

Network neutrality and the role of Presse-Grosso Trust in the information society\*

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## **A Basics**

### **I. Network and the economy**

Goods production and goods distribution are clearly distinguishable fundamental functions of a developed economy. During medieval times, farmers or basket makers sold their fruits or products themselves on the city markets in the vicinity. Independent distribution was understandably done quickly by themselves over large a commercial area. Thinking particularly, among other things, of training in the large trading firms of the Middle Ages and modern times. This trend continued to strengthen world trade, although “global players” also today partly still try to organize international distribution of their goods themselves (usually certainly in independence under company law). The transport of goods and their retail are today typically (but not yet without exception) separated production.

Then transport of good over long distances quickly led to the establishment of trade routes, such as the old Silk-Route and the old Salt Roads and the formation of introduction of county shows. The roads served not only the needs of goods transport, but also those of travellers.

With the industrial revolution the transportation network become ever more varied, the roads and water ways increasingly used from ever increasingly greater machine-driven vehicles and/or ships. Technology-dominated networks, especially the railways, and finally the air traffic networks developed. The use of these transportation networks for goods is obviously something other than to that of goods distribution or passenger usage. The transport networks are not for goods distribution, but a prerequisite for goods distribution. In general, they serve not only the interests of an individual enterprise, but to the many companies and more specifically the general public. They are public networks. The legal construction follows suit by declaring roads as public property with public access.

But it doesn't remain in the transport networks. The labour market is also building other networks from sales and service networks to other networks such as, for example, ice and drink vending machines.

The prototype of the rail networks followed the energy networks, as the more technical networks (electricity, gas and water) allowed for longer production of energy and its distribution on the one

hand,(often under control of the government) until its breakup under the influence of market euphoria and privatisation under European Law.

Communication networks went their own way because they regularly distribute information that doesn't relate to transfer of goods. The Post is an early prototype of a principally non-technical information system where the information production and distribution are almost hermetically separate from each other. This also applies to the first technical information network, the telephone, and later the radio and telefax. For the broadcast networks this separation of radio production and broadcasting distribution, however, was often not initially available, and the Internet has finally very much combined these and other intermediate forms for individual and mass produced communication.

Networks of printed information, such as the press and book markets, contain characteristics of both product distribution on the one hand, and its associated information distribution on the other. This makes it clear that distribution is to be seen not only as an expression of economic freedom but especially freedom of communication. This is a legally divides book and press wholesalers from other crucial wholesalers. It is this fact that means Presse-Grosso stands on several constitutional pillars: namely freedom of enterprise, economy and communication. The strict separation of information generation and dissemination of information - as with the post or telephone - leaves strong influences in the area of press and books. From this, in more recent times, publishers and independent postal companies are trying to eliminate a great deal of the division or damage to the information systems.

The level separation in the information system shows up particularly in the singular concentration of the German Presse-Grosso. A contract network has ensured, for a long time, there being a separation from information production on the one hand, and information distribution on the other.

## **II. Use of networks**

More customers - and hence lower costs, can be reached through a network of providers. Conversely, the customer likewise has lower costs and more choice. By joining various market

players, these so-called external networks lead to combined benefits from the increased size of the network, which increases proportionally in density. This is the real economic use of the network.

The size and value of networks is growing principally from its neutrality and independence, because all network users are treated equally. This can lead to lower costs structures, but above all, lead to greater press therefore diversity of opinion. The network also allows one to become independent from labour optimization within network operations. The separation allows for more levels of efficiency, all related to the sales organization of press distribution and prevents structurally hidden cross-subsidies for the press by producing falsified cost of sales.

## **B. Legal Framework**

Living in a state of law, these extensive networks are such an important phenomena that they can not exist without legal response and refinement. In any case, decisions on major infrastructure allowed for living together in society “much” (as a legal technical term) within the meaning of the materiality of Federal Law and therefore require, in principal, a statutory embodiment of parliament. This is certainly true of the privatised networks, as is indeed clear from our legal system. This is certainly true of the largest government and private networks, in the former case, while, of course, private networks are always predominantly made without any statutory scheme.

The Internet represents an interesting intermediate category, which will possibly profit from influencing sovereign standardisations.

## **I. National Networks**

Classic national networks (roads, waterways and flight paths) are primarily governed by public law. The Federal reform Act II, established a connection network of the federation (Art. 91c Abs. 4GG), providing a logical design for the Federation. However, European and International law continue to penetrate here and have long been dominant, e.g. Air traffic control.

