The public: consumers or citizens? Participatory initiatives and the reform of public service media regulation in Germany

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Abstract

The German federal interstate treaties, as the regulatory framework for public service media (PSM), have recently been under reform. The starting point of the amendments is the so-called ZDF decision of the German Federal Constitutional Court from the 25th of March, 2014.[1] The Federal Constitutional Court was confronted with the question of whether the composition of the broadcasting council in the second biggest public service broadcasting station in Germany, the ZDF (*Zweites Deutsches Fernsehen*, Second German Television), is compliant with the constitution. This resulted in reforms of numerous regulatory regimes in several German federal states. This article compares the decision-making process related to the WDR (*Westdeutscher Rundfunk*, West-German Broadcasting) (whose legislator is Northrhine-Westfalia) and the ZDF (whose legislator is Rhineland-Palatinate), the two biggest PSM broadcasters in Germany. In the case of these two German federal states, this paper strives to provide insight into the strategies of the state chancellery, the responsible legislative authorities, to negotiate a new regulatory framework. The paper also discusses the issue of the "implied audience" during the negotiations and civil society's participation in media policy debates and media governance. The analysis is based on a systematization of the citizen and the consumer in media policy. This working hypothesis assumes that the implied image of the audience differs in the two federal states. The negotiations in Rhineland-Palatinate can be described as ambivalent in terms of how it understood the audience, whereas Northrhine-Westfalia rather addressed the audience as citizens. The study suggests that the ZDF decision created a momentum for broader media policy debates in Germany, which has long been a neglected issue, both in civil society and media regulation – as well as in communication studies.

Keywords

Media policy; media regulation; civic participation; public service broadcasting; Germany

Introduction

Public Service Broadcasting in Germany was established by the allied forces after WWII. In the Western Federal Republic of Germany it follows the British Model of a licence-fee financed broadcaster with a serve-all mandate. As a result of the Nazi Era, when broadcasting was used as a propaganda tool, Public Service Broadcasting in the new republic was organized relatively free from state intervention, which is also established in the Basic Law (constitution)[2]. Following the blueprint of the British BBC, the

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[1] Zweites Deutsches Fernsehen (ZDF; *Second German Television*) is the second biggest nationwide broadcaster in Germany and situated in Mainz, Rhineland-Palatinate.

[2] In Germany the constitution is called Basic Law, because the allied forces elected a council of experts in the year 1949 to design the "constitution". There was no public ballot about it, as citizens were not accustomed to democracy after the Nazi regime.

regulation of Public Service Broadcasting (PSB) in Germany was supposed to be organized between state and market, which is reflected in a co-regulation within the respective bodies (as an alternative to state-controlled and self-controlled broadcasting). Broadcasting councils have to safeguard the fulfilling of program standards and elect the director of a broadcaster, whereas broadcasting boards mainly decide about financial and personnel issues. Both bodies follow a representative democracy model. Until mid-2016 the council members were exclusively representatives of "relevant social groups", like political parties and affiliates, employer and trade associations, employee organisations and unions, churches, and educational institutions. However, the representatives are mandated to represent the general public and not their sending organisation. Aside from this process, there was no possibility for the broader public or civil society to participate in media governance.

In 2009 the Federal Constitutional Court was confronted with the question of whether the composition of broadcasting councils in public service media (PSM) and the existing political influence was compliant with the constitution[3]. The Federal Constitutional Court decided in favor of the prosecutor and pronounced a judgement stating that the composition of the broadcasting council of the second largest PSM television broadcaster – ZDF – violates the constitutional principle to be free from state influence. The decision is not only binding for the ZDF, but also for the other 11 (federal) PSB stations in Germany (Dörr, 2014, p. 6). The court demanded the legislator to present a draft of a new regulatory framework by June 2015. The state chancellery of Rhineland-Palatinate took over the lead-management for the negotiation process, as the ZDF is situated in Mainz, Rhineland-Palatinate. As ZDF has a nationwide range, all prime ministers of the sixteen federal states had to agree on the new regulatory framework for the broadcaster's decisive bodies.

The official negotiations that lead to the amendment took place during the time between the court's decision in March 2014 and the presentation of the draft version by the prime ministers within the due date. They were accompanied by a consultation open to the public, with 29 individuals and interest groups submitting their statements. On June 14th, 2015, the prime ministers of all federal states proposed a new regulatory framework[4] and the 16 federal parliaments accepted the 17th interstate ZDF-broadcasting treaty. According to the Federal Constitutional Court's verdict, the supervisory bodies of the WDR (*Westdeutscher Rundfunk*, Westgerman Broadcasting) – the biggest broadcasting station under the umbrella of the ARD (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland*, Working Group of Public Service Broadcasters in the Federal Republic of Germany) – were also scrutinized. After an open consultation process, the WDR Treaty was adopted on February 2nd, 2016. It remains unclear, however, if and how much the amendments were informed by the citizens' submissions.

