LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

Ewa Komorek

War of the Worlds?
Pluralism vs. Market Liberalistion: the European regulation of the television broadcasting sector

2008

TRINITY COLLEGE
05 AUG 2008
LIBRARY DUBLIN
TH08LS
8590

DECLARATION

It is hereby declared that this thesis:

(a) has not been submitted as an exercise for a degree at this or any other University

(b) is entirely my own work and

(c) may be lent or copied by the Library on request.

Signed: E Komorek

Date: 24.06.2008

For my husband, my children,

my parents and my sister.

Special thanks to my supervisor Dr. Eoin O'Dell for his support and guidance.

I would also like to thank
my colleague Daithí Mac Síthigh for stimulating discussions;
Tarlach McGonagle from the Institute for Information Law, University of Amsterdam for inspiring my interest in the European media regulation;
as well as
Kevin Coates and Torben Toft from the European Commission for guiding me through the nuances of the European Union's policy in the media sector.

SUMMARY

This thesis makes the case for the European regulation of media concentration in the television broadcasting sector. Television broadcasting is currently undergoing substantial and rapid changes. The phenomena of digitalisation and the resulting technological convergence stimulate the minds of regulators in Europe and underlie the new Audiovisual Services Directive which is to replace the Television Without Frontiers Directive. There is even a trend to proclaim the death of television broadcasting understood as a traditional "point-to-multipoint" transmission of content, and the dawn of the era of Internet and interactive services. And yet, so far all studies and reports have shown that television remains the primary source of information for the majority of Europeans, and that not all consumers are willing to avail of the latest technological advances.

Development of technology and rapid changes are accompanied by concentration in the sector, which is dangerously growing beyond tolerable limits and crossing national borders. This causes concern not only for market efficiency, but also, and more importantly, for structural and internal media pluralism, which, according to Article 11(2) of the Charter of Fundamental Rights of the European Union, deserve respect at the European Union level. Meanwhile there is no binding media concentration regulation provided by the EU law. An attempt to introduce a media concentration directive in the mid-1990s is a story of missed opportunity. The directive was ill-thought from the beginning. Not only did it try to reconcile too many conflicting interests, but also it did not take account of convergence. It also introduced a "common denominator" for measuring concentration in all national markets and, finally, the "flexibility clause" it envisaged would cause a situation as if there was no harmonisation at all. Even if successfully introduced, the directive would have been a failure – it would not have slowed down the pace of concentration and it would have worsened the feeling of the lack of legal certainty.

The lack of regulation and coherent approach by the European Union to the issue of media concentration derives from a "culture/commodity" policy dilemma associated with the broadcasting sector. On the one hand there is a need to support further growth of big European media companies to make them able to compete in the global market, and on the other hand, the need to protect pluralism as an established common European value. This clash between liberal and more protective regulatory approach has become nothing short of the "war of the worlds".

Currently, the liberal approach prevails. Following the failure of the directive in 1997, the European Commission chose to take the "commodity" side of the policy dilemma, and has consistently refused to return to the discussion on the possibility of introducing the EU-level regulation of media concentration. The Lisbon Strategy's emphasis on making the European Union the most competitive economy in the world by 2010 favours big media companies as major contributors to the EU's wealth. The importance of fostering convergence, technology and digital future is emphasised in most speeches by the EU Commissioners and officials responsible for regulation of the media. The feeling of "technological determinism" is prevalent – in the new media environment characterised by the abundance of channels there is apparently no need for regulation.

The only remaining institution of the European Union actively advocating for the ideas of pluralism and diversity is the European Parliament. Unfortunately, its recurrent calls for the action at the EU-level fall on the Commission's deaf ear or, worse even, are answered with sarcastic comments on the Parliament's populist stance. And yet, media concentration at the EU level is growing, making the need for action by the European Union necessary and urgent.