## II. Privatised Networks

In particular, the privatization of former state networks in the area of the railway, postal and telecommunications, but may also include electricity, gas and water networks had the first wave of significant legalization, the so-called regulatory law, led, at least initially – to not less, but rather more legislation. Previously designed as core functions of public interest, these tasks, especially through the influence of European law, have been, to a large extent, shifted to private companies.

After privatisation, the State no longer takes a fulfilment of responsibility but it must stand as a guarantor for performance conservation and provision of most common state related engineering systems. There is no exaggeration to the claims of obligation to public security. Under the Constitution there are specific guarantee obligations of State, compatible with Article 87e para 4 GG dealing with railways, and Article 87f, paragraph 1 GG dealing with postal and telecommunications, derived from an expression of its infrastructure responsibilities. Accompanying the liberalization and deregulation of formerly state-monopolized markets was the securing of basic services in most common related services is a major concern.

[The achievement of a national responsibility guarantee was flanked by the introduction of the universal model. This project is to make the users demand for a minimum service possible, with a specified quality and at reasonable prices. A basic infrastructure being guaranteed to be supplied to the final users, the conflict between this goal and competition system with the European Union is reduced. The universal model amounts to this: If in a privatisation, the market fails to provide basic services as protection against possible market failures, either all or some providers impose universal service obligations, whereby the resulting costs can be adjusted.]

Ensuring basic services as an issue for the State is determined by the regulation of their respective global markets. [These are largely traditional instruments of economic administrative law used by the exercise of regulatory powers to actively intervene on antitrust scrutiny of specific a specific type of legal and technical supervision of individual vendors in the post and telecommunications, railway and energy market sectors.] The common starting point for regulation is free entry for all service providers as well as adequate public safety through the implementation of the general parameters of competition or market-compatible instruments.

[Market access is determined according to sector-specific access rules such as in § § 20 ff EnWG, § § 16 ff, 70 the Act and § 14 AEG. This state is characterised as a network responsibility ensuring responsibility for major infrastructures, including the design of network ownership. Especially in cases where there is only one operator, whose network is to be open, and also of state responsibility after the separation of multiple service providers to extend the network, with particular significance to ensure an open network under the terms of use, the allocation of limited capacity and usage fees . Arising from these issues are further obligatory guarantees, in particular for communication networks, which are largely determined by fundamental rights.]

### **III. Internet**

An important and interesting intermediate category is represented by the Internet, which has since developed into one of the most important sources of information for the population as well as an important space for freedom of personal development. In addition to the virtually inexhaustible reservoir of information, especially with regard to opening up opportunities for participation of individuals in varied network-like communications structures, which itself has a democratising effect on participation, organisation and dissemination of communication. The internet was originally largely on a national technical basis but has long been privatised and today is used by private technical telecommunications networks. The network organisation and content of network design is primarily entirely private matter, though governmental influences are certainly present, and a trend towards state internet censorship could increase as well.

It is striking that the Internet has largely been governed by the principal of International, social self-regulation (ICANN) which certainly also has a lack of democracy. With progress in developing technical entry barriers and filtering techniques, one must expect increased government influence.

[This applies not only to non-democratic or pre-democratic countries (e.g. China, Singapore, Saudi Arabia), but increasingly also for democratic nations in the fight against anti-constitutional, child pornography and violent content, as, for example, not yet enforced in the more aggressive German statutory law. This represents a fundamental turning point in the recent unbridled building structures of the Internet, in constitutional states – on grounds of fundamental rights – which should not be made without legal basis.]

#### **IV. Private networks**

Despite all the fascination, especially for economists, but also for the lawyers of privatisation and the consequences of privatisation, it should not be overlooked that major private networks are not products of privatisation. Such networks have been established in advance by individuals without having previously been in state hands. This refers primarily to primarily non-technical networks, even if the detail of technology is used. The haulage and taxi industry, and above all, the distribution systems of trade, particularly those of wholesale, have always been private networks. Even in the Presse-Grosso. This has always been private. Networks are products of individual activities of freedom, primarily of professional freedom, free enterprise and especially also the freedom of press and the Presse-Grosso.

