 1986 by RTL plus (now RTL). Today a large number of private companies offer radio and television programmes. There is a clear distinction between the two media. None of the large private television broadcasters transmits radio programmes at the same time. Nearly all private television programmes are transmitted nationwide, private radio programmes, on the other hand, only regionally or locally.

Most private television productions are broadcast as full programmes but they have a much larger entertainment content than public programmes. Although specialised programmes have much lower viewer ratings they have been able to establish themselves. Pay-TV and Pay-per-view programmes, too, are still in their infancy.

The programmes of the following private broadcasters have the largest market shares: RTL, SAT1, PRO SIEBEN, RTL2, Kabel 1, VOX, SuperRTL, EUROSPORT, DSF.

3. Funding

The basic distinction between public and private broadcasters is also reflected in their different funding systems.

Private broadcasters obtain their revenue basically from advertising. Only "Premiere" and "DF1" as pay-TV broadcasters have chosen a method of financing based on viewer subscriptions.

The public corporations, however, have a system of mixed funding. They receive a proportionate share of the revenue from licence fees. These funds can be supplemented to a limited extent by income from advertising. As regards advertising they are however subject to far heavier restrictions than private broadcasters. Licence fees are paid by everyone who possesses a serviceable radio or television set - that is the sole criterion, irrespective of whether the set is actually used.

F. The Inter-State Agreement on Broadcasting

1. The Inter-State Agreement as the national framework for broadcasting

The [Inter-State Agreement on Broadcasting](#) concluded by all state governments and ratified by all state parliaments is the general framework for uniform state broadcasting regulations. Similar agreements involving all the states have been concluded on the establishment of the ZDF (Channel II) and on licence fees.

The Inter-State Agreement serves to harmonise state law on all the major aspects of broadcasting. It thus serves much the same purpose as the laws of the European Union which harmonise the legislation of the member states. The fact that a specific matter is regulated in the Inter-State Agreement does not rule out the possibility of that matter being the subject of a state law as well. Nonetheless the states are prevented by the Agreement from adopting laws of their own which diverge to any material extent.

2. The substance of the Agreement

The Inter-State Agreement principally covers the substance of three main areas:

- The [first section](#) contains definitions of terms used in the Agreement as well as the general provisions which apply to both private and public broadcasters. They relate to such matters as protection of young persons, short coverage of events, advertising content and sponsorship. The provisions on sponsorship are consistent with the standards pre-scribed by European law.

- The [second section](#) concerns the public corporations. It covers revenue from advertising and other income. There are provisions on the insertion and duration of advertisements in the corporation's programme and on the power of the corporations to adopt their own programme and advertising directives. The public corporations may not allow teleshopping, and they may only participate in satellite programmes under certain conditions.
- The [third section](#) concerns private broadcasters. It contains the basic provisions governing the admission of private television operators as well as plurality of opinion, programming principles as well as the insertion and duration of advertisements. It also defines the responsibilities of the state supervisory authorities for private broadcasters.

The third and most recent amendment to the Inter-State Agreement on Broadcasting came into effect on 1 January 1997.

G. The European influence on German broadcasting law

German broadcasting law is in many respects influenced by European law. This applies not so much to general organisation as to programming requirements. It should also be remembered that European law is still for the most part concerned with television and practically ignores radio broadcasting.

Broadcasting in Europe is largely governed by the EC directive on television and the Convention on Transfrontier Television of the Council of Europe. The fact that other rules of community law may also have an influence on television is clearly demonstrated by the advice to viewers at the end of commercials for medical products that they should consult a doctor or pharmacist about possible side-effects. The provisions of the television directive are the minimum community rules for Germany since she is a member of the European Union. Following Germany's ratification of the Television Convention in 1994, the minimum requirements of that instrument too, which by and large concur with those of the directive, are binding on the German legislature