The European Commission believes that current regulatory regime for the protection of media pluralism, consisting of several EU measures complemented by national law, is satisfactory and sufficient. The European instruments for the protection of structural pluralism centre on merger control and the possibility of obliging network operators with significant market power to grant access to their networks on fair and non-discriminatory terms. The country of origin principle, which is the cornerstone of the Television Without Frontiers Directive is also believed to actively promote structural media pluralism. Internal pluralism is supposedly supported by the European Union with the permission for must-carry rules, as well as requirements on independent and European production quotas. The above measures are complemented by national media concentration legislations.

However, closer analysis reveals that media pluralism is safeguarded at the EU level in an inconsistent and incoherent manner, put together in a fairly random way. National regulations on the other hand, not only are inherently unable to deal with growing cross-border media concentration, but are also currently undergoing significant liberalisation and, what is most worrying, EU law allows for their legal bypassing. All these trends point at the ever closer-European Union as best placed for "harmonising re-regulation" of the media sector. The Member States have to jointly address the issue of media pluralism, which currently transcends national borders.

Unfortunately, in the current political climate, the prospects for an immediate introduction of a specific EU-level media concentration regulation are remote. There is no clear legal basis for legislation of cultural and ownership aspects of broadcasting, and there is no political will to establish one. Therefore, this thesis suggests several alternative solutions which could be introduced now, given the current scope of the European Union's competence. Although not as powerful as a regulation, these measures could at least result in keeping the matter on the EU political agenda. The solutions examined by this thesis include strengthening transparency and monitoring of media concentration, adopting "soft law with hard statements", introduction of media specific merger review by including a "pluralism test" in the EU Merger Regulation, and more active promotion of public service broadcasting as a counterweight to concentrating commercial media. These alternative solutions could alleviate the negative effects of excessive media concentration and, by raising awareness, help to build a political momentum for a specific legislation at the EU level.

Radical Euro-scepticism is currently quite popular. It has been suggested that the idea of "ever closer Union" has burnt out and European politicians have lost any interest in building "one Europe". Therefore, proposals to introduce new common policies and to broaden the European Union's scope of competence to include social and cultural matters, are promptly dismissed. Nevertheless, this thesis presents a warily Euro-optimistic approach and calls for regulation in the area which is currently suffering from the lack of EU-level rules to the detriment of European citizens. The recent proposal by the Belgian prime minister Guy Verhofstadt to build a federal "United States of Europe" shows that the idea of "ever closer Union" is still alive, and if academic advocacy and awareness raising efforts continue, a time may come when the Member States will see the European Union as best placed to safeguard pluralism in the "European media".

Table of contents

1. Introduction 1

1.1 *Casus belli*: culture/commodity dilemma 1
1.2 The battleground: television broadcasting 10
1.3The warriors and their arguments 22
1.4 Sources and methods 42

2. European approach to media concentration regulation – the clash of values 45

2.1 Council of Europe 45
2.2 European Union 59
2.2.1 Lost battle for a media concentration directive in the 1990s 59
2.2.2 Current policy line of the European Union: the triumph of liberalism 76

3. European tools I: Why the European Court of Human Rights will not suffice? 101

3.1 Defending individual rights 101
3.2 Why is the European Court of Human Rights not enough? 120

4. European tools II: European competition law – policy evolution 123

4.1 "Smuggling" public interest to merger analysis under Van Miert 124
4.2 "Convergence craze" and regulated monopolies under Monti and Kroes 153
4.3 Access to premium content as a conduit for pluralism? 160
4.4 Why competition law alone does not suffice? 166

5. European tools III: Flaws of fragmentary legislative measures at the EU level 175

5.1 Legislative support for structural pluralism 179
5.1.1 Access remedies 180
5.1.2 Interoperability 182
5.1.3 "Country of origin principle" in the Television Without Frontiers Directive 185
5.2 Legislative support for internal pluralism 187
5.2.1 Must-carry rules in the E-Communications Framework 187
5.2.2 Measures supporting internal pluralism in the Television Without Frontiers Directive 203
5.2.3 Subsidising European audiovisual production – MEDIA programme 220
5.3 Overall conclusions on legislative EU measures supporting media pluralism 223