#### **V. Aspects of Basic Rights**

Basic rights initially means that the already existing rights of private (and gradually also privatised) networks have the fundamental right to protection of proceeds i.e. resulting from fundamental activities. The Presse-Grosso is somewhat the product of basic rights of use and is therefore worthy of protection. Therein lies one constitutional, but important, side aspect. The legal use of a network is a basic right, the main significance of the network and its function as a fundamental implementation of the network. The network enables the perception of many basic functions for the operator and the user, with the buyer and seller, and could be giver and recipient of information. Presse-Grosso, as a fundamental implementation of network deals, has the basic rights as wholesaler, publisher, but ultimately journalist and, last, but not least, the basic rights of the reader. Through the network of Presse-Grosso, the basic rights referred to, in fact, are realized or made exercisable. This multiplicity of possible basic legal implementations it makes it appear meaningful to put the basic rights of at least the private and privatized networks - in this case the Presse-Grosso - under the protection of basic rights and in the context of an objective guarantee for an institution or structure. The basic rights for a network themselves are anything other than an addition, i.e. the sum of all individual basic rights in relation to the network.

Basic network rights are initially aimed at protection from state action, not only from imperative procedures (forbidden), but also from hindrance by the state through state competition. In contrast, if basic right of network protection is directed against government omissions, in this

case government action should be enforced under appeal of basic rights. This can be possible using legal aid (subsidies) especially in relation to the defence of third parties, and attacks on private parties on the grounds of legal protection. This could, for example, mean the state defence of publishing in traditional wholesale areas and grants for the distribution of newspapers in sparsely populated areas.

Although the state has significant space for decision, the measures meeting legal duties to protect basic legal rights must not fall below a certain minimum (banned minimum) but shouldn't be denied that a third impact (e.g. in the context of economic competition) itself can enjoy basic rights (e.g. in advance of publishing in traditional wholesale Presse-Grosso areas). The state then gets into conflict of basic expectations of various fundamental basic rights. It must, in such cases, try to solve this fundamental collision, i.e. establish a practical correlation of the fundamental positions affected by a careful balance between these positions. This compensation takes into account the number of people affected and the scale of intensity for concern for the basic values of law, for example, the objective importance for the freedom of press and press pluralism, there meaning simply 'constituting democracy'.

## **C. Network Neutrality**

### 1. General

Networks as a result and enabling of basic rights entitlement is in itself not an entitlement. It is more than the sentence: Networks – your obligation. It has long been law, just because many people concurrently, but in a variety of ways, are dependant on their basic right to develop a network, including the need for open access and non-discriminatory participation and use of it at a relevant standard is politically demanded.

### 2. Network Neutrality on the Internet

The discussion about the concept of net neutrality is currently unfolding at a particular intensity in the communications network of the Internet. Network neutrality means, in this context,

especially the treatment of data packets, regardless of their source, to whom they are sent or what they carry. Until now, access to global networks, which is ensured by the constitution of the Internet, so far is without safeguard to anybody. The technological development makes it possible, however, the source - the packet is sent computer from a computer - and find out the contents of data packets (Deep Packet Inspection). This has allowed qualitative or quantitative preferential treatment for data transmission, the disabling, third party filtering, or blocking of unwanted packets. The technical conditions therefore allow network operators to restrict the neutrality of the Internet.

[The end-to-end principle, the development of Internet applications and the Internet economy as it stands today, has developed: its simple design and innovators have made the Internet open. Each vendor has based his ideas of new services on the IP-basis. The ever-increasing volume of data has collected through the so-called backbone operators. These backbones are central broadband data connections; the quasi "backbone" of the Internet represents a large proportion of the flow of Internet traffic. It will fund these major network operators and key exchange points for the traffic from access providers, and in turn, ask the service provider to the checkout.]

With the emergence of ever new services on the Internet, which require an ever-greater bandwidth, this principle of a neutral network, all packets treated equally, are being questioned more and more. Whether it's Voice over IP (VoIP), for calls over the Internet, or be it the streaming of multimedia content: for the customer, a film without stuttering and pausing arrives in real time and a phone conversation can be conducted without breakup, a shorter time window for the delivery of individual data packets, at the same time, with an increasing network load. Recent studies estimate that the increase of such multimedia will be achieved in 2010, with the capacity limitations of the Internet in its current form.

