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**Cross media ownership:
A comparison of the legal framework of
Australia and Germany**

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Abstract: Australian and German media concentration laws display an astonishing degree of structural conformity despite being based on quite different historical backgrounds. The following essay compares their approaches regarding the prevention of predominant media power and elaborates necessary improvements in order to prepare media concentration laws for present and future challenges.

The essay compares the legal framework of Australia and Germany with a particular focus on cross media ownership because this type of economic concentration can lead to an especially worrying influence on public opinion. Therefore, it is necessary to limit the extent of cross media ownership by both competition law and specific media regulation.

A. Types of concentration

It is important to understand the economic background of media concentration in order to assess the effectiveness of the current legal framework. Private broadcasting companies are commercial enterprises that are subjected to market forces and, consequently, strive for a dominant market position. They can achieve this goal both by growing faster than their competitors (internal growth) or by merging with other enterprises (external growth).² Mergers can lead to horizontal, vertical and conglomerate cross-media concentration – the entire development being supported by the convergence of media.

2 Müller, Konzentrationskontrolle zur Sicherung der Informationsfreiheit (2004), p 150.

I. Horizontal concentration

Horizontal concentration entails merging of companies belonging to the same stage of production, for example, combinations of two broadcasting companies, or two newspaper publishers. These enterprises benefit from economies of scale and decreasing contact costs. Economies of scale concern rationalisation effects in the area of acquisition, production, distribution and financing. A peculiarity of the broadcasting sector is that the costs of production and broadcasting remain the same no matter how large the audience is. The unit cost advantage increases significantly with the audience reach.³ Furthermore, the advertising industry focuses on the audience rate when allocating advertisement slots. Therefore, an increase in the audience rate – while keeping production costs stable – does not only lower the expenses per recipient, but also augments the advertising revenues. This phenomenon fosters large broadcasting groups. The flipside is high barriers for new entrants that are less attractive for advertising clients due to their lower audience reach.⁴ Finally, we have to address the impacts of horizontal concentration on media pluralism. Groups of channels can use contents multiple times, and the audience might subjectively perceive a variety of information, although being presented with the same information through different outlets. A few or even one media group would then be in the position of dominating public opinion.⁵

II. Vertical concentration

Vertical concentration involves merging of media companies belonging to the upstream or downstream production stage. The production stage includes, for example, production of movies or documentaries, broadcasting through free- and pay-TV, publishing newspapers, maintaining websites, and technical infrastructure. Media companies can save high transaction costs comprising, among other things, expenditures for research, contract formation and the dealer's margin.⁶ Additionally, vertical integration can lower marketing risks, which are quite significant because the marketing of products is characterised by great uncertainty

3 Gounalakis/Zagouras, Medienkonzentrationsrecht (2008), p 195; Heinrich, Medienökonomie, Band 2: Hörfunk und Fernsehen (2002), p 241.

4 Janik, AfP 2002, p 104 (107); Helwig, Die Kompetenz der Europäischen Gemeinschaft zur Schaffung eines Europäischen Medienkonzentrationsrechts (2009), pp 24, 26–28; Müller, Konzentrationskontrolle, p 152; Heinrich, Medienökonomie, p 241.

5 Helwig, Europäisches Medienkonzentrationsrecht, p 32; Trafkowski, Medienkartellrecht (2002), pp 12–13.

6 Heinrich, Medienökonomie, pp 245–246; Janik, AfP 2002, p 104 (108).

about consumers' preferences. This makes it very difficult to assess whether a purchased Hollywood movie or a self-produced TV show will be more successful. The success of a broadcaster highly depends on attractive, but also extremely expensive, media content. Hence engaging in the trade of programme rights as well as in movie production can provide a significant competitive advantage.⁷

The main concern regarding vertical concentration is the control of distribution channels. A media entity that integrated a large part of the supply chain not only possesses market power, but also a dominant influence on public opinion. Special risks for media pluralism emerge in the case that a company also controls the infrastructure for the distribution of media content, since it can both prefer its own productions and exclude other broadcasters. This control constitutes a gate-keeper position.⁸

III. Cross-media concentration

Cross-media concentration describes the cooperation of enterprises being part of different types of media, for example, a newspaper publisher purchasing a TV channel. Again these companies profit from multiple usages of information and from a competitive advantage in the advertising market, especially by offering combined rates for cross-media advertisements. These enterprises also have the options of advertising their own products through different media and of internal cross-subsidising of unprofitable media sectors.⁹

The downsides of such a strong market position for the diversity of opinions are quite obvious. First, the range of opinions will be reduced in the long term because of the elimination of small, independent undertakings and because of higher entry barriers for new entrants.¹⁰ Secondly, conglomerate concentration promotes homogeneous reporting and a decrease of intermedia criticism, additionally enabling the merged companies to report negatively about competitors in

7 Müller, Konzentrationskontrolle, pp 153–154.

8 Gounalakis, AfP 2004, p 394; Janik, AfP 2002, p 104 (108); Helwig, Europäisches Medienkonzentrationsrecht, pp 32–33.

9 Müller, Konzentrationskontrolle, pp 154–155; Janik, AfP 2002, p 104 (108); Helwig, Europäisches Medienkonzentrationsrecht, pp 29–30, 33–35; Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 196–197.

10 Kübler, Medienverflechtung (1982), pp 96–99; Janik, AfP 2002, p 104 (109).

a subtle way.¹¹ What is more, the audience often does not recognise this interaction, thus attributing a higher credibility to information being reported several times.¹²

IV. The impact of media convergence

All these effects are reinforced by the convergence of media, meaning the approximation of different types of media especially due to digitisation.¹³ There is, first, technical convergence and, secondly, content-related convergence. Technical convergence is characterised by a convergence of distribution channels enabling, for instance, the transmission of information for TV, radio, and internet by the same cable network.¹⁴ In addition, the former separation of devices has become obsolete, since computers can nowadays be used to watch TV programmes and TVs are able to connected directly to the internet. Technical convergence also facilitates the convergence of contents because the same piece of information can be used multiple times in several different media at no great expense – for example, by marketing a weather forecast in a newspaper, on the radio, TV, and the internet. This can optimise the marketing chain, but also lead to homogeneous media coverage.¹⁵

B. Provisions against media concentration

The risks associated with media concentration are twofold: economic power and a prevalent influence on public opinion. Accordingly, both Germany and Australia have implemented two legal regimes addressing these concerns. On the one hand, special broadcasting regulations restrict links between different media companies. On the other hand, general competition laws focus on the economic aspects of mergers.

11 Mailänder, Konzentrationskontrolle zur Sicherung von Meinungsvielfalt im privaten Rundfunk (2000), pp 184–185; Bender, Cross-Media-Ownership (1997), pp 79–80; Janik, AfP 2002, p 104 (108–109).

12 Renck-Laufke, ZUM 2000, p 369 (374); Helwig, Europäisches Medienkonzentrationsrecht, pp 33–34.

13 Gounalakis, Konvergenz der Medien (2002), p 12.

14 Rossen-Stadtfield, ZUM 2000, p 36 (37); Zagouras, Konvergenz und Kartellrecht (2002), pp 9–10.

15 Helwig, Europäisches Medienkonzentrationsrecht, pp 37–38; Zagouras, Konvergenz und Kartellrecht, pp 11–12.

I. Australia

Publications regarding German media law regularly start by highlighting the particular constitutional role and protection of the press and the broadcasters. The German parliament is obliged by the constitution to provide a legal framework that guarantees media diversity. On the contrary, most of the Australian articles focus primarily on ordinary laws. The Australian Constitution does not contain an explicit constitutional right for newspaper publishers and broadcasting companies and hence no constitutional foundation for media concentration provisions.¹⁶ Instead the High Court has recognised the existence of an implied freedom of political communication forming an important part of the representative democracy.¹⁷ Yet it only encompasses a freedom from government restraint without directly conferring a right on individuals.¹⁸ The decisive question is whether this different starting point of Australian and German media law also results in a different level of protection against media concentration, which will be recognisable towards the end of this essay.

Australia subjects its media entities both to a sector-specific legal framework (*Broadcasting Services Act* 1992 = BSA) and to the general competition law provisions (*Australian Competition and Consumer Act* 2010 = CCA). The CCA provides restrictions on media companies that are not covered by the BSA print media.¹⁹ Apart from that, the spheres of application of the BSA and the CCA overlap, raising the question about the relationship between these legal regimes. According to s 77 of the BSA its ownership and control provisions “have effect notwithstanding the *Competition and Consumer Act* 2010”. The Federal Court interpreted this section as subjecting media transactions to both legal systems;²⁰ in other words, a merger might comply with the CCA but violate the BSA. Moreover, the CCA applies to the print media for which no specific diversity provisions exist.²¹ The following paragraphs outline the specific prerequisites of the BSA before turning

16 *Sawer/Abjorensen/Larkin*, Australia: The state of democracy (2009), pp 208–209; *Leonard*, Making Converged Regulation Possible, *Communications Law Bulletin* Vol. 31.2 (June 2012), Convergence Review Special Edition, p 1. This author criticises the lack of a broader constitutional guarantee.

17 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *McCloy v New South Wales* [2015] HCA 34, [30].

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

19 *Butler/Rodrick/McNamara/Fitzgerald*, *Australian Media Law* (2012), p 895.