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[3] The common term Public Service Broadcasting can be replaced by Public Service Media, because of their multiplatform strategies in a digital and networked environment (Enli, 2008).

[4] The ZDF is a nationwide broadcaster, unlike the broadcasting stations under the umbrella of the ARD. Therefore, all prime ministers have to negotiate a ZDF interstate broadcasting treaty. In contrast, the WDR Treaty is adopted by the federal parliament of North-Rhine-Westfalia, as the WDR is defined as a regional broadcaster.

This study is based on reports, academic literature, content analysis of press releases, and observations. As a first step, the article discusses a conceptual framework of in how far audiences can be conceptualized as citizens and actors of civil society or rather as consumers. On this theoretical grounding, the analysis tries to shed light on how much we can speak of an "implied audience" as consumers or citizens. The second section analyzes the two different negotiation processes for new regulatory frameworks in Rhineland-Palatinate (home of the ZDF) and Northrhine-Westfalia (where the WDR is situated). The key question in this section regards how much citizens could participate in the policy negotiations about the new PSM regulatory framework. The paper thus aims to contribute to a growing literature linking several areas of expertise, like audience studies and media policy (Daskal, 2016; Livingstone & Lunt, 2011). A third and last section draws the conclusions.

Theoretical considerations on the role of audiences as citizens and civil society actors

According to Livingstone and Lunt (2011), media regulation follows specific audience images. The authors proposed the term "implied audience" and identified two opposing frames for the audiences - as consumers and as citizens. The study about media regulation in Great Britain made obvious that regulators, in line with the industry, tend to focus on consumers' choice instead of citizens' interests and communication rights. In consequence, consumers are allowed to complain but not participate. The German communication studies scholar Uwe Hasebrink (2011) promotes a conceptual distinction and a broadening of user roles by including users as citizens. The dominant paradigm of audience studies usually conceptualizes users as consumers (whose media choices fulfill individual gratifications), victims (audiences need to be protected from media influence), or commodities (the concrete value the advertisement industry is ready to pay for certain audiences) (Webster & Phalen, 1996). Media quality is mostly equalized with consumers' choices. However, consumer's taste is often not congruent with quality criteria, defined by normative values. "Accordingly, some studies show that media offerings that from a normative perspective are classified as 'high quality' usually do not get high audience ratings" (Hasebrink, 2011, p. 323).

One reason to why the role of the user-as-citizen in a democratic society has barely been conceptualized and systematically investigated yet is this contradiction of ascribed roles (Hasebrink & Schmidt, 2012). It is therefore important to acknowledge the audience-as-citizens in media policy and regulation, who articulate personal (normative) criteria for media quality, like diversity, unbiased information, investigative and critical journalism, and credibility. This should be taken seriously as, unlike consumers, citizens are interested in media as a vital part of society by, for example, offering a broader understanding of its members and problems (Hasebrink, 2011, p. 325). These normative goals are clearly linked to a functioning civil society.

From the perspective of democratic theory, deliberation describes the public dialogue about policy options in which – ideally – all segments of society can participate

and are included, also the less organized between state and market: the civil society (Habermas, 1990). Civil society's participation in an open public sphere is seen as a core value of democratic systems. Civil society is defined by its functions that have a positive connotation – groups or even individual citizens try to be heard in public in order to serve common welfare and have an impact on the formation of opinion and decision-making. Civil society is also ascribed with a specific "problem-sensitivity", which results from being close to the everyday life of ordinary people and less interested in gaining or staying in power. However, it is further characterized by a low degree of organisation and legislation contribution, which makes it a relatively weak factor in the institutionalized media debate. The audience-as-citizens "is in this respect a typical civil society actor" (Hasebrink, 2011, p. 329).

This area of expertise can further be tied to communication studies' approaches that are concerned with an extension of media regulation and media governance (Kleinsteuber, 2011; Krotz, 1996; Weichert, 2005). Media governance approaches are influenced by political science and a raising of awareness, making it impossible to take decisions without civic participation (Kleinsteuber, 2011, pp. 68-69). In the highly-competitive media sector, media governance in PSM is perceived as necessary. It can be assumed that PSM "will be more important than ever in the digital age" to counterbalance commercial influence and to maintain quality programme standards (Jakubowicz, 2010, p. 11). "The relevance for democratic process and the political discourse grows" as PSM are identified within a specific political system and can, hence, be a counterweight against internationalizing media markets (Jakubowicz, 2010, p. 11). This includes a more "horizontal extension" of media policy, i.e. letting the audience-as-citizens be a part of media governance and regulation (Foster 2007; Jarren 2007; Puppis, d'Haenens & Saeys, 2007). The overall goal is to equip the audience not only with rights but also with responsibilities and, thus, legitimize strategic decisions and programs. Media literacy is seen as a "by-product" of citizen's participation in decision-making and media regulation (Jarren, 2007).