Against this background, the provider is actively working on considering reorganizing the Internet. A so-called "intelligent" network could, for example, already be designed, which is dependent on the transport of data from its content, sender or receiver. It would be possible to create different classes of traffic that would be treated differently: in future, who pays more would have preferential transport of content. In particular, providers of time-consuming or bandwidth-hungry services such as VoIP, then have to pay proportionately more to get the guaranteed bandwidth and transmission speed, so that they can offer further services.

At this point, however, a dilemma is created, resulting from the amalgamation of some existing access providers and content providers. The means of such great intelligent network operators also be in a position to own services above those of competitors who may not have its own network capacity on this scale, would be preferred. Thus, there have already been the first attempts by individual operators in the U.S., to stop the artificial VoIP service from competitors.

Against this background, in particular, a debate resulted over network neutrality in the U.S. The advocates are calling for a regulatory intervention in the future by the legal or regulatory authority, to guarantee equal treatment for all deals over the Internet. The opponents want to leave the matter to competition and deal with only one possible abuse of general competition rules. The U.S. government has now called explicitly and strongly for network neutrality and wants them to enforce the FCC (Federal Communications Commission). In 2004, the FCC had set up four Internet principles which lay out their duties: firstly, freedom of access for consumers to all legal content; secondly, freedom to select the right applications and services; thirdly - to be allowed to use free equipment, and; fourthly, tariff transparency.

These four “Internet principles” should be expanded two more, by the FCC, under new plans: content and services providers may not discriminate once and must disclose it to other networks. As an example of the need for the two new principles is an attempt by an internet provider to silently block peer-to-peer network traffic, which will, after the announcement, be preventable by the FCC.

This administrative approach is already being implemented. It is flanked by a bill being introduced in congress by Republican Congressman Markey, the “Preservation of Internet freedom Act 2009.”

This detailed draft regulation prohibits preference or arbitrarily discriminating Internet content. Interference with traffic is only allowed for reasons of network management, for example, load control. It is already at the third attempt to enshrine net neutrality into law in the U.S.A. After the change of political direction in the U.S., the prospects for success of the bill are concrete.

It has now been decided by the EU to provide a potent telecoms package for network neutrality, but is already criticized as inadequate in terms of ensuring a continuation of network neutrality. The coalition agreement between CDU, CSU and FDP by the autumn of 2009 has now also

adopted the issue of network neutrality on the Internet and other new media. If this principle of free competition is not ensured, then, if necessary, it should be counterbalanced with the target of network neutrality. Instruments of administrative control would be a viable means to anchor an enforcement of the principle of network neutrality in the market, when ultimately unsuccessful as self-regulating.

One sees the Internet not only as a marketplace for providers of services, but now also as one of the most important communications media, so the idea of net neutrality has here also a very fundamental aspect. People use the Internet not only for shopping, but rather to inform themselves about independent and different sources or to express their views on the topics which interest them, either through their own websites, known as blogs, by commenting on online articles or by participating in discussion forums. It can be seen that a preference or discrimination of certain content or the sender by the network operators also has a direct opposite (detrimental or preferential) effect on freedom of information or freedom of expression of other network users. Overall, it is clearly intended that the concept of net neutrality and the preservation of freedom of expression and diversity of opinion should be borne in mind behind the debate about net neutrality and major Internet service providers, be they large online retailer or provider of search engines, their motivation may also be due to concerns about its costs and profit margins. As always, mass communication has the unmistakable role of network neutrality. Their absence would be able to seriously hinder the free flow of information on the Internet and other media.

### 3. Presse-Grosso and Network Neutrality

What is being discussed on the Internet and still calls for legal protection, has been broadly defined and self-regulation has been implemented within the German Presse-Grosso for many years. The Presse-Grosso has long ensured neutrality of press distribution. Not only is this economically important, especially for small and medium press enterprises, but it is also particularly important against the backdrop of diversity and promotes diversity of conservation in the press and opinion market. Neutrality of the Presse-Grosso alone, correlated with the basic delivery through the respective press wholesalers, requires them to absorb the range of products of all publishers on non-discriminatory terms. In particular, this decision must not be made dependant on the contents of the press product. This corresponds, on the part of publishers, with

the claim of press wholesalers, that their products will be included within the ranges of the wholesalers.

This requirement of the wholesalers for neutrality would rather be passed over to the disposition of retailers, which in turn are obliged to present the product range supplied to them fully and without discrimination.