20 *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1.

21 *Butler/Rodrick/McNamara/Fitzgerald*, *Australian Media Law*, p 896.

to the more general competition rules. Finally, Australian restrictions on foreign investments are addressed.

1. *Broadcasting Services Act*

a) *Substantive law*

The following chapter will provide an overview of the Australian media concentration provisions. All of them try to address the control which one media entity exercises over another, which is why the term “control” gains a key role. Therefore, the concept of control will be explained first, before this essay looks at the prohibited control-based connections between different media companies.

aa) The concept of control

“Control” is the decisive prerequisite triggering the below mentioned restrictions on media mergers; the Australian Communications and Media Authority (ACMA) is in charge of making this assessment. S 6(1) of the BSA basically defines control as being the result of trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights. This definition focuses on the manner in which control is obtained. The content of control is outlined by Schedule 1 of the BSA.²² However, the ways in which control can emerge are so diverse that an exhaustive definition cannot realistically be formulated. A flexible understanding of control better reflects reality.²³ According to the Federal Court the term “control” refers to the power to direct or restrain what a company may do on any substantial issue. Consequently, even a veto power can be sufficient.²⁴ A very important practical tool for assessing the existence of control is the assumption contained in Part 3 of Schedule 1 of the BSA. Accordingly, a person is deemed to be in a position to exercise control over a company if his company interests exceed 15%.²⁵ A company interest can, for example, relate to shareholdings, voting rights, dividends and the later winding-up of a company. Each of these interests is explained in s 8 of the BSA. What makes it even more difficult to appraise the control of a company is

22 *Butler/Rodrick/McNamara/Fitzgerald*, *Australian Media Law*, p 882.

23 Explanatory Memorandum to the Broadcasting Services Bill 1992, Part 5 – Control of commercial broadcasting licences, available on <https://www.comlaw.gov.au/Details/C2004B01820/Explanatory%20Memorandum/Text>.

24 *CanWest Global Communications Corporation v Australian Broadcasting Authority* (1998) 153 ALR 47 at 77, 82.

25 *Rolph/Vitins/Bannister*, *Media Law: Cases, Materials and Commentary* (2010), p 137.

the fact that other companies can be used as an intermediary. Therefore, Part 4 of Schedule 1 provides a method for tracing company interests through a chain of companies, the so-called fractional tracing method. It basically multiplies the interests a person has in several companies. If a person has a company interest to the extent of 30% in company A and company A again has an interest in the amount of 10% in company B (the target company), then the fractional tracing method suggests multiplying 3/10 and 1/10, thus resulting in a 3%-interest of that person in the target company B. However, this method leads to outcomes that do not sufficiently reflect reality. For example, Part 4 of Schedule 1 assigns a company interest of 8% to a person having a company interest of 80% in undertaking A, which again possesses an interest of 10% in the target company B. This figure is too low given the fact that the person in question can fully control the first company A with an interest of 80% and is able to fully exercise his 10% interest in the target company B. The fractional tracing method should grade the different interests instead of applying a schematic formula. If a company interest exceeds 50%, then there should be an assumption of a 100% interest in this very company. This would also reduce the contrast between Part 3 and Part 4 of Schedule 1 caused by the above-mentioned assumption in Part 3 of Schedule 1 according to which a company interest of 15% is enough to control a company.

bb) Horizontal concentration

Mergers of television companies are confined by s 53(2) of the BSA, which limits a television broadcasting company to one television licence per licence area. The licence areas are defined by the ACMA. Furthermore, s 53(1) of the BSA provides an audience reach restriction by prohibiting a person from exercising control of commercial television broadcasting licences across the country that reach more than 75% of the Australian population. However, the allocation of licence areas seems outdated nowadays because broadcasts can also be received via the internet which does not face the same geographical restraints as traditional transmission technologies.²⁶

Horizontal mergers of radio broadcasting companies are similarly restricted. Pursuant to s 54 of the BSA, a person is not allowed to exercise control of more than two commercial radio broadcasting licences in the same licence area. This provision tries to strike a balance between the necessity of economies of scale and the prevention of an undesirable concentration of ownership. In contrast

²⁶ Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, pp 872–873.

to commercial television, the BSA does not impose an audience reach limit on radio broadcasters.²⁷

There is no specific piece of legislation restricting mergers between publishers in order to guarantee the diversity of the Australian press. Yet those undertakings have to comply with the requirements of competition law²⁸, which will be addressed later.

cc) Cross-media concentration

The reform of the BSA in 2006 significantly changed the legal framework for cross-media ownerships. Before this amendment a media company was limited to one type of media; in other words, a television broadcasting company was not allowed to acquire a radio broadcaster or newspaper publisher, if the radio broadcaster's licence area or newspaper's primary circulation was within the television broadcaster's licenced service area.²⁹ This restriction was relaxed and nowadays there are two safeguards against cross-media concentration: a prohibition of transactions leading to an "unacceptable media diversity situation"³⁰ or to an "unacceptable three-way control"³¹.

(1) Unacceptable media diversity situation

The requirements of an unacceptable media diversity situation depend on whether the affected licence area is a metropolitan or a regional one. Mainly State capital cities qualify as metropolitan licence areas, whereas the remaining licence areas fall within the second category. The relevant licence areas are those of commercial radio because they better reflect the likely influence of a given media company on public opinion than the quite large and geographically diverse television licence areas.³² If a merger is about to occur on a national scale, the parties have to analyse the impact on each affected radio licence area.³³ An unacceptable media diversity situation regarding a metropolitan radio licence area requires that the number of "points" in the licence area is less than five, while this threshold is reduced to four

²⁷ Rolph/Vitins/Bannister, Media Law, p 134; Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, pp 874–875.

²⁸ Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 896.

²⁹ Rolph/Vitins/Bannister, Media Law, pp 127–130.

³⁰ S 61AB of the BSA.

³¹ S 61AEA of the BSA.

³² Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 876.

³³ Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 878.

“points” regarding regional licence areas.³⁴ This test is therefore often referred to as the 5/4 rule. A point represents an independent media “voice” in a given licence area which could consist of an independently controlled commercial television or radio broadcasting licensee or of a newspaper *associated* to the relevant licence area. A newspaper is associated with a certain licence area if at least 50% of its circulation takes place within this very area. Consequently, national newspapers are not included in the diversity test despite their large circulation, since their circulation is not specifically associated with any licence area.³⁵ However, subscription licensees, magazines and online content do not count as a “voice” for the purpose of this test. S 61AC of the BSA and its table specify what qualifies as a point.³⁶ If e.g. one media company exercises control over another, then the BSA allocates only one point to both media operations.³⁷ The ACMA maintains a Register of Controlled Media Groups presenting the ownership and control of media groups in each licence area in order to enable compliance with the cross-media ownership restrictions.³⁸ However, this register does not constitute an accurate list of the total number of points in a licence area, since its focus is on controlled media groups without mentioning independent media groups. If a prospective buyer wants to obtain further information, he has to consult the Media Control Database displaying all – controlled and independent – media operations in each commercial radio licence area. This database also contains an estimate of the total number of points in each licence area.³⁹

The Australian ownership regulations have three major downsides: First, all media operators are treated as equally influential despite significant differences. A media group owning a daily newspaper, a television and two radio stations in a licence area accounts for only one point just like a radio station with a small listening audience. In addition, the legal framework does not take into account whether a certain media outlet provides information of public concern or just aims at entertaining its audience.⁴⁰ The Government actually considered a qualitative test weighing the impact of a merger on the “news culture”. Yet this approach faced the difficulty that there are no objective methods for measuring media diversity,

34 S 61AB of the BSA.

35 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 880.

36 *Rolph/Vitins/Bannister*, Media Law, p 133.

37 Item 1 of the table within the BSA.

38 *McGill*, (2007) 30 UNSW Law Journal 280, 281, 283; *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 876.

39 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 877.

40 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 878.

thus resulting in legal uncertainty about the potential outcome of the analysis.⁴¹ Secondly, the cross-media provisions do not cover all relevant media. Among print media the BSA only takes into account newspapers in English that are published at least four days a week. Moreover, a newspaper must be associated with a certain licence area and at least 50% of the circulation of a newspaper must be by way of sale. Hence, national and freely distributed newspapers and magazines are not captured by the cross-media ownership rules.⁴² This is quite precarious, since especially national newspapers and political magazines have a major influence on shaping people’s opinion. The same is true for freely available newspapers because of their potential to reach a large audience.⁴³ Further on, subscription broadcasting and online services are not included in the cross-media ownership test either, clearly showing that the reform in 2006 did not manage to prepare the diversity test for current and future challenges caused by the increasing social and political interaction via online platforms.⁴⁴ Thirdly, choosing radio licence areas as a benchmark for the diversity provisions seems even more outdated because the programme of radio and TV broadcasters is available nationwide via the internet.⁴⁵

(2) Unacceptable three-way control

The above-mentioned test is supplemented by the prohibition of the combined ownership of three types of media in a radio licence area. An unacceptable three-way control situation exists if a person has control of (a) a commercial television broadcasting licence significantly overlapping with the relevant radio licence area, (b) a commercial radio broadcasting licence and (c) a newspaper associated with the relevant radio broadcasting licence area.⁴⁶ This restriction displays similar shortcomings as the 5/4 rule by not taking into account national and freely available newspapers or magazines.⁴⁷ It cannot prevent a media group from obtaining a television broadcasting licence in Australia’s major licence areas enabling it to reach 75% of the population, and from controlling two radio licences in every

41 Explanatory Memorandum to the Broadcasting Services Amendment (Media Ownership) Bill 2006, pp 21–22.

42 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 878; *Rolph/Vitins/Bannister*, Media Law, p 133.