With respect to the aforementioned role of the audience-as-citizens, one could assume that the existing communicative opportunities of participative media, or Web.2.0 applications, respectively, increases the accessibility of civil society to the discourse and, as such, makes it easier for it to take part in the public debate about media policy and regulation. However, with respect to activists in media policy debates, high expectations are confronted by disillusioning results: most civil society activists in new media seem to be concerned in taking part in debates about *media criticism* instead of *media policy* (Eilders, 2011, p. 176). Moreover, the audience prefers to adhere to the "controlled routes of customer care and complaint resources" (Livingstone & Lunt, 2011, p. 173). These results correlate with the "implied image" from regulators of the audience-as-consumers rather than citizens in media regulation: the audience seems to accept its consumer role and has difficulties in identifying itself as citizens, especially when it comes to partaking in media policy debates. While regulators do not seem to be interested in a change of that hierarchical relationship, audiences – in consequence – are rather "spoken for" than being heard.

Comunicação e Sociedade, vol. 30, 2016

The public: consumers or citizens? Participatory initiatives and the reform of public service media regulation in Germany · Christine Horz

Critical scholars question whether discursive participation can fully meet democratic principles and, therefore, enunciate existing hierarchies of power in public debates and decision-making processes. The communication studies scholar Carpentier, for example, calls for a "maximalist model" of participation, in which not only partaking in debates or elections, but also decision-making in media institutions and regulation should be possible. He asks for "equalized power positions of privileged and non-privileged actors in particular decision-making processes" (Carpentier, 2015, p. 20). Access to the debate and interaction with broadcasters through controlled routines is important. But only if audiences-as-citizens can fully participate in the media and are, hence, involved in decision-making processes, can one speak of participation. As PSM are institutionalized in society, the public, or rather: civil society as those participants in the public debate situated between state and market, would be included in media policy-making and regulation. Participation in media governance also enacts citizenship and should therefore be seen as a vital part of the purpose of PSM (EBU, 2014).

Operationalization

The aforementioned studies and approaches can be condensed in the following systematic overview, which is far from claiming to provide a complete picture of approaches related to user participation in media policy. Instead, it is only one step towards a definition of the audience-as-citizens. Certainly, the complex subject needs to be engaged in further empirical research (Table 1).

Author(s)	Approach	Argument; Points of critique	Implied audience	Normative goals of approach
Livingstone & Lunt 2011; Hasebrink 2011	Critical audience studies, intersection of audience and policy studies	Consumer-oriented audience studies as well as media policy; undifferentiated audience roles; consumer seeks only individual gratification, are vulnerable and victimized. Citizens' rights are neglected or show an ambivalent approach. Focused mainly on market regulation.	Audience-as--consumers, victims or commodity, top--down, media literacy in the sense of consumer knowledge.	Research and policy focus on citizens' interest in media that fulfils democratic, social, and cultural values; communication rights, participatory, inclusive, interlocking, overlapping networks.
Puppis & D'Haenens 2007, Kleinsteuber 2011; Jarren 2007	Media governance	Horizontal as well as vertical extension of government, Including citizens in media regulation is necessary to come to bearing decisions.	Citizen; citizen as non-governmental actors in decision--making processes.	Media governance as a new way to legitimize media policy, safeguarding media pluralism, citizens' co-responsibility for media pluralism and quality.
Habermas (1990);	Public sphere / Deliberative/Participatory theory	The public sphere is dominated by influential groups and the media industry; citizens are neglected in public debates, although civil society is "problem-sensitive".	Citizen; participation in public debate enacts citizenship and legitimizes democracy	Civil society should be able to participate in the public debate; open access to the debate for all society members.

Carpentier (2011)	Radical democracy	All institutions should be part of democratiza- tion – also the media.	citizen as equal stakeholder in decisions.	Radical democracy approach: citizens should be included in decision-making processes. Bottom-up.

Table 1: Different approaches of user participation and implied audiences

The operationalization leads to the following research questions:

RQ 1: How were the decision-making processes about the new broadcasting treaty organized?

RQ 2: What kind of image of the "implied audience" of PSM policy-making can be identified in both decision-making processes – was the audience seen as consumers or as citizens?

RQ 3: Is the implied audience reflected in the amendment of the new regulatory framework for PSM?

Observations and analysis

The idea of democratic theory and citizens' participation in public discourse is deeply rooted in PSM's legal framework in Germany. The high importance of PSM for opinion-formation and for all of society has been attested and reconfirmed by the Federal Constitutional Court in several decisions since its first decision of 1961. According to the highest German court, PSM are obliged to follow a serve-all principle with a clear educational mandate. PSM are a reference for public debate and should provide fundamental services, comparable to what is called the "Reithian-Trinity": information, education, and entertainment (Enli, 2008, p. 106). PSM's normative mandate is to enable all citizens to free formation of opinion. In contrast, commercial broadcasting is not equipped with a comparable mandate. In order to fulfil their task, PSM are funded by broadcasting fees, which currently sum up to over 8 billion Euro, from which 22 different analogue and digital TV and 60 radio stations in Germany are financed (Beitragsservice, 2014, p. 41).