The legal detail of the nature of the obligation of neutrality in the Presse-Grosso is in dispute. In part, this is seen simply as a (legally binding) ethos of publishers and wholesalers: the wholesalers take all publishing products in their range, and in return, the publishers are required to give adequate margins to allow the distribution of less profitable products.

A widespread opinion in favour of the duty of neutrality is manifested in the unique position of Presse-Grosso. If the largest of wholesale publishers or their various titles deny access, they would be seen to lose their unique claim for antitrust legitimacy and be themselves exposed to antitrust sanctions. However, the observance of the neutrality obligation is already in the best interest of the wholesalers, the only way to legitimize their special position permanently.

## **D. Network Independence**

### **I. General**

The separation of levels is an important type of specialization influence distribution in the economy, especially the media industry. The separation of functional levels is a means of distribution, entanglement and control of economic and public opinion. A special form of this control is the creation of network independence, referring in particular to the separation of the production level of the distribution layer or the separation of the information generated by the dissemination of information.

Network independence stands in relation to serve network neutrality. It has no self-purpose, but it is an instrument for ensuring network neutrality. The separation between product manufacturers and service providers and network operators on the one hand, the other is to prevent

discrimination or restrictions occurring from network access, i.e. that no more or no longer solely from the performance (e.g. the product or information quality), but decided on access material or market success. That would be a falsification of journalistic quality competition. So this does not happen, in principle, guaranteed by a network independence where this is not outweighed by economic influences, or equity participation, e.g. through the network purchase from producers or through the acquisition of companies by Presse-Grosso publishers.

That should not alter the view that network neutrality, even for illegal independent company networks, and in particular, is ensured by network suppliers appropriate statutory obligations (see e.g. §§ 20 ff EnWG, 16 ff, 70 the Act and 14 AEG).

Network independence only has to become secure in its requirements for neutrality, an eminent advantage itself, institutionally, organizationally and economically. [It is similar to the separation of powers in constitutional law. Of course, the basic rights of state powers and other contracts of law enforcers would be obligatory. The legal divisions agreed to do so, however, institutionally.] The division of layers secures institutional neutrality.

It is therefore not surprising that the claims of network independence, especially in connection with the former monopoly, be it in the railway sector or electricity sector, which are already partly realised, because this is the most effective security for network neutrality as a legal access regime.

## **II. Network Independence for Communication Networks**

It corresponds that in the field of mass communication, the independence of networked distribution channels from upstream or downstream levels, i.e. the independence of networks as a separate layer, is given their own significant policies and may even be of constitutional value.

This becomes clear by the example of broadcasting. Because the distribution of radio and thus the distribution of transmission capacity is determined, at least in Germany, not only by economic criteria. The distribution of broadcast licenses by the state media institutions makes it quite possible to be directly influenced by the choice and variety, i.e. both influencing to the multipartite of media outlets.

In the wake of media convergence, especially in the wake of growing together of the different types of transmission media deals, whether in the form of telemedia or radio is the particularly virulent question of access for radio. On the one hand, competition now offers a variety of media in the same mode of transmission. On the other hand, it follows the European Commission's plan to transfer the choice within broadcasting and take them into the spectrum of the telecommunications regulatory models.

The prevailing system in Germany of a dual service public and private broadcasting system, is aware of this basic policy goal, and the diversity of opinion is ensured by domestic pluralism, with only partial compatibility of the regulatory conception of the European commission, however.

On the Internet, the importance of network independence or separation of the informational levels is very high. The problem of different transmission speeds has already been mentioned here (see above). In addition, here the general dangers of mixing layers are more apparent. The idea is e.g. together with the growing trend, the generation of information and its distribution. This happens because the major Internet providers, the operators of search engines, provide content and buy media companies, or vice versa.

[The risk from the formation of monopolies and media concerns in today's world, the communication services of the Internet. The economic factor as an incentive to the concentration of media to create and increase earning potential is considerable. Intermediaries take regard of the placement and the spread effect of a central information hub in the network of networks on the Internet. The search engine Google holds approximately 80 percent of all searches worldwide, de facto –a monopoly, which in turn translates economically into the marketing of advertising. The flow of information as a condition of public opinion will be channelled through intermediaries such as Google, but also filtered and thus directly affected because it is in the hands of information broker, the kind of content accessed by the public opinion market.