43 Also critical: *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 879.

44 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 878.

45 Similar criticism: ACMA, Broken concepts: The Australian communications legislative landscape (2011), p 23.

46 S 61AEA of the BSA.

47 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law (2012), pp 879–880.

radio broadcasting licence area (no 75% limit) in combination with a national newspaper. The current legal safeguards are clearly insufficient and do not avert a further increase of the already very advanced media concentration.

(3) Disclosure of cross-media links

Media entities are not only subjected to restrictions in terms of cross-media ownerships, but also to certain disclosure duties after the implementation of such connections. Television and radio broadcasters as well as newspaper publishers are obliged to disclose the existence of cross-media relationships when they report about the business affairs of a cross-controlled media company. This is called the “business affairs disclosure method”. Radio broadcasters have a choice: They can either opt for the business disclosure method or for the “regular disclosure method”. The latter requires them to regularly broadcast a statement describing the cross-media relationship.⁴⁸ The statement has to be mentioned in a way that brings the relationship to the attention of a reasonable person.⁴⁹ This requirement means for radio broadcasters that they have to indicate the cross-media relationship during prime-time hours if they choose the regular disclosure method.⁵⁰ A newspaper has to mention this connection within the same edition.⁵¹ It is important to point out that for broadcasters compliance with the disclosure obligation constitutes a licence condition, and for newspapers an infringement amounts to a criminal offence.⁵² This duty of disclosure is a very positive instrument for counteracting one of the risks assigned to cross-media ownerships: a homogeneous reporting of news by the same media group through different outlets (e.g. TV and newspaper) that could be perceived as very trustworthy by the audience. However, it is less effective than it might seem at first sight, as the key requirement triggering the business disclosure method is quite vague. Pursuant to s 61BH(1) of the BSA matter or material that is about the business affairs of a cross-controlled media entity includes a reference to matter or material, where it would be reasonable to conclude that the object, or one of the objects, of the matter or the publication of the material was to promote or otherwise influence members of the public to view, listen or read that matter. When making this assessment regard is to be made to the nature of the matter or material and the way in which it is presented.

48 S 61BE(2) of the BSA.

49 Ss 61BB(6), 61BE(6), 61BF(6).

50 S 61BE(6) of the BSA.

51 S 61BF(2) of the BSA.

52 S 61BF(8) of the BSA.

dd) Vertical concentration

There are no specific provisions in the BSA addressing vertical concentration. This problem is left entirely to the competition authority.

b) Enforcement

The ACMA is vested with the powers of enforcing the ownership and control rules. Media companies are obliged to provide the ACMA with information regarding the control of media assets and directorships pursuant to ss 62 to 65B of the BSA. These notification duties are supposed to guarantee that the ACMA obtains the relevant information. An infringement of these requirements can result in substantial pecuniary fines.⁵³ If an envisaged transaction infringes one of the above-mentioned impermissible media concentration provisions, the concerned person can apply to the ACMA for a temporary approval of this breach. An approval may be granted if the ACMA is satisfied that the infringement is incidental to the objectives of the transaction which is the case if it is a subsidiary and relatively immaterial element of the overall transaction.⁵⁴ In addition, the applicant has to ensure that the breach ceases after a specified time. Undertakings by the applicant can be enforced in the Federal Court, e.g. by issuing a payment order in favour of the ACMA.⁵⁵ If the ACMA finds out about an intended unlawful transaction before its completion, it can seek an injunction from the Federal Court to stop the transaction.⁵⁶ A person, who actually manages to complete a transaction, without having obtained a prior approval of the infringement, commits an offence. The ACMA then has the discretion to issue a notice requiring the affected person to remedy this breach. Provided that the breach persists, the offender can be prosecuted.⁵⁷

2. Competition and Consumer Act

a) Substantive law

As mentioned earlier in this chapter the CCA has a broader sphere of application than the BSA in that it restricts the mergers of subscription television and radio broadcasting companies and of newspaper publishers. The key provision is s 50 of the CCA prohibiting the acquisition of shares or assets by a corporation or a

53 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 893.

54 *McGill*, (2007) 30 UNSW Law Journal 280, 286.

55 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, p 890.

56 S 205Q of the BSA.

57 *Butler/Rodrick/McNamara/Fitzgerald*, Australian Media Law, pp 891–892.

person if this would have the effect, or be likely to have the effect, of substantially lessening competition in a market.⁵⁸ Pursuant to s 4E of the CCA the term “market” refers a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services which are substitutable for, or otherwise competitive with, the first-mentioned goods or services. The market concept basically subdivides into the product and geographic market. Both categories aim at delimiting the products that effectively compete with each other. The product market is mainly defined by the properties of a product determining which products might be regarded as interchangeable by the consumer. The geographic market delineates the area in which competition of these interchangeable products takes place.⁵⁹ The Australian Competition and Consumer Commission (ACCC)⁶⁰ deploys the SSNIP-test for defining the relevant market. This test is based on the hypothetical scenario that a producer imposes a *small but significant and non-transitory increase in price* on a product (A). If enough customers then switch to a different product (B) and make the price rise unprofitable, both products are regarded as interchangeable and belong to the same market. Conversely, if the producer retains a significant amount of its customers and the price rise proves to be profitable, product A already constitutes the relevant market.⁶¹ After having defined the relevant market the Australian Competition and Consumer Commission (ACCC) has to analyse whether the merger will substantially lessen competition within that market. S 50(3) of the CCA provides a non-exhaustive list of assessment criteria such as barriers to entry, the level of concentration, countervailing buyer power and the extent of vertical integration.

The definition of the relevant market has proved crucial for the admissibility of an intended merger.⁶² The accurate market delineation decides whether the

58 Griggs/Duke/Nielsen/Cejnar, *Competition Law in Australia* (2012), p 120.

59 Market definitions highlighting the criterion of substitution were used in the following cases: *Queensland Co-operative Milling Association Ltd/Defiance Holdings Ltd, Re Proposed Merger with Barnes Milling Ltd* (1976) ATPR 40–012; for a more general explanation of the concept of the relevant market: Griggs/Duke/Nielsen/Cejnar, *Competition Law in Australia*, pp 42–43; Butler/Rodrick/McNamara/Fitzgerald, *Australian Media Law*, p 896. These books also mention the criteria “function” and “time” which are less relevant for our analysis.

60 More information about the ACCC can be found in: Griggs/Duke/Nielsen/Cejnar, *Competition Law in Australia*, p 52.

61 ACCC, *Merger Guidelines* (2008), pp 17–18; also see: Griggs/Duke/Nielsen/Cejnar, *Competition Law in Australia*, p 126.

62 The importance of market definition was highlighted in *Queensland Wire Industries v. Broken Hill Proprietary* (1989) 167 CLR 177, 188.

competition rules will effectively prevent an increasing concentration in the media market.⁶³ There has been a significant shift in the ACCC’s attitude regarding market definition. Until 2006 it viewed television, radio, newspapers and online media as distinct product markets. This had the negative side-effect that competition law played a minor part in securing diversity in terms of cross-media ownership.⁶⁴ But also diversity on a horizontal level was not sufficiently protected by the competition provisions, as the example of the newspaper market reveals. The ACCC focused on the geographic coverage of newspapers and limited the market for capital city daily newspapers to their metropolitan territories. As a consequence, newspapers published in different cities would likely belong to separate markets despite potentially sharing a considerable amount of common content.⁶⁵ What is more, even if the geographic reach of newspapers significantly overlaps, their different content (e.g. local versus national focus) can cause their allocation to separate markets. Therefore, the ACCC was not able to obviate a high concentration of Australia’s print media.⁶⁶ The ACCC adjusted its practice for cross-media ownerships. In its paper “Media Mergers” it admits that due to the convergence of media the different forms of media cannot be regarded as belonging to different markets anymore. The focus is more on the actual product, e.g. advertising slots and content, instead of distribution channels. Products can be offered across several delivery platforms. Nowadays the ACCC differentiates among the supply of advertising possibilities, the supply of content to consumers and the acquisition of content from content providers.⁶⁷ However, one issue is still not entirely settled: the importance of non-economic aspects. Is the ACCC entitled to take into account how a merger will impact on media diversity? S 50 of the CCA focuses on economic criteria and does not contain public interest criteria which could operate as a means of considering social, cultural and political consequences of mergers. The ACCC has declared that it will factor in repercussions on media diversity⁶⁸ – even though the Explanatory Memorandum to the BSA indicates otherwise⁶⁹.

63 Butler/Rodrick/McNamara/Fitzgerald, *Australian Media Law*, p 899.

64 Butler/Rodrick/McNamara/Fitzgerald, *Australian Media Law*, p 899.

65 House of Representatives Select Committee on the Print Media, *Parliament of Australia, News and Fair Facts: The Australian Print Media Industry* (1992), para 4.18.