The normative goals, however, have long been challenged. Public service broadcasting is situated in a quickly-changing and pluralising media environment. In Germany it has been challenged by political, technological and demographic changes, digitization, and convergence alongside a major shift in audience behaviour, from mere consumers to "prosumers" (Iosifidis 2010, p. 1; Jakubowicz 2010; Lowe 2007)[5]. Active parts of society claim to be heard as consumers, as Daskal (2016) pointed out. In the following sections, two cases of the inclusion of citizens in regulation and strategy-planning are explored.

The Federal Constitutional Court's ZDF decision

In the media menu for viewers in Germany, TV is still the leading medium with the broadest range. For 86% of the average German consumer above the age of 14, TV it is

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[5] In a digital environment the audience is able to produce own content, i.e. by commenting TV content on second screen in social networks or independent websites. Therefore, active users are also described as prosumer, produsers or similar.

Comunicação e Sociedade, vol. 30, 2016

The public: consumers or citizens? Participatory initiatives and the reform of public service media regulation in Germany · Christine Horz

the preferred medium to access information, followed by radio (79%) and the Internet (43%) (ARD & ZDF, 2011, p. 16)[6]. A representative survey with intermediate comparison came to the result that 68,6% of the German population (from 14 years on) relies on public service TV and 66,5% on public service radio for information (Hasebrink & Schmidt, 2012, p. 36). In the year 2015 this summed up to an average of 207 minutes of daily television consumption, 173 minutes of radio consumption, and 107 minutes of Internet use. Amongst young people between the age of 14 and 29, the preferred medium is the Internet (173 daily minutes) followed by TV (144 daily minutes) (Engel & Breunig, 2015, p. 312).

ZDF is the second biggest PSB network in Germany, situated in the western federal state of Rhineland-Palatinate. It is a television-only public service broadcaster with nationwide reach. Furthermore, ZDF and nine broadcasters under the umbrella of the ARD jointly engage in operation programs with Switzerland and Austria (3sat) and with France (Arte). ZDF had the highest market share in the German broadcasting market for the fourth year in a row in 2015.

The starting point of the legal action in the Federal Constitutional Court was the impeded re-election of the ZDF chief editor in 2009 after suspected interventions of the conservative Prime Minister Roland Koch, party member of the CDU (*Christlich-Demokratische Union*, Christian Democrats) who was then Vice-Chairman of the ZDF-broadcasting board. The ZDF's chief editor had to resign and was replaced by Peter Frey, presumably more in line with conservative politics. However, Rhineland-Palatinate and Hamburg assumed the election process as illegal and decided to demand a judicial review by the highest court. The main point of the prosecution was the assumed decisive power of politicians in the ZDF bodies because of their high numbers. In fact, until July 2016, the broadcasting council had 77 members, of whom at least 44% were members of political parties or the national or federal governments.

In fact, the debate about political influence in the supervisory bodies is part of the DNA of the ZDF: before its establishment in 1963 the conservative government under Konrad Andenauer (CDU) planned another programme (parallel to the broadcasters under the umbrella of the ARD) regulated by a federal law and not by the federal states. At the time, the Federal Constitutional Court decided in its first broadcasting verdict in 1961 that broadcasting is a cultural good and, hence, has to be regulated independently by the federal states. It thus kept up the idea that media pluralism What is even more important in the light of current events is that the highest court at the time also refused the intended dominant influence of politicians in the decision-making bodies. Although the ZDF was built as a public service broadcaster after the intervention of the Federal Broadcasting Court, the debate about a dominant political influence in the supervisory bodies of the ZDF has flared up in the past decades on a regular basis (Donsbach & Mathes, 2000, pp. 486-492; Krotz, 1996).

The impeded re-election in the year 2010 of the ZDF chief editor, Nikolaus Brender, known for his integrity and independence, created a momentum to clear up a long-lasting irritation of the ZDF council is dominated by (conservative) politicians. Thus, in its 14th

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[6] Immigrants: TV (79%), radio (51%), and Internet (39%).

broadcasting verdict in March 2014, the Federal Constitutional Court decided in favour of the prosecutor who asked to clarify, if the high amount of politicians in the council is a violation of the constitutional requirement of PSM being distant from the state. The most important guidelines of this judgement are:

1. Politicians and government representatives have to be reduced to a third of the total council members in order to impair the influence of the state.

2. Political parties' representatives are no longer allowed in the councils.

3. The work of the PSB councils should be made transparent, so that society is able to co-control PSM and the work of the bodies.