6. National tools: Why they fail 228

6.1 Media concentration laws in selected Member States 229
6.1.1 United Kingdom 229
6.1.2 Ireland 240
6.1.3 Italy 251
6.1.4 Poland 260
6.2 Member States' weakness in the era of global media 264
6.2.1 Liberalisation tendencies 266
6.2.2 Media empires beyond national control 272

7. Failure to safeguard pluralism. The need for action at European level 283

7.1 The ideal: Media pluralism regulation 283
7.2 Lack of political will 292
7.3 Question of a legal basis 295

8. What else can be done now? 315

8.1 Transparency requirements and constant monitoring 317
8.2 Soft law with "hard" statements 324
8.3 Media specific merger review 330
8.4 Active promotion of public service broadcasting as a counterweight for consumerism 332
8.5 Power to the viewers! Fostering media literacy 354

9. Conclusions 360

Index of tables

Table 1. Instruments adopted by the Council of Europe in the field of media pluralism 58
Table 2. EU rules on must-carry in the broadcasting value chain 197
Table 3. Events of major importance listed by the Member States 209
Table 4. Current tools for the protection of pluralism in Europe and their limitations 227
Table 5. Media concentration regulation in the UK before and after the 2003 Communications Act 239
Table 6. Media merger review procedure in Ireland 250
Table 7. Ownership of major commercial channels in Ireland (Chorus/NTL cable network) 320

Index of cases

European Court of Human Rights

Albert-Engelmann-Gesellschaft Mbh v Austria, (App. no. 46389/00), Judgment of 19 January 2006.

Autronic AG v Switzerland, (App. no. 12726/87), [1990] 12 EHRR 485.

Castells v Spain, (App. no 11798/85), (1992) 14 EHRR 445.

De Geillustreerde Pers NV v Netherlands, (App. no. 5178/71), [1976] 8 DR 5.

Groppera Radio AG v Switzerland, (App. no. 10890/84), [1990] 12 EHRR 321.

Haider v Austria, Commission's admissibility decision (App. No. 25060/94), [1995] Decisions and Reports 86.

Handyside v The United Kingdom, (App. no. 5493/72), (1976) 1 EHRR 737.

Informationsverein Lentia and Others v Austria, (App. no. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90), [1993] 17 EHRR 93.

Jersild v Denmark, (App. no. 15890/89), (1995) 19 EHRR 1.

Lingens v Austria, (App. no. 9815/82), (1986) 8 EHRR 407.

Malisiewicz-Gąsior v Poland, (App. no. 43797/98), Judgment of 6 April 2006.

Murphy v Ireland, (App. no. *44179/98*), [2004] 38 EHRR 13.

Oberschlick v Austria, (App. no. 20834/92), (1995) 19 EHRR 389.

Piermont v France, (App. no. 15773/89 and15774/89), (1995) 20 EHRR 301.

Purcell and Others v. Ireland, Commission's admissibility decision (App. no. 15404/89), [1991] Decisions and Reports 70.

Radio ABC v. Austria, (App. no. 19736/92), [1988] 25 EHRR 185.

Raichinov v Bulgaria, (App. no. 47579/99), Judgment of 10 April 2006.

Sokolowski v Poland, (App. no. 75955/01), Judgment of 29 March 2005.

Tele I Privatfernsehgesellschaft MBH v Austria ,(App. no. 32240/96), [2002] 34 EHRR 181.

Ukrainian Media Group v Ukraine, (App. no. 72713/01), Judgment of 29 March 2005.

Verein Alternatives Lokalradio Bern v Switzerland, (App. no. 10746/84), [1986] 49 DR 126.

Verein Gegen Tierfabriken v Switzerland, (App. no. 24699/94), [2002] 34 EHRR 159.

Wirtschafts-Trend Zeitschriften-Verlags GmbhH v Austria, (App. no. 58547/00), Judgment of 27 April 2005.