The plurality of content on the Internet faces much just in terms of economic competition in the Internet as the danger of the formation of opinion monopolies is also taking place. Whether, as in the broadcasting sector, a specific order to ensure the legislature is to guarantee the plurality of opinion on the Internet, is controversial. But it must be remembered in this context, very grave

differences exist in broadcasting that leads to trans-nationality of the internet which means national regulatory norms are quickly reached.]

### **III. Presse-Grosso**

In the area of level separation in the information sector, i.e. here in network independence, the Presse-Grosso can happily say “I’ve been there!” For decades, organisationally it has secured organisational and financial independence in its distribution networks and press neutrality. It has been ensured that, despite some economic difficulties in the media industry - especially from the competition of electronic deals - and despite the media concentration processes in Germany, the diversity of choice in the press area is still, by international standards, relatively high.

The press in Germany, but also the political community itself can certainly be glad that in this country a well-established, independent company for the distribution network neutrality organization adhering to the press area already exists. This has, therefore, been significantly more available than other areas of mass communication, which has at best partial solutions, and is still fighting for the appropriate structures.

The appreciation of the Presse-Grosso from politics is therefore understandable. It is noticeable that both representatives of the (then) federal government and the (then) opposition to the protection and preservation of the Presse-Grosso have required the protection and preservation of the diversity-preserving functions of the Presse-Grosso – though at the same time, the ideas about correct instruments have naturally been divided.

The new yellow-black government stands in continuity with its predecessors when it declared it as “an essential part of our media policy” in its coalition agreement in the autumn of 2009 (S. 124). This appreciation is understandable, because it also decreases the political work. The assured principle of neutrality and independence in the Presse-Grosso would have to be simulated in all other areas, and therefore operational. This of course, raises some political opposition.

## **E. Possibilities for operation and operational obligations of the state in relation to the Presse-Grosso**

### **I. Presse-Grosso Constitutional Guarantee**

Not every political objective is constitutional, but necessary if only because of its political desirability. This also applies to the Presse-Grosso in its present form. This specific branch of wholesaler is welcomed, but generally does not grow in constitutional power. As a result of the exercise of basic rights and freedom as a possible network basic right, it is protected by basic rights (especially by Article 5 paragraph 1 sentence 2 of the Constitution, and also by Article 12, 14 GG). Of course, this means by virtue an absolute prohibition of constitutional change. However, the government must conduct themselves in any work on the limited possibilities of restricting fundamental rights, including the so-called excess ban.

This will cause political difficulties when changing the constitution of| Presse-Grosso, but not completely preventable. There is, only in this relativistic form, the claim for the protection of basic right for the Presse-Grosso, i.e. particular claims from the state against third parties, but here the state must comply with the ban on minimum size. For state-level protection against third parties, the basic rights of the third parties must be observed, e.g. wholesale publishers who in turn enjoy the protection of basic rights as a publisher in Article 5 para.1.2. Conversely, it is clear that the government must act on principle to protect the Presse-Grosso, while a requirement of state action is conceivable only in exceptional circumstances, such as one for the danger to continued existence of the Presse-Grosso by a third party.

### **II. Protection of Network Independence**

If one looks at a network in the Presse-Grosso, a call for publishing independence of the Presse-Grosso is nothing more than a demand for network independence, or in general terms, a division of levels in mass communication. This network independence serves to ensure diversity of media and the genuine competition between press products. It is especially instrumental in securing press neutrality.

Thus the possibilities of relevant legal actions are defined. The legislative power to protect the basic rights of network independence, i.e. to ensure the independence of the Presse-Grosso, can hardly be disputed. Such laws indeed have the fundamental rights of the publishers, especially true of Article 5 para.1 sentences 2, 12 and 14. As part of the restriction of these fundamental ways the state can, however, secure a level of separation, making the independence of expression in the Presse-Grosso possible.

With relevance to concrete obligations of the legislative acts, i.e. concrete obligatory standards, one is not given any leeway in order to protect the principal of basic rights of organisational freedom. Only in exceptional cases would it be worth talking about the relevant state obligations to act to secure the network as an expression of basic rights, such as when endangering the existence of a network.

### **III. Protection of Network Neutrality**

This approach is changed by questioning whether it is, at least in the protection of network neutrality and open and non-discriminatory network access, not just a legal manoeuvre but also a relevant statutory obligation to act.