4. The broadcasting councils have to be diversified and should adopt a more dynamic composition scheme in order to countervail the "petrification" of a dominant-opinion majority and to reflect society's "diversity of experiences and interests". This also includes small groups and individuals that are not represented in the media "so that also those not coherently organized perspectives can be reflected" (Bundesverfassungsgericht, 2014, s/p)

In terms of PSM's 60-years-long history in Germany, this last point, as such, can be seen as a small revolution. Until 2016 the composition of the councils remained more or less unchanged since PSB was founded after WWII. Social groups, underrepresented or more-or-less excluded in the supervisory bodies, such as female representatives, migrants, or religious minorities, should now be entitled to participate. It further points out that a proportion of the council's representatives should reflect civil society's non-organized interests, as well as those of individuals, which is a novelty within the corporatist model of the German media system (Hallin & Mancini, 2004). The demanded "dynamic" composition of the broadcasting council challenges the existing rigid representation scheme. Moreover, it demands that gender equality be respected. In fact, a survey of the women's journalists league (Journalistinnenbund, 2012) revealed that in six of eleven supervisory bodies less than 30% of the representatives were female[7]. This is perceived as a violation of the legal framework.

In the broader perspective of a restructuring of the PSM for the 21st century, the decision might not be revolutionary but rather pragmatic, as politicians and government representatives are not completely banned from the councils and are still allowed to constitute a powerful faction, not only in numbers, but also in terms of qualitative power through informal networks called friendship-circles (*Freundeskreise*). These influential circles have also been criticised by the highest court, however, were not touched upon by the legislator, probably because informal networks are difficult to account for[8].

Audiences as actors of civil society in media policy debates and media regulation

The German media market is the one with the highest range and most diverse supply of broadcasting and media output in Europe. However, as mentioned above, media

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[7] Radio Bremen has the highest amount of female representatives (51,7%), whereas East-German MDR has the lowest (11,7%).

[8] I have discussed the new regulatory framework of the ZDF with respect to dynamics and diversity elsewhere, see Horz 2016.

policy seems to not be in a special focus for civil society. It is a peculiarity of the German system that an organization like the British *Voice of the Listener and Viewer* (VLV) does not exist, although the German PSM System is comparable to the BBC. The VLV was founded in 1983 by Jocelyn Hay, and became an influential pressure group with the aim of safeguarding the independence and quality of the BBC's programmes. The VLV also demands for an independent Licence Fee Body – an institutionalized council that leads the public debate about the financing of the BBC –, because recent negotiations were settled behind closed government doors and without the audience's involvement (VLV, 2015).

In Germany, the implementation of a new licence fee in the year 2013 – a pay-per-citizen or "household levy" instead of the former pay-per-device – created a momentum for a broader public debate about media policy issues. Some users rejected the fees or PSM altogether, and also lobby groups mushroomed after the "household levy" was implemented to argue against PSM.

The pressure groups rejecting the fees perceive the new financing-scheme as unjust and as a tax-like "compulsory levy" (Zwangsabgabe). Activists like *Remote-Control*, the *Initiative for media use without compulsory levy* (Initiative Mediennutzung ohne Zwangsgebühren), or *Online-Boykott* critically question why they have to pay for basic services in the face of the availability of a plethora of different media. According to their own accounts, the various online-petitions organized about 800.000 signatures against the household levy. The activists of *Remote-Control*, combining constructive principles with their boykott, have organized over six thousand boycotters, together holding back over 2.5 million Euro in licence fees. They demand a reward for their fees and a public service media that no longer ignores the public debate: "we suspend our payments in order to negotiate how our fees are spent. We demand a socially-agreeable calculation of the amount. We demand for political and economic transparency. Public Service Broadcasting has to be as plural as its users" (Remote-Control, 2013)[9].

Online-Boykott describes itself as the "biggest platform in Germany that deals with the financing of PSM"[10]. The *Initiative for media use without compulsory levy* launched an open petition and received over 12000 supporters, according to their own account[11]. However, it is not easy to tell if the figures are correct and if these activists indeed evolved from civil society – or are rather supported or even launched by lobbyist with a neoliberal agenda, like for example *GEZ-Boykott*. This campaign was launched by the *Prometheus Institute*, which has a clear agenda against public funding of media and is situated close to the FDP political party, which moderates an anti-PSM debate that will be referred to below[12].

The Permanent Audience Conference of the PSM (*Ständige Publikumskonferenz der öffentlich-rechtlichen Medien e.V.*) is an association that is mainly focused on media content criticism and formal complaints about PSM content, but also picks up on the

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[9] Retrieved from http://www.zahlungsstreik.net/.