66 Butler/Rodrick/McNamara/Fitzgerald, *Australian Media Law*, p 900.

67 ACCC, *Media Mergers* (2006), para 21.

68 ACCC, *Media Mergers* (2006), para 12.

69 Explanatory Memorandum to the Broadcasting Services (Media Ownership) Amendment Bill 2006 (Cth), p 10, para 34; available on: <http://parlinfo.aph.gov.au/parlInfo/>

b) Enforcement

Although there is no need for a prior approval of a merger, it is recommendable to contact the ACCC in advance to find out whether the merger faces any objections, since the ACCC can bring a court action challenging a merger, and a violation of competition provisions may have severe consequences.⁷⁰ There are three different ways to (partially) ensure that a merger will not be challenged afterwards: informal reviews, formal clearances and authorisations.⁷¹ An informal review provides the parties to a merger with an estimate by the ACCC of whether the merger in question might breach s 50 of the CCA. However, even if the ACCC does not articulate any concerns during the informal review, this prevents neither the ACCC nor third parties from taking legal actions later, although the informal procedure does provide some assurance that it is unlikely that the transaction might be challenged by the ACCC. If the ACCC finds for an infringement, the parties can offer enforceable undertakings to the ACCC in order to alleviate its concerns. More legal certainty can be gained by applying for a formal merger clearance. In the event of a successful outcome neither the ACCC nor third parties can take legal action against the merger as long as it is carried out in accordance with the clearance decision. The competition authority has 40 business days to make its decision. If it fails to comply with this time limit, the application is regarded as being refused. The parties to a merger can challenge a rejection or an imposed modification before the Australian Competition Tribunal. The third option consists of an application for a merger authorisation by the Australian Competition Tribunal. However, an authorisation – unlike a clearance – does not confirm the compliance with the s 50 of the CCA but represents an exemption from this provision based on public benefit grounds. The discretionary decision of the Competition Tribunal is not appealable.⁷²

If an intended merger breaches competition provisions and the parties to the merger do not offer sufficient remedies, the ACCC can apply to the Federal Court for an injunction to stop the merger. Beyond that, the ACCC can request the

download/legislation/ems/s527_ems_e5dd9ce3-3335-4e59-9bd4-9fba85f050ef/upload_pdf/305117em.pdf;fileType=application%2Fpdf.

70 Griggs/Duke/Nielsen/Cejnar, Competition Law in Australia, p 122.

71 Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 897.

72 Griggs/Duke/Nielsen/Cejnar, Competition Law in Australia, pp 122–124; Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, pp 897–899. The informal merger review is explained in details in the ACCC's Merger Review Process Guidelines of July 2006 which are available on <https://www.accc.gov.au/system/files/Merger%20Review%20Process%20Guideline%20July%202006.pdf>.

divestiture of shares or assets or apply for penalties if the transaction has already been advanced.⁷³

3. Restrictions on foreign investments

Foreign investments in television and subscription television broadcasting services, but not in the print media, were restricted until the implementation of the *Broadcasting Services Amendment (Media Ownership) Act 2006*. These restrictions were abolished and foreign investments in the media sector are now only subjected to the general foreign investment provisions comprising the *Foreign Acquisitions and Takeovers Act 1975*, the *Foreign Acquisitions and Takeovers Regulations 1989* and the government's foreign investment policy.⁷⁴ In addition, US investors and broadcasting services providers benefit from the free trade agreement between Australia and the US, but are subjected to the Australian provisions in terms of the broadcasting sector.⁷⁵ Foreign investments in "sensitive sectors" require prior notification and approval by the Treasurer advised by the Foreign Investment Review Board. The media sector is considered "sensitive" and an investment in this sector must not conflict with "national interests". However, there are no hard and fast criteria for this assessment. Decisions are made on a case-by-case basis.⁷⁶ The Foreign Investment Review Board considers, among others, impacts on the national security, competition, the economy and on other Government policies (including taxation).⁷⁷ The national interest test proves to be of little relevance in reality, since only three out of 24,105 applications decided in the period 2013–2014 were rejected.⁷⁸ A rejection by the Treasurer can be challenged in the Federal Court, albeit the chances of such an appeal are questionable because of the discretionary nature of this assessment.⁷⁹ All in all, the restrictions on foreign investments regarding cross-media ownerships are of limited practical importance.

73 ACCC, Merger Review Process Guidelines, p 4, at para 3.5.

74 Rolph/Vitins/Bannister, Media Law, pp 156–157; Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 903.

75 Australia–United States Free Trade Agreement, p 48, available on http://www.sice.oas.org/TPD/USA_AUS/Studies/AUSFTAguide_e.pdf.

76 Rolph/Vitins/Bannister, Media Law, pp 157–158.

77 Foreign Investment Review Board, Annual Report 2013–2014, p 21.

78 Foreign Investment Review Board, Annual Report 2013–2014, p 22.

79 Butler/Rodrick/McNamara/Fitzgerald, Australian Media Law, p 905.

II. Germany

Germany similarly has two legal frameworks for coping with media concentration: the Inter-State Broadcasting Agreement (Rundfunkstaatsvertrag, abbreviated as RStV) – pendant to the Australian *Broadcasting Services Act* – and the competition law which again splits up into German and European components. However, there is no a corresponding European Broadcasting Services Act, which is why mergers on a European scale lack an important regulatory instrument, a shortcoming that will be picked up again towards the end of this essay. As in Australia, there does not exist any special regulation only for press diversity. Restrictions on foreign investments in the media sector by member states of the European Union (EU) are not possible because they would thwart the EU's objective of an internal market without frontiers. Additionally, the EU member states' legislative power for restrictions regarding investors from non-European countries is limited pursuant to Articles 63 and 64(2) of the Treaty on the Functioning of the EU (TFEU).

1. Inter-State Broadcasting Agreement

First, we will explain the sector-specific requirements of mergers regarding media companies and, secondly, a case will illustrate their practical application.

a) Abstract outline

To understand German broadcasting provisions, their underlying constitutional principles and concerns it is important to unearth the historical background constituting the particular constitutional role of broadcasting companies. Broadcasters possess a particular role because they are considered very vulnerable to abuse after having been used for propaganda purposes during the Second World War.⁸⁰ The German Constitutional Court attributed fundamental significance to the freedom of broadcasting enshrined in Article 5 (1) of the German Constitution ("Grundgesetz").⁸¹ In the middle of the 20th century the number of broadcasting companies was very small due to the high expenses for founding a broadcasting company. TV programmes, especially, were produced only by state funded corporations until the end of the 1970s. The German constitution and the Inter-State Broadcasting Agreement guarantee the independence of broadcasting companies

80 Gounalakis/Zagouras, *Medienkonzentrationsrecht*, pp 10–12, 49–50, 73–74.

81 BVerfGE 35, 202 (219); 117, 244 (258).

towards state authorities.⁸² On the other hand, there are hardly any regulations for the press because there has always been a great number of competing newspaper publishers.⁸³

The RStV is a legally binding inter-State agreement concluded between the sixteen states of Germany, and regulates broadcasts which are available nationwide.⁸⁴ A federal law on media diversity is not feasible at the moment because of a lack of federal legislative power.⁸⁵ On the contrary, broadcasting companies with a regional or local audience reach do not fall within the scope of the RStV, but are subjected to special state media laws.⁸⁶ The media diversity provisions within the RStV basically codify the case-law of the German Constitutional Court.⁸⁷ The final assessment whether a merger would result in an impermissible media concentration is taken by the "Kommission zur Ermittlung der Konzentration im Medienbereich" (abbreviated as KEK),⁸⁸ which can be regarded as an equivalent to the ACMA. Ss 25 ff. of the RStV focus on the commercial television sector and only take other types of media into account as far as they strengthen the influence on public opinion exercised by television broadcasts.⁸⁹ S 25(1) of the RStV lays down the general objective that commercial broadcasts should reflect the plurality of opinions. This is obtained by allowing the major political, ideological and social forces and groups an adequate opportunity for presenting their opinions. Minority opinions shall also be considered adequately. The core element is to prevent a single social group from misusing the power of television broadcasts for their own ends.⁹⁰

The restrictions for ensuring the achievement of the above-mentioned goal is contained in s 26 of the RStV. S 26(1) of the RStV operates as a general provision

82 Ricker/Schiwy, *Rundfunkverfassungsrecht* (1997), pp 26–27, 37, 40–41; see also: Helwig, *Europäisches Medienkonzentrationsrecht*, pp 51–54.

83 Gounalakis/Zagouras, *Medienkonzentrationsrecht*, pp 50, 61.

84 S 26(1) of the RStV refers to nationwide available broadcasts.

85 BVerfGE 12, 205. More information about the failed attempt of the federal government to implement a federal law in the 1950s can be found in: Ricker/Schiwy, *Rundfunkverfassungsrecht*, pp 33–36.

86 See for example s 33(1) of the State Media Law ("Landesmediengesetz") of North Rhine-Westphalia. For further information on the delimitation of the RStV and the state media laws: Hesse, *Rundfunkrecht* (2003), p 246, and in general the whole chapter 5.