This is certainly the case when it is the only network available for press companies' own product distribution and it is virtually eliminated.. Then the laid down basic rights for an open and discriminations free network access would be used to decide network neutrality. Put another way, without open and discrimination-free network access, small and medium-sized businesses publishers would, in fact, not be able, or very limited in exercising their basic rights. There would be no decisive changes in other service networks (especially subscriptions and station newsagents and book retailers), because the sales of the retailers is vital to their existence.

Under these circumstances the legislator is responsible for ensuring the basic rights protecting independence and powers of open and non-discriminatory network access. There is in any case, no specific legislative solution given. Rather, the legislature has the choice of different means: it may also provide for the directing of network content without network independence (1, 2) or pursue strategies for network independence (3, 4, and 5) and finally put press distribution in the hands of the state.

1. Obligation of the existing neutrality of press wholesalers, or for open and non-discriminatory access for press products, is implicit.
2. Development of special cartel rights for the distribution of newspapers etc. with anti-discrimination and market regulations lies with the regulatory authority.
3. Restriction or prohibition of publications or direct services of the press in retailers (=direct delivery) when the existence of the general Presse-Grosso is threatened.
4. Future barriers to for publishers in “Grosso” businesses, where a mix of levels is formed from the acquisition of Presse-Grosso companies.
5. A division of levels, when the publisher is already active in an area of press wholesale. Consequently, this is a theme for deliberation for the new national government.
6. Establishment of a state press wholesalers i.e. through the requirement of the state to manage infrastructure, as was the case regarding infrastructure provision for post and telecommunication services before privatisation, or as is still the case with regard to the allocation of radio slots. That would amount to the creation of a state distribution system or the nationalisation of a press wholesaler (with a duty to pay compensation) and following from that a particularly difficult clash of constitutional basic rights.

Basically, legislature, in the framework of the constitution, is widely discretionary in this regard. However, the legislature is required to maintain the fundamental intervention at a minimum and keep those involved constitutional positions balanced. These positions weigh-up and must apply the relevant basic rights regarding the networks. These are particular to the position of basic rights of network owners, operators, vendors and customers on the network, up or downstream markets and, not least, by network users.

In the framework of prerogative legal protection, is the obligation of the legislators to prohibit the use of over excessive measures. In trial, the best and most suitable of basic rights is chosen from those available. Therein lays a solution and also a difficulty. Given the diversity of positions within wholesale press, it is not always easy to determine which position on basic rights is the best alternative.

Until the market functions as a self-steering system on a sustainable basis with the same national targets, in the press market and development of press diversity and plurality of opinion, it can (and must) do without measures to control competition. This is particularly true in view of the Community Declaration of Press Associations and the representatives of the Presse-Grosso. In the German press market, despite the last few years, the processes of concentration has been observed – namely through amendments in the system of independent network press distribution - so far a relatively high level of diversity of opinion through network neutrality is not respected even in some cases, by the "Joint Declaration".

These individual cases have been, if they were not already, stopped by the courts, the Presse-Grosso system and thus the essence of the Joint Declaration in total has not yet shaken. But this does not preclude further dangerous developments. If, however, the self-obligatory agreement should be predominantly and superficially damaged, it would be appropriate, for the sake of press pluralism and freedom of press - a statutory provision. The fact that a statutory scheme in such a case of doubt must be counted on, also shows a view of the yellow-black coalition agreement of the autumn of 2009. This wants media and journalism in the 17th antitrust legislature to check and keep the Presse-Grosso as an indispensable part of media regulation.

## **F. Outlook**

In sight of the “flagship,” it is no surprise that individual members are given to occasionally attempting to erode the foundations of the Presse-Grosso, although it sometimes only poses tensions from in-fights between publishers and wholesalers.

The Presse-Grosso is a self-defined network of the press industry in broader terms. Is it really expected to do better than a network of state government or a national network regime? The press can achieve much, handled intelligently with the instruments of self-restraint, such as shown by the activities to avoid state press privacy regulations by the German Press Council. So, naturally, it should be of natural interest to the media companies, not to jeopardise the operation or even

existence of the Presse-Grosso. If the press goes against the Presse-Grosso, it is, in principle, against its own interests.

They who want freedom of press, must want diversity of press. And they who want diversity of press, must want an open, independent and neutral press distribution network. The Presse-Grosso has ensured this open and independent neutral distribution of press for decades. This is thanks to a landscape in the German press, almost unique in the world.

May this continue to remain so!