[10] Retrieved from http://online-boykott.de/de/buergerwehr/146-kontrolle-ist-besser-aber-wer-kontrolliert-die-kontrolleure

[11] Retrieved from http://www.mediennutzung-ohne-zwangsgebuehren.de/index.php/petition-unterschriftensammlung; https://www.openpetition.de/petition/online/ard-zdf-so-gez-nicht-weiter-zahlungszwang-stop-rundfunkreform-jetzt

[12] Retrieved from http://prometheusinstitut.de/uber-uns/

accusation that the PSM is arrogant and distant from the viewers and listeners (Kleinsteuber, 2011; Wolf, 2015). More in-depth research is necessary, but at this point a single-issue orientation can be observed that is rather focused on the user as consumer (broadcasting fees, media content criticism). "Problem-sensitive" civic participatory initiatives that demand structural changes and better opportunities for participation in media governance, however, seem to be rare. The PSM Initiative (*Initiativkreis öffentlich-rechtlicher Rundfunk, Köln e.V.*) was established and has been active since 1994, but is still a rather regional phenomenon, situated in Cologne, next to the largest broadcaster WDR. One bottom-up activist group, the Association for the establishment of audience councils (*Initiative zur Etablierung von Publikumsräten*, short: *Publikumsrat*), strives to enhance audience opportunities to be included in media policy debates and decision-making with respect to PSM. The civil society groups consist mainly of media and communication scholars, former PSM employees and individual listeners and viewers who have vested interest in a functioning public service media[13]. The idea is not new, in fact the scholarly debate about the inclusion of audiences in media policy decisions and media governance of public service broadcasting has been conducted for over thirty years in Germany, since the liberalization of the broadcasting market. New, however, is the recent attempt to use the debate about the restructuring of broadcasting councils as a fresh starting point to foster a bottom-up discourse about media policy issues.

In Germany, broadcasting councils should represent the general public, which was recently confirmed by the regulator and laid down in the 17th treaty for a changed inter-state broadcasting (*17. Rundfunkänderungsstaatsvertrag*, §19a (1) in Bundesländer, 2015, p. 6). Confronted with the question of audience participation, broadcasting council members and directors describe their roles as the advocates or ombudsmen of the audience, hence seeing further participation as unnecessary. However, communication scholars state that representatives often regard themselves as representatives of their respective organisations rather than the wider public. Their work is described as non-transparent and elitist (Kleinsteuber, 2011, p. 59).

In consequence, scholars discuss whether a representational system dominated by interest groups alone is legitimate to decide about and supervise PSM – or if audiences need to take part in a more direct, plebiscitary manner. With respect to media governance, audiences as actors of civil society should not only be held responsible financially, but also involved in the decision-making processes (Krotz, 1996; Weichert, 2005; Eilders et al., 2006; Jarren, 2007; Kleinsteuber & Nehls, 2011). Hence, better participation options seem reasonable, but need careful consideration in the face of broadcasting freedom and the question of who is legitimated to speak for others.

The public debate

Carpentier (2011a) perceives the discrepancy between participation options in the Internet and PSM as a paradox that is used in battles about the definition of what is

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[13] This initiative will not be further evaluated, as the author of this paper is a co-founder.

democratic and what is not. These battles can also be observed in the recent debate about the amendment of the ZDF interstate treaty. It is important to mention that these arguments have to be considered in a broader controversy about the role and purpose of PSM in Germany. Two strands dominated the public debate while the negotiations about the new regulatory framework for the ZDF and other PSM broadcasters went on, with one pleading for the abandonment of PSM altogether. This, again, is articulated with various arguments from diverse standpoints. On the one hand, it is influenced by a neoliberal agenda put forward by interest groups that perceive public financing of PSM as a distortion of competition in a free market. Lobby groups like the Association of Private Broadcasters and Telemedia (*Verband Privater Rundfunk-und Telemedien, VPRT*) or the Federal Association of German Newspaper Publishers (*Bundesverband deutscher Zeitungsverleger*), who cannot rely on public funding, have a genuine interest in a liberalized media market that contrasts the role and purpose of PSM. Pressure groups like the Federal Association of the Digital Economy provide their own recommendations: that PSM should be transformed into non-funded players in a totally liberalized media environment (*Bundesverband Digitale Wirtschaft*, 2015). On the other hand, critical audiences as well as right-wing, anti-Islamic media sceptics like PEGIDA[14], and other ideological groups, accuse PSM of biased reporting.

On the other hand, political debates are also partly informed by the argument to abolish PSM. The scientific board of the Ministry of Finance provided an expertise report, saying that PSM should not be publically-financed anymore. They argued that, instead of a reference, PSM should provide additional offerings to what commercial broadcasters cannot provide. However, this report intentionally masks that PSM are particularly protected by the law. Furthermore, according to the time when it was published – in the middle of the negotiation process about a new PSM regulatory framework – it can be identified as a political campaign to influence the negotiations (*Wissenschaftlicher Beirat des Bundesfinanzministeriums,* 2014).

Apart from this, the second position is put forward mainly by communication scholars, liberal politicians, and practitioners who have a vested interest in a functioning PSM and articulate qualified critique about media coverage, supervision, and organization. They argue that PSM are in line with normative-democratic principles and for the benefit of a pluralistic media system. This view advocates for new models for broader participation of civil society in media governance instead of the current corporatist structures. This perspective basically deals with a collectivization that has to be organized in media regulation in line with fundamental rights (Krieg & Rhomberg, 2015).