87 Gounalakis/Zagouras, *Medienkonzentrationsrecht*, p 73.

88 S 36(4)(1) of the RStV.

89 Gounalakis/Zagouras, *ZUM* 2006, 716 (719–720); Gounalakis/Zagouras, *Medienkonzentrationsrecht*, p 75.

90 BVerfGE 12, 205 (262); Gounalakis/Zagouras, *Medienkonzentrationsrecht*, p 77.

prohibiting a broadcasting company to achieve a prevalent influence on public opinion alone or in combination with other companies. Such a prevalent influence on public opinion is presumed according to s 26(2)(1) if a media company achieves an average audience rate of 30% or more during a year due to its TV programmes. Moreover, pursuant to s 26(2)(2) a dominant influence on public opinion is also assumed if a media enterprise exceeds an audience rate of 25%, provided that one of the following two conditions is met: Either this company possesses a dominant role in another media-related market, or its influence on public opinion is equivalent to the one of a company with a television audience reach of 30%. The latter assessment is based on an overall consideration of the company's activities regarding the television sector and media-related markets.

The audience reach limit in s 26(2)(1) RStV contains an absolute limit of media power regarding nation-wide available TV programmes and counteracts horizontal concentration.⁹¹ The supplementary regulations in s 26(2)(2) RStV address the problems of vertical concentration and cross-media ownerships.⁹²

b) The failed merger of Springer and ProSiebenSat.1

The failed merger of the newspaper publisher Axel Springer and the TV channels ProSiebenSat.1 in 2006 illustrates how s 26(2) operates and the mechanism used to assess cross-media ownerships. ProSiebenSat.1 possessed an audience share of about 22% which is neither enough to fulfil the thresholds of s 26(2)(1) – 30% – nor of s 26(2)(2) – 25%. The KEK based its rejecting decision on s 26(1), the general provision, by arguing that the influence of the merged entity on media-related markets would be strong enough to compensate for the low audience reach.⁹³ The KEK converted the merged company's bearing on media-related markets into a fictitious broadcasting audience rate by comparing the influence of a television broadcast on public opinion with the influence wielded, for example, by a newspaper. This very conversion is based on the criteria of suggestive power, actuality, and reach. Axel Springer published the newspaper "Bild" which, at that time, had a market share of 26%. The influence of the "Bild" on public opinion was converted into a fictitious television "audience" share of 17%. The suggestive power of newspapers and hence their influence on public opinion was considered less strong due to the fact that people are more influenced by motion pictures than

91 *Mestmäcker*, in: Immenga/Mestmäcker, Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen (2001), Vor § 35 para 109.

92 *Trute*, in: Hahn/Vesting, Rundfunkrecht: Rundfunkstaatsvertrag (2012), § 26 para 49.

93 KEK, reference number: 293 – 1 bis 5, pp 84–87 – Axel Springer AG.

text.⁹⁴ The KEK also took into account that the Springer media group owned TV programme guides. Their influence on public opinion was considered to amount to 1/7 of that of a television broadcast. This assessment was based on the fact that magazines are less up-to-date and that their suggestive power is quite low. However, they can have a very large reach, and in addition are often read several times. TV guides have an appreciable influence on the programme selection, as they contain evaluations and offer the possibility of advertising certain channels.⁹⁵

The KEK regarded the potential bearing of online activities on the public's attitude as half of that of television broadcasts. This evaluation proved to be very difficult because in 2006 hardly any reliable findings with regard to the impact of the online available media content on the users' attitude existed. The KEK estimated the audience reach as being quite limited, since the internet was not already accessible at any time by the wide-spread usage of internet-capable mobile phones. An important factor of the evaluation was the high level of actuality. The KEK regarded the suggestive power of online available content as relatively low, an assessment that would surely be made differently today because of the highly increased range of on-demand videos. The KEK still considered the internet as a medium only supplementing press products and broadcasts. Media companies would regularly reuse the contents they have already produced for the classical media outlets by putting it online. They primarily use their websites for cross-promotion and less as an independent information provider. The KEK weighted the influence of the merged entity ProSiebenSat.1 and Springer on public opinion through online services at 6%, and subsequently converted this influence into a fictitious television audience reach of 3% because of the assumed lower suggestive power and reach of online services compared to television broadcasts.⁹⁶ The KEK investigated the influence of the merging undertakings in every relevant media sector and converted this influence into a fictitious broadcasting audience reach, which in the end amounted to 25%. The overall audience share, after having added the real (22%) and the fictitious figures (25%) – reached 47%. This influence on public opinion was deemed too strong by the KEK and led to the prohibition of the merger.⁹⁷

Its decision was heavily criticised. On the one hand, it was argued that the assumed dominant influence by the merging companies on the public's attitude

94 KEK, 293 – 1 bis 5, pp 88–91 – Axel Springer AG.

95 KEK, 293 – 1 bis 5, pp 92–94 – Axel Springer AG.

96 KEK, 293 – 1 bis 5, pp 96–98 – Axel Springer AG; Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 146–147.

97 KEK, 293 – 1 bis 5, p 99 – Axel Springer AG.

was not supported by scholarly findings because reliable and precise media-specific research results were not available for this assessment.⁹⁸ However, the fact that media academics are not capable of providing the necessary findings cannot lead to the permissibility of all types of cross-media concentrations.⁹⁹ Also the criticism that the KEK's approach lacked transparency has to be contested, since it clearly and comprehensively explained its method, the relevant steps and the final outcome. The KEK should not be blamed for having adapted a new procedure because this type of cross-media merger did not fit into the normal thresholds and categories.¹⁰⁰ However, in the end the German Supreme Administrative Court ("Bundesverwaltungsgericht") overturned the KEK's decision. It held that the real audience reach of ProSiebenSat.1 was too far removed from the legal thresholds in s 26(2) of the RStV. The legislator had attributed a high significance to these thresholds and placed the broadcasting audience reach in the centre of the assessment, whereas the influence on media-related markets only plays a subordinate role. Therefore, the explicitly mentioned thresholds must not be circumvented too easily by having recourse to a company's influence on media-related markets. However, the general approach of converting the influence on related markets into a fictitious broadcasting audience rate was not considered impermissible. This method can still be applied provided that the thresholds in s 26(2) of the RStV have already been met.¹⁰¹ But considering the development of the last decades it seems quite unlikely that a broadcasting company in Germany will obtain an audience share exceeding 25%. As long as this threshold is not fulfilled, broadcasters can theoretically expand their cross-media shareholdings to an unlimited extent, e.g., by acquiring several newspaper publishers, and hereby obtain a very large influence on public opinion. The current lack of an effective regulatory tool for preventing such a development is deeply worrying.¹⁰²

2. Competition Law

Mergers of media companies can fall within the scope of European or German competition provisions. If the merging undertakings are quite big and the merger thus achieves a Community dimension, the European Council Regulation on

98 Paschke/Goldbeck, ZWeR 2007, 49 (72).

99 Gounalakis/Zagouras, Medienkonzentrationsrecht, p 151.

100 Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 152–153.

101 BVerwGE 149, 52–65 = NVwZ-RR 2014, 473–477.

102 See also the opinion of the KEK: 17. Jahresbericht, 2013/2015, p 138.

control of mergers (ECMR)¹⁰³ is applicable. A Community dimension is given pursuant to Art 1(2) of the ECMR if the combined aggregate worldwide turnover of all the undertakings concerned exceeds 5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state. These quantitative thresholds are lowered and refined in Art 1(3) of the ECMR. However, there is no need to go into details, since media mergers in Europe normally do not fulfil the thresholds of the ECMR. The substantive assessment of the European and German competition provisions does not actually differ, since the competition provisions of the EU member states are often modelled on the ECMR.

a) European competition law

The ECMR is enforced by the EU Commission (pendant to the ACCC). Mergers (the ECMR uses the broader term "concentration" including both mergers and the acquisitions of shares etc.¹⁰⁴) with a Community dimension require prior notification and approval by the Commission.¹⁰⁵ Contrary to the Australian provisions, a merger falling within the scope of the ECMR is not allowed to proceed without the prior approval of the Commission¹⁰⁶ and a violation of this formal requirement triggers a severe financial fine amounting up to 10% of the aggregate turnover of the undertakings concerned.¹⁰⁷ A merger that is not compatible with the common market can also be reversed subsequently.¹⁰⁸ The procedure is based on the idea of a "one-stop-merger control" meaning that mergers with a Community dimension are only investigated by the Commission and not by national competition authorities.¹⁰⁹ However, even though a merger has a Community dimension, it can be investigated by a national competition authority if the member state can prove a legitimate interest for the purpose of Art 21(4) of the ECMR. Such a legitimate interest can be the preservation of media plurality.

103 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

104 Art. 3(1) of the ECMR.

105 Art. 4(1) of the ECMR.

106 Art. 7(1) of the ECMR.

107 Art. 14(2) of the ECMR.

108 Art. 8(4) of the ECMR.

109 Art. 21(2) of the ECMR. See also Whish/Bailey, Competition Law (2012), pp 844–845.

Yet this exemption provision is rarely applied.¹¹⁰ The examination is divided into two phases. Phase 1 contains a summary assessment of the intended transaction and is normally limited to 25 working days¹¹¹. At the end of phase 1 the Commission can declare the concentration compatible with the common market, accept commitments by the parties or open a phase 2 investigation. However, it cannot block the transaction at this procedural stage.¹¹² Phase 2 allows the Commission to conduct an in-depth investigation of the transaction for which it regularly has 90 working days¹¹³. At the end of phase 2 the Commission can either accept commitments, clear or block the transaction.¹¹⁴ As part of its substantive test the Commission has to assess whether a concentration would “significantly impede effective competition” in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.¹¹⁵ This test slightly differs from the one the Australian competition authority applies which is the “substantial lessening of competition”. The Australian test has the same wording as the one enshrined in the UK *Enterprise Act*.¹¹⁶ The term “substantial lessening of competition” is commonly regarded as being a bit wider than the EU requirement of a significant impediment to effective competition by creating or strengthening a dominant position, since the EU merger control has a stronger focus on dominance. However, the practical implications of these theoretical differences – if there are any at all – are hard to identify.¹¹⁷ The EU competition provisions, like the Australian ones, assign a high importance to the definition

110 *Whish/Bailey*, Competition Law, p 852.

111 Art 10(1)(1) of the ECMR. This time limit can be extended to 35 working days pursuant to Art 10(1)(2), e.g., if the parties offer commitments.

112 Art 8(2) of the ECMR.

113 Art 10(3)(1) of the ECMR. The time period for the phase 2-investigation can be increased to 105 working days if the undertakings concerned offer commitments at a late stage of the procedure.

114 Art 8(3) of the ECMR.

115 Art 2(3) of the ECMR.

116 S 22(1)(b) of the UK *Enterprise Act* 2002.

117 The theories of harm counteracted by the UK and EU competition provisions are the same: unilateral, coordinated, vertical and conglomerate effects. See for example: *Whish/Bailey*, Competition Law, pp 866–867, 932; *Rodger/MacCulloch*, Competition Law and Policy in the EU and UK (2015), pp 275–276. The assessment criteria used by the EU Commission are similar to the ones adduced in Australia: *Griggs/Duke/Nielsen/Cejnar*, Competition Law in Australia, 125 et seqq.

of the relevant market and the resultant determination of market shares.¹¹⁸ The EU competition law also subdivides the market into a product and a geographic market. In doing so it deploys the same criteria for delimiting the product market such as the interchangeability of products due to their characteristics,¹¹⁹ and even the SSNIP-test.¹²⁰ If the EU Commission has competitive concerns, the merging undertakings can offer commitments, referred to as “remedies”,¹²¹ to alleviate them.¹²² These remedies play a significant role and many mergers were cleared as a consequence of such remedies, whereas it is quite rare for the Commission to block a merger completely.¹²³ Undertakings can directly appeal against rejecting decisions to the European Court of Justice.¹²⁴

b) German competition law

aa) Abstract outline

The German merger provisions can be found in ss 35–43 of the “Gesetz gegen Wettbewerbsbeschränkungen” (GWB). The “Bundeskartellamt” (pendant to the ACCC) is responsible for the enforcement of the GWB. Intended mergers meeting the later mentioned thresholds have to be notified in advance,¹²⁵ and the competition authority has one month to inform the parties whether it will start an in-depth investigation¹²⁶ for which it has a time period of four months¹²⁷. If one of these deadlines is not adhered to, the merger can proceed.¹²⁸ Media entities are generally subjected to the same competition provisions as any other undertaking, except for the thresholds that trigger the application of the German merger provisions. The

118 EU Commission, Horizontal merger guidelines, para 14. See also *Whish/Bailey*, Competition Law, p 868.

119 ECJ, 6/72 – Continental Can (1973), ECR 215, para 14; *Whish/Bailey*, Competition Law, 27 et seqq.

120 Only the European Commission, not the ECJ, applies the SSNIP-test: Commission Notice on the definition of the relevant product market for the purposes of Community competition law (97/C 372/03), para 17. However, the fact that the ECJ does not use this test makes no recognisable difference: *Rodger/MacCulloch*, Competition Law, p 96.

121 Commission Notice on remedies 2008/C 267/01, para 2.

122 Art 8(2)(2) of the ECMR.

123 *Whish/Bailey*, Competition Law, p 884.

124 Art. 16 of the ECMR.

125 s 39(1) of the GWB.

126 s 40(1)(1) of the GWB.

127 s 40(2)(2) of the GWB.

128 GWB: S 40(1)(1) – first deadline – and s 40(2)(2) – second deadline.

normal threshold for merging companies is quite high. The combined aggregate worldwide turnover of the undertakings concerned has to exceed €500 million. Additionally, at least one of the undertakings concerned must achieve a domestic turnover of more than €25 million, and the domestic turnover of another undertaking concerned has to be more than €5 million. Media companies hardly ever reach these figures and would often not be caught by the merger provisions. Therefore, the legislator decided to multiply their turnover.¹²⁹ For the publication, production and distribution of newspapers and magazines the *eight-fold* (before 2013: *twenty-fold*) amount of the turnover shall be taken into account, whereas for the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time as much as the *twenty-fold* amount of the turnover is taken as a basis.¹³⁰ The thresholds for the press sector were lowered in 2013 because this industry faces strong competition by online providers, and the legislator considered a higher level of concentration to be conducive to safeguarding the future existence of a sufficient number of newspaper publishers.¹³¹ The German competition authority applies the same market definition and the same substantive test (“significant impediment to effective competition”) as the EU Commission,¹³² and the approach does not differ significantly from the one of the ACCC.¹³³ When delineating the relevant product market the focus is clearly placed on the advertising market. There is no market especially for “broadcasts”, since the reception of television and broadcasting services – unlike the acquisition of press products – is normally free of any direct charge and therefore lacks an exchange of performances, which again constitutes a main requirement for a market.¹³⁴ As a consequence, the competition provisions do not capture restrictions which affect the actual contents of the broadcasted programme.¹³⁵ This is the reason why content diversity in the media sector cannot effectively be safeguarded by merger regulations. Plurality of the media does not currently amount to an assessment criterion, and the task of protecting media diversity is clearly assigned to the sector-specific authorities, the

129 Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 55–56.

130 S 38(3) of the GWB.

131 Regierungsbegründung für ein Aches Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drucks. 17/9852, p 29 (Nummer 21 Buchstabe a); Lettl, WuW 2013, 706 (708).

132 The “significant impediment to effective competition” criterion entered German competition law in 2013. Körber, WuW 2014, 250.

133 B. II. 2. a).

134 Parlasca, WuW 1994, 210 (214–215); Trafkowski, Medienkartellrecht, pp 32–33.

135 Schmidt, ZUM 1997, 472; Trafkowski, Medienkartellrecht, pp 35–36.

KEK.¹³⁶ The insufficient protection afforded by competition rules can be seen in the press sector. There are no press-specific diversity provisions and the competition regulations are obviously not apt for filling this gap. An analysis in 2006 showed a high concentration in the newspaper market. At that time about 73% of the former West German areas were dominated by one local newspaper, and similarly only one newspaper existed in about 55% of the East German areas.¹³⁷ The fact that the concentration in the broadcasting sector has not advanced this far is due to the strict regulations of the German broadcasting services provisions.

bb) The failed merger of Springer and ProSiebenSat.1

The German competition authority BKA blocked the merger of ProSiebenSat.1 and Springer owing to competitive concerns, showing that the economic analysis can make a contribution – albeit limited – to the protection of media diversity. The BKA held that even prior to the intended cross-media merger there had been an oligopoly consisting of ProSiebenSat.1 and another broadcasting family (RTL) regarding the market for nationwide broadcasted television commercials. It was concerned that this oligopoly would extend its market power after the merger because ProSiebenSat.1 and the publisher Springer could then provide a one-stop shop for cross-media advertising campaigns.¹³⁸ Additionally, the BKA proved a positive correlation between the reports in one of Springer’s newspapers, the “Bild”, and the readers’ choice of TV programmes. The “Bild” was therefore assumed to possess a significant influence on the television broadcasting sector.¹³⁹ Furthermore, a study revealed that a very high percentage of “Bild” readers above 14 also watched the programmes Sat.1 (approx. 90%) and ProSieben (about 80%).¹⁴⁰ As a result, the broadcasting family ProSiebenSat.1 and the publisher Springer can promote each other very effectively and, thus, expand their prevailing market power.¹⁴¹ This type of cross-promotion is especially worrying from the media diversity perspective if it is presented in a subtle way that the readers of the newspaper or the television audience do not realise the interconnection between the two media.¹⁴² Unlike in

136 Gounalakis, AfP 2004, 394 (396).

137 Seufert/Schulz/Brunn, Gegenwart und Zukunft des lokalen und regionalen Fernsehens in Ostdeutschland (2008), p 31.

138 Bundeskartellamt, reference number: B 6–92202-Fa – 103/05, pp 38–40, 62–63.

139 Bundeskartellamt, B 6–92202-Fa – 103/05, p 51.

140 Bundeskartellamt, B 6–92202-Fa – 103/05, pp 47–48.

141 Bundeskartellamt, B 6–92202-Fa – 103/05, pp 51–58.

142 Gounalakis/Zagouras, NJW 2006, pp 1624 (1625–1626); Gounalakis/Zagouras, Medienkonzentrationsrecht, p 196.

the Australian *Broadcasting Services Act* there are no obligations to disclose this interdependence. The competition authority scrutinised other markets as well, such as the market for nationwide distributed newspapers where Springer held a dominant position (80% market share) by virtue of the above-mentioned newspaper *Bild*, which again could also be reinforced by the merger.¹⁴³ It finally rejected the merger because it found for too many competitive concerns.

III. Comparison of the competition and the broadcasting provisions

One might question the necessity of two regulatory instruments in Germany and Australia especially considering the burden for media companies that are involved in two different law suits. In Germany, the Academic Advisory Board of the Federal Ministry of Economics once proposed the integration of the specific broadcasting provisions into the competition law.¹⁴⁴ However, we should not overlook the fact that both legal assessments have a different focus and supplement each other. Therefore, we want to highlight four major differences illustrating the necessity of retaining the broadcasting-specific restrictions.

First, competition provisions aim at hindering the creation or strengthening of a dominant position as a result of a merger; this development is also referred to as *external growth*. The reason for this is the fact that such a transaction does not create new economic capacities, but only changes the control over already existing ones. On the contrary, growth by its own efforts (*internal growth*) can have a positive connotation, since it proves the competitiveness of a company and the increase of its resources.¹⁴⁵ However, the broadcasting services provisions have a very different perception of internal growth, meaning in this context the increase of audience share, as this development can result in a prevalent influence on public opinion and represent a threat to the pluralism of opinions.¹⁴⁶ The broadcasting

143 Bundeskartellamt, B 6-92202-Fa – 103/05, p 43.

144 Proposal of the Academic Advisory Board of the Federal Ministry of Economics, paper “Offene Medienordnung”, 29 et seqq., available at: <http://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Medienordnung1.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>. See for a critical analysis of this proposal: Kübler, ZRP 2000, 131.

145 Kling/Thomas, Grundkurs Wettbewerbs- und Kartellrecht (2004), p 460; Gounalakis/Zagouras, Medienkonzentrationsrecht, p 185.

146 Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 181–182; Helwig, Europäisches Medienkonzentrationsrecht, p 78.

provisions limit the absolute audience reach and thus the potential for internal growth to 30% (Germany)¹⁴⁷ or 75% (Australia).¹⁴⁸

Secondly, competition law in general – regardless whether one refers to German, European or Australian provisions – is based on a very accurate delineation of the relevant market. This can lead to the definition of very small markets, e.g., the German competition authority once identified a separate market for fishing magazines.¹⁴⁹ If the product characteristics are very particular, it is quite difficult for the consumer to find a substitute, which again results in the definition of a very narrow market. It is obvious that this narrow perspective is not apt to capture cross-media ownerships. From a (narrow) economic perspective a television broadcast and a newspaper might not be interchangeable, but from the (broader) media diversity perspective they can form a complementary unit for exerting a decisive influence on public opinion and must be regarded as a whole.¹⁵⁰

Thirdly, the German broadcasting provisions very much reflect the case-law of the Constitutional Court, which is why they reflect the legislator’s reaction to certain decisions rather than an overall political concept. As a result of this, the clauses of the German broadcasting Act, especially the more general ones, have to be interpreted in the light of the German Constitution.¹⁵¹ This statement needs to be relativised in terms of the Australian *Broadcasting Services Act* that is not underpinned by a broad constitutional guarantee of freedom of media.¹⁵²

Fourthly, competition provisions in both jurisdictions focus on the advertising market and do not consider the audience share as a market of its own, since the advertisement-funded free-to-air TV does not require any exchange of services between the viewers and broadcasters. But it is precisely the audience share that reveals the real bearing on the public’s attitude that a media company has obtained. For securing plurality of opinions the audience share is the most crucial factor, and the fact that the competition provisions leave it completely aside evidences their inability to protect the media-based democracy.¹⁵³ The broadcasting services provisions are therefore indispensable.

147 S 26(2)(1) of the RStV.

148 S 53(1) of the BSA.

149 Bundeskartellamt, B 6 - 88/00, WuW/E DE-V, 370 (371).

150 Kübler, ZRP 2000, 131 (133); Helwig, Europäisches Medienkonzentrationsrecht, p 80.

151 Mailänder, AfP 2007, 297 (298); Gounalakis/Zagouras, Medienkonzentrationsrecht, p 181.

152 Sawyer/Abjorensen/Larkin, Australia: The state of democracy, pp 208–209.

153 Frey, ZUM 1998, 985 (989); Schüll, Schutz der Meinungsvielfalt im Rundfunkbereich durch das europäische Recht unter besonderer Berücksichtigung des europäischen

IV. Comparison of the German and the Australian legal system

Germany and Australia subject mergers in the media sector to two control systems in order to prevent market and media power. Regarding the substantive competition law there are no material differences. However, German competition law lowers the turnover thresholds for media companies. This has a major impact on mergers of publishers because in both countries they are restricted only by competition law. The fact that mergers require prior notification and approval under the German and European regime is a procedural difference without significant practical impact on the accumulation of media power.

Both legal systems focus too much on the traditional broadcasting system. They neither provide an overall approach including all types of media for the purpose of a real media concentration regime, but adhere to their narrow broadcasting-centred perspective. German provisions place the television audience share in the centre of the analysis and regard the influence on other types of media as an ancillary factor. A broadcasting company's influence on publishers and online services providers is merely converted into a fictitious audience share, instead of accepting the important role of the other types of media and seeing their combined strength. However, the German provisions better address the problem of cross-media mergers than the Australian *Broadcasting Services Act*. Online services are not caught at all by the Australian regulation despite their increasing significance, while the German Broadcasting Act at least takes account of them by converting their influence into a fictitious television audience share. The Australian prohibition of an unacceptable three-way control situation is clearly not sufficient because the combined ownership of two different media can already amount to a worrying dominance. The current cross-media review system is too undifferentiated. There should be at least an assessment of the importance and size of the remaining media company in order to avoid the merger of two very influential companies, e.g., the only newspaper in a certain area and the only television broadcasting corporation while leaving only one independent radio broadcaster with a very small audience reach and a purely entertainment programme. The Australian laws should include more qualitative factors instead of a pure quantitative assessment. The same is true for the 5/4 rule, which suffers the additional downside of being based on radio licence areas. Using radio licence areas as the benchmark for assessing a company's influence on the public's attitude is no longer up-to-date and belies reality, since

Wettbewerbsrechts (2006), p 296. The fact that gratuitous services are not sufficient for constituting a market in Australia can be concluded from the following passage: Griggs/Duke/Nielsen/Cejnar, Competition Law in Australia, p 126.

the internet is not divided into licence areas. Furthermore, nationwide newspapers are not caught by the licence-based system although their influence exceeds that of local newspapers being associated to a particular licence area. The whole licence-based approach strongly differs from the German one. However, the Australian system includes an obligation to disclose cross-media links, which is very positive because it obviates the risk that a recipient might assign a higher credibility to a piece of information provided through two formally different but interconnected outlets. This can be seen as a role model for reforming the German broadcasting supervision. On the contrary, the Australian audience reach limit of 75% is much too high and shows a much more uncritical approach compared to the German limit of 30%. This different attitude might be based on the negative historical experience during the Second World War when broadcasting companies were abused for propaganda purposes. Still, every democracy should show a particular sensitivity towards media concentration especially of the horizontal variety.

V. Recommendable Improvements

1. Germany

The media concentration review in Germany has two major shortcomings. First, it focuses too much on television broadcasts instead of providing a more comprehensive regulation – a real media concentration law. Second, there are no broadcasting provisions on a European scale and the European competition law is neither designed nor apt for safeguarding media diversity, especially since – contrary to the German competition provisions – it does not even lower the thresholds for media mergers. Consequently, there is a major supervisory gap that should be filled by a European media concentration controls. However, the question whether the European Treaties provide for a legislative power for such an ambitious goal is very controversial and the following section will give some insight into this complex legal matter.

a) Improvements of the German diversity provisions

First, having two separate authorities for competition and broadcasting regulations makes mergers for media companies quite onerous. In the end, they may have to appeal against two rejecting decisions. A one-stop shop would be more advantageous and encouraging for investors.¹⁵⁴

154 Gounalakis, NJW-Beilage 23/2002, 20 (23); Koenig, K&R 2000, 1 (2).

Secondly, the audience reach limits in the German broadcasting statutes only consider German-speaking programmes¹⁵⁵, which obviously seems outdated considering the increasing consumption of English-speaking information via the internet. It also encourages German television broadcasting corporations to merge with broadcasters from another European country.¹⁵⁶ This enables those companies to benefit from synergy effects such as common exploitation of intellectual property licences and common information sources like internationally operating news agencies. All these advantages can be realized even if the final programme is distributed in different languages. The above-mentioned failed merger of ProSiebenSat.1 and Springer is a good illustration of this increasing international focus of German media companies because ProSiebenSat.1 was then sold to the investor group Permira and Kohlberg Kravis Roberts.¹⁵⁷ Kohlberg Kravis Roberts also invests in the Australian media sector.¹⁵⁸ The above-mentioned development regarding European media entities underlines the necessity of a European regulation for media diversity.¹⁵⁹