X *v* Sweden , Commission's admissibility decision (App. no. 3071/67), [1968] Decisions and Reports 71.

European Court of First Instance

Case T-17/96 *Télévision française 1 SA (TF1) v* Eur*opean Commission,* [1999] ECR II-1757.

Case T-46/97 *SIC v. European Commission*, [2000] ECR II-2125.

Case T-210/01 *General Electric v. Commission* [2005] ECR II-5527.

European Court of Justice

Case C-155/73 *Sacchi*, [1974] ECR 409.

Case 27/76 United Brands v. Commission [1978] ECR 207.

Case 85/76 Hoffman-La Roche v. Commission [1979] ECR 461.

Case C-52/79 *Procureur du Roi v, Debauve*, [1980) ECR 833.

Case C-322/88, Grimaldi v Fonds des Maladies Professionnelles [1991] ECR 4402.

Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, [1991] ECR I-4007.

Case C-353/89, *Commission v Netherlands* [1991] ECR I-04069.

Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media*, ECR [1993] I-487.

Case C-155/91 *Commission v. Council*, [1993] ECR I-939.

Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* ECR [1994] I-4795.

Case C-222/94, *European Communities v. United Kingdom of Great Britain and Northern Ireland*, [1996] ECR, I-04025.

Case C-34/95 *Konsumentombudsmannen v. De Agostini and TV-Shop*, [1997] ECR I-3843.

Case C-368/95 *Familiapress*, [1997] ECR I-3689.

Case C-14/96 *Criminal proceedings against Denuit*, [1997] ECR I-2785.

Case C-56/96 *VT4 Ltd v. Vlaamse Gemeenschap,* [1997] ECR I- 3143.

Case C-377/98 *Kingdom of the Netherlands v* Europ*ean Parliament and Council of the European Union*, [2001] ECR I-07079.

Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747.

Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, [2001] ECR I-9067.

Case C-12/03 P *Commission v. Tetra Laval* [2005] 4 CMLR 8.

Case C-380/05 *Centro Europa*, Reference for a preliminary ruling from the Consiglio di Stato by order of that court of 19 April 2005 in Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni, Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni, OJ (2006) C10/9.

Opinion 2/94 regarding the Accession of the Community to the European Human Rights Convention (Opinion 2/94), [1996] ECR I-1759.

European Commission

Case IV/32.150 *EBU/Eurovision System*, OJ (1993) L179/23;

Case COMP/37.398 *UEFA Champions League*, OJ (2003) L291/25.

Case COMP/38.453 *FA Premier League*, OJ (2004) C 115/3;

Case M.308 *Kali and Salz/MdK/Treuhand*, OJ (1994) L 186/38.

Case M.410 *Kirch/Richemont/Telepiu*, OJ (1994) C 225/4.

Case M.423 *Newspaper Publishing*, OJ (1994) C 85/5.

Case M.469 *MSG Media Service,* OJ (1994) L 364/1.

Case M.489 *Bertelsmann/News International/Vox*, OJ (1994) C 274/6.

Case M.490 *Nordic Satellite Distribution*, OJ (1996) L 53/20.

Case M.553, *RTL/Veronica/Endemol*, OJ (1996) L 134/3

Case M.709 *Telefonica/Sogecable/Cablevision*, OJ (1996) C167/3.

Case IV/M.938 *Guiness/Grand Metropolitan*, OJ (1998) L228/24.

Case IV/M.794 *Coca-Cola Enterprises/Amalgamated beverages*, OJ (1997) L218/15.

Case M.993 *Bertelsmann/Kirch/Premiere,* OJ (1999) L 53/1.

Case M.1027, *Deutsche Telekom/BetaResearch*, OJ (1999) L 53/31.

Case JV.37 *BSkyB/KirchPayTV*, OJ (2000) C 45/3.

Case M.1845 *AOL/Time Warner*, OJ (2000) C 130/06,

Case M.1943 *Telefonica/Endemol,* OJ (2000) C 170/5.

Case M.2050 *Vivendi