Organization of the Decision-Making Processes for New Regulatory Frameworks
Negotiating Media Policy in Rhineland-Palatinate, Home of the ZDF

Rhineland-Palatinate, which led the country-wide negotiations, invited the public for the first time to take part in a public hearing via the Internet. In this manner, everyone

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[14] Patriotische Europäer gegen die Islamisierung des Abendlandes (*Patriotic Europeans against the Islamisation of the Occident*).

interested could contribute recommendations for the 17th interstate treaty (Ministerin für Bundesangelegenheiten, Europa und Medien, 2015). Of 29 statements received by the state chancellery, 26 came from political parties, unions, a few civic associations like LGBTQ organisations, the humanist society, and women's rights organisations. Furthermore, PSM and even the ZDF itself took part in the process, as well as other professional media organisations, media producer's associations, and the digital economy.

The opening of the public debate indicates that the implied audience in this process are imagined as citizens. However, the open question of what should be changed in the amendment required expertise. Accordingly, only two contributors are bottom-up audience groups (*Publikumsrat* and *Ständige Publikumskonferenz*) and only one statement was sent by an individual citizen. Moreover, the statement of the individual citizen, Mr. Wall, was not initially published. Mr. Wall stated in an interview with the author of this paper (2015) that he discussed the matter with the state government and it finally agreed to publish his statement as well. This incident illustrates that the regulator's aim to request statements from the audience seems ambivalent. Those responsible for media regulation in Germany seem to have influential associations and the corporatist idea of democratic decision-making in mind when they define the implied audience as citizens. While the statements presented are published in the homepage of the state government, there are no further comments[15]. Here again, the focus lies on those specifically-informed or interested in the statements and the consultation process and not on a broader public debate.

In fact, the negotiations before and after the consultation have been criticised. After the first draft was launched on May 19th, 2015, civil society groups denounced that the composition of the future council – according to the draft – was still not independent enough from state influence (Huber, 2015). Politicians like Tabea Rößner (Federal Minister and Speaker of the Green Party for Media and the Creative Industries) demanded more transparency and a broader public debate about the statements. She proposed to summon an independent commission that should, first of all, discuss who was legitimate to represent the general public (PM 2015). However, the prime ministers of the federal states (Bundesländer) did not follow this proposal and decided on the composition of the council behind closed doors.

The public was only sporadically informed by the media, for example after the convention of prime ministers of the sixteen federal states pronounced a reduction of seats in the ZDF council from 77 to 60 (Grimberg, 2014). The lack of transparency is particularly interesting, as it is a central demand of the Federal Constitutional Court's verdict. Moreover, the negotiations had already raised public awareness on the topic.

The Federal Constitutional Court demanded a reduction of politicians to a third of the total members, which is reflected in the amended broadcasting treaty. Thus, 20 members of the new councils are government officials or representatives. The remaining forty representatives are divided into two subgroups. The first consists of socially-relevant interest groups such as churches, unions, employer organisations, and others

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[15] Retrieved from https://www.rlp.de/ar/landesregierung/staatskanzlei/medienpolitik/.

who are long-term members of this body. As this particular group has already been part of the council, the composition remains practically unchanged. The second subgroup, a so-called small-basket group, consists of sixteen representatives, of which each federal state has to appoint one specific minority, like youth, migrants, Muslims, etc. Furthermore, the composition of the small-basket group will be audited after two legislative periods (eight years).

It is indeed positive that a seat for minorities will be reserved for the first time since the conception of PSM. In this new system each accepted minority group will not have to negotiate separately anymore about their specific demands to PSM in the hopes of being heard. They are now part of the process. Nevertheless, the group's orientation is not what was emphasized by the Constitutional Court. Moreover, it is overdue to include cultural and religious minorities. Only six out of eleven PSM stations in Germany have so far provided a seat for migrant representatives, for example. Additionally, only two PSM stations reserve a seat for Muslims in the supervisory bodies, even though Islam is the second largest religion in Germany after Christianity (Horz, 2016).

Taking a closer look at the amendment reveals more problematic aspects. First of all, a hierarchy between religious beliefs can be observed. Whereas four Christian representatives and one Jewish representative belong to the groups with fixed seats, Muslim representatives belong to the small-basket group that can easily be excluded after the evaluation. While Christians make up about 60% of society, the Jewish minority is estimated at about one to two hundred thousand while about four to six million Muslims live in Germany. However, Islam in Germany does not have the same legal status as a corporate body that Christianity has. This is of special importance with respect to the third-party right to broadcast that allows corporate bodies to have independent influence on the programming. Hence, the amendment of the new regulatory framework for the ZDF does barely reflect the "super-diversity" of German society.