Thirdly, the present focus on television broadcasting companies and their audience rate is not appropriate for coping with different kinds of media concentration. A dominant position in a media-related market is only taken into account as far as it impacts on the television sector, thus not providing a comprehensive protection. Therefore, we need a media law addressing all kinds of concentration and not a mere television broadcasting law.¹⁶⁰ The importance of this concern is also emphasised by the recent development including the increase of the threshold for mergers in the press sector and the decision of the Supreme Administrative Court regarding the merger of ProSiebenSat.1 and Springer. The German Competition Act lowered the threshold for mergers in the press sector by two and a half times in 2013, enabling a lot of mergers to proceed without a review by the competition authority. This risks a serious amount of concentration in the press sector, and is especially worrying in combination with the decision of the Supreme Court from 2014 regarding the failed merger of ProSiebenSat.1 and Springer: provided that

155 S 27(1) of the RStV.

156 Helwig, *Europäisches Medienkonzentrationsrecht*, pp 82–83.

157 Hess/Jury-Fischer, *AfP* 2007, 103 (104).

158 Rolph/Vitins/Bannister, *Media Law*, pp 124 and 158.

159 Gounalakis/Zagouras, *ZUM* 2006, 716 (723).

160 Bretschneider, *ZUM* 2010, 418 (422); Gounalakis/Zagouras, *ZUM* 2006, 716 (717, 719–720); Schwartzmann, *Konvergentes Konzentrationsrecht für konvergente Medien*, in: Krautscheid/Schwartzmann (ed.), *Fesseln für die Vielfalt? – Das Medienkonzentrationsrecht auf dem Prüfstand* (2010), pp 18–19.

a television broadcasting company does not reach an audience share of at least 25%, even a very strong influence on other media – converted into a fictitious television audience reach – is not enough to finally fulfil the threshold triggering a review.¹⁶¹ As a consequence, a broadcaster with an actual audience share not exceeding 25% can theoretically acquire an unlimited number of newspaper publishers and strengthen its media power.¹⁶² Since newspaper publishers are subjected only to the competition law – which also relaxed its review criteria by raising the thresholds – huge conglomerates consisting of publishers and broadcasters might emerge in the coming years. This process has proven very difficult – politically and legally – to reverse, and can cause lasting damage to media plurality. The German Constitutional Court has often expressed its worries about the combined power of publishers and broadcasters, and highlighted the necessity to obviate such a development from the beginning because of the factual impossibility to correct such a negative development *ex post*.¹⁶³ If the failed merger of ProSiebenSat.1 and Springer had been brought in front of the German Constitutional Court, this court would certainly have established stronger restrictions for cross-media ownerships.

b) Necessity and feasibility of a European media concentration control

Nowadays we are facing the challenge of mergers between private media companies on a European scale. The existing laws can not tackle this problem because the national State Broadcasting Treaties only address national influence of media companies on public opinion, and the European competition law merely covers economic aspects. As a media company might already have achieved a dominant bearing on public opinion prior to offending the European Competition Law, transnational mergers are hardly limited.

Here the question arises whether it is possible to implement a European media law. However, there is no explicit legislative power within the Treaty on the functioning of the European Union (TFEU) allowing the EU to pass such a law.¹⁶⁴ What is more, media affairs are cultural matters coming under national sovereignty.¹⁶⁵ Nevertheless, the former European Community (EC) regulated fields not directly related to their legislative powers, and the European Court of Justice (ECJ) had no objections because it interpreted the legislative powers of the EC

161 BVerwGE 149, 52–65 = NVwZ-RR 2014, 473–477.

162 KEK: 17. Jahresbericht, 2013/2015, 138.

163 BVerfGE 73, 118 (175) = AfP 1986, 314.

164 Helwig, *Europäisches Medienkonzentrationsrecht*, p 287.

165 Ress/Bröhmer, *Europäische Gemeinschaft und Medienvielfalt* (1998), p 31.

very broadly. For instance, there is no explicit legislative power to regulate human health, but according to the ECJ the EU was allowed to limit tobacco advertisements. Although the first paragraph of Article 168 of the TFEU excludes any harmonisation of laws and regulations of the member states designed to protect and improve human health, harmonising measures adopted on the basis of other provisions of the Treaty can have an impact on the protection of human health. The approximation of national laws on the advertising and sponsorship of tobacco products was based on Articles 114, 53 and 62 of the TFEU. Article 114 (1) of the TFEU empowers the Council to adopt measures for the approximation of provisions in member states that prioritise the establishment and functioning of the internal market. Provided that the conditions of the aforementioned Articles are met, the protection of human health can be a decisive factor.¹⁶⁶

A European media law could be based on Articles 53 (1) and 62 of the TFEU. These Articles empower the EU to coordinate provisions concerning the taking-up and pursuing of activities as self employed individuals and covering the freedom to provide services within the Union. The freedom of establishments is affected once a media company transfers its registered office to another Member State, whereas the freedom to provide services is concerned once a TV programme is broadcasted transnationally. The different national regulations addressing media concentration could have a negative impact on either freedom – for instance, if the Member States provide different regulations regarding admitted audience rates, reader rates, or mergers between media companies.¹⁶⁷ For example, while there are no laws covering media concentration and cross-media mergers in Denmark and Finland, Estonia prohibits cooperation between the press, radio stations, and TV corporations.¹⁶⁸ An approximation of the criteria for mergers and cooperation would further the internal market.

Moreover, according to the case law of the ECJ, a measure must genuinely prioritise the improvement of the conditions for the establishment and functioning of the internal market. A mere finding of disparities between national rules and the abstract risk of hindering fundamental freedoms or of distorting competition is not sufficient.¹⁶⁹ These premises are fulfilled due to the significant disparities concerning national media laws.¹⁷⁰

166 ECJ, C-376/98 - Tobacco Advertising I, EuGHE 2000, I-8419, para 88.

167 Gounalakis/Zagouras, JZ 2008, 652 (656–657); Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 215–218.

168 KEK, Dritter Konzentrationsbericht (2006), p 404.

169 ECJ, C-376/98 - Tobacco Advertising I, EuGHE 2000, I-8419, para 84–86.

170 Gounalakis/Zagouras, Medienkonzentrationsrecht, pp 217–218.

Finally, the principle of subsidiarity in Article 5 (3) of the Consolidated Version of the Treaty of the European Union (EUT), the principle of proportionality in Article 5 (4) of the EUT, and the cultural clause in Article 167 (5) TFEU do not limit the exercise of powers. Pursuant to Article 167 (5) of the TFEU the EU is not empowered to harmonise laws and regulations of the Member States concerning cultural matters. Consequently, critics contend that the EU is confined to regulating the economic aspects of broadcasting, such as TV commercials, whereas the protection of media pluralism does not fall within its legislative powers.¹⁷¹ However, Article 167 (5) of the TFEU is intended only to prevent the EU from replacing or harmonising national cultural policies.¹⁷² Protection of media pluralism on a European level would not constrain the cultural independence of the member states, but protect it from a co-ordinated reporting by a European oligopoly forming public opinion.¹⁷³ Additionally, Article 11 (2) of the European Charter of Fundamental Rights postulates media pluralism and has been binding since the Treaty of Lisbon pursuant to Article 6 (1) EUT.¹⁷⁴

The principles of subsidiary and of proportionality do not confine the exercise of powers because it is evident that the Member States are not capable of fighting transnational influence on public opinion.

2. Australia

The Australian legislator should abolish the licence-based assessment of the *Broadcasting Services Act*, and should no longer adhere to a system that assigns importance to the transmission route. Instead, the real impact on public opinion based on the reach of a media and its contents ought to form the focus of attention, regardless of whether the information is transferred online or terrestrially. The derogation of the licence-based system should likewise resolve the contradiction that a local newspaper is more likely to be taken into account than one distributed nationwide. There is no point in trying to limit the assessment to newspapers which are associated with a certain radio licence area, since the predominant media power of a newspaper is not limited to these areas and, conversely, a nationwide newspaper is much more influential. However, the idea behind the prohibition of

171 Hain, AfP 2007, 527 (532); Dörr/Schiedermair, Ein kohärentes Konzentrationsrecht für die Medienlandschaft in Deutschland (2007), 35–39.

172 Zagouras, Pluralismus in Europa (2009) p 79.

173 Gounalakis/Zagouras, ZUM 2006, 716 (718); Gounalakis/Zagouras, JZ 2008, 652 (659–661).

174 Helwig, Europäisches Medienkonzentrationsrecht, pp 286–287.

a three-way control goes into the right direction, but should be improved by introducing a qualitative assessment of the media power of the remaining independent media company. This additional assessment criterion should include, among others, the audience reach and contents. As long as these factors are clearly defined by the *Broadcasting Services Act* there is no any risk of legal uncertainty. One of the most important amendments ought to address the television audience reach limit which is currently much too high (75%) considering that horizontal concentration represents the most significant and immediate risk to the diversity of opinions. It allows one television broadcasting company to control most of the reporting done by the media with the highest suggestive power. All in all, the Australian media diversity rules are not yet sophisticated enough to catch the present and future perils for media diversity.

C. Conclusion

The Australian and German media diversity rules still have some way to go in order to be prepared for the challenge created by the increasing consumption of television broadcasts via the internet. Likewise cross-media ownerships are not sufficiently regulated. The co-existence of two legal frameworks – competition and broadcasting provisions – proves to be a valuable interaction that prevents media power despite causing a considerable burden for media companies. This onus can be alleviated by enhancing the cooperation of both authorities and eventually by uniting the separate administrative procedures to a single one. Yet it might prove difficult to gain a political majority for these fundamental reforms especially for the implementation of a future European media concentration law.