Furthermore, equally-important groups like the peace movement or Attac (*Association pour la Taxation des Transactions Financières et pour l'Action Citoyenne*, network of alter-globalists, originally from France) will not be represented. Thus, it can be concluded that the composition seems to be arbitrary. Furthermore, the evaluation of the configuration of this group after two legislative periods (eight years) seems too long with respect to the demanded dynamic process. Particularly, civil society groups and individuals' interests – with nevertheless innovative ideas and cultural benefits – remain more or less excluded. Therefore, the comprehensive demand from the Federal Constitutional Court that the audience should be addressed as citizens by also giving individuals and non-organized interests the opportunity to participate in the councils remains a problem.

Negotiating Media Policy in Northrhine-Westfalia, home of the WDR

The WDR a regional broadcaster with nationwide range and the largest public service broadcaster under the umbrella of the ARD. According to the verdict of the Federal Constitutional Court, Northrhine-Westfalia, home of the WDR, also had to review its

PSM regulation, which resulted in the new WDR Treaty passed by the legislation on the 2nd of February, 2016. Like in Rhineland-Palatinate, the state government decided to launch a public hearing. However, in contrast to Rhineland-Palatinate, the legislator of Northrhine-Westfalia conducted a slightly different method of public consultation.

The process took the form of an online questionnaire with easy and accessible questions related to the of viewers' and listeners' everyday life. It was open to the public between February 19th and March 19th, 2015 (Presseinformation, 2015). The online consultation consisted of 20 questions that revolved around media policy issues, programme issues, and the WDR as an institution and seemed to rather inquire about the public value of the WDR from citizens' perspective.

The online questionnaire received "overwhelming feedback", according to the Minister for the Media, Angelika Schwall-Düren (Ministerin, Startpage of the Online-Consultation, 2015). In fact, about 1200 comments and over 1700 appreciations were posted. Moreover, thirteen statements reached the state government, of which seven were sent by individual users of the WDR, and two by bottom-up audience groups. Surprisingly, many of the statements, then visible in the homepage of the consultation process, were very well informed. Question number eight (regarding the composition of the broadcasting council) received 59 comments. Comment number one for example, points out that the composition of the council is outmoded and does not reflect the pluralistic society anymore. Comment number four asks why Muslims are excluded from the body, whereas comment number five rejects representatives of religious groups in the council altogether. Most of the commentators chose to be anonymous, which makes it difficult to analyse if they come from civil society or rather experts, media professionals such as employees of the WDR itself or interest groups. Furthermore, it is also not possible to tell if commentators logged in several times to post comments on the same issue.

The answers and the statements reflect a more participatory scheme of the WDR bodies. Finally, it has been laid down in the amendment of the WDR Treaty that nine seats of 58 will be publicly advertised, of which seven had to apply to the state government and two to the broadcasting council of the WDR. All nine new members of the civil society are meanwhile elected. The legislator in Northrhine-Westfalia, hence, partly complied with the Federal Constitutional Court's demand to be more transparent, to prevent the body from petrification, and to diversify the representatives. In fact, for the first time a PSM council in Germany was open for membership applications from civil society and individuals.

Concluding remarks

The Federal Constitutional Court demanded for a complex representation scheme based on democratic theory. It had to come to a solution that respects group rights as well as individual interests in order to allow public legitimacy for PSM – an idea that reflects the scholarly debate (Kleinsteuber, 2011, p. 74).

The case of the ZDF interstate treaty negotiations indicates that neither the legislator nor the civil society followed an implied view of audience-as-citizens. Instead, the public was more or less excluded from the decision-making process. Only the exception

of the open consultation built a window of opportunity to take part in the decision-making about the future composition of the ZDF council. The statements submitted to the ZDF interstate treaty suggest that the approach of the consultation and the openness – paradoxically – created a problem. The consultation mostly reached the well-informed and other usual stakeholders. Thus, the ZDF consultation remains a rather elitist process, which barely resonates amongst wider audiences as actors of civil society.

Northrhine-Westfalia also decided to launch an open consultation. In contrast to Rhineland-Palatinate, it approached the audience with an easy and accessible online questionnaire. It can be assumed that the questions oriented the audience towards important media policy issues, which made it easier for them to take a standpoint. The encouraging amount of comments related to the WDR Treaty suggest that media policy can be an interesting issue for active audiences if understood as citizens. Moreover, the WDR's online consultation itself has the potential to further develop the debate about media policy. It can be assumed that the Northrhine-Westfalian government partly respected the users' comments, i.e. that the composition of the council needed to be diversified. The recent possibility of applying for a seat in the WDR council could be a starting point for a participatory structure that is getting over the traditional PSM corporatist model.

The evidence from previous studies that civil society tends to engage in media criticism instead of media policy has to be re-examined.

Further studies could systematically investigate the implied image of the audience in media regulation. Additionally, the self-perception and forms of dialogue between citizens and PSM could be rewarding to be researched and would contribute to a better understanding of the idea of users-as-citizen in media governance.

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The public: consumers or citizens? Participatory initiatives and the reform of public service media regulation in Germany · Christine Horz

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Comunicação e Sociedade, vol. 30, 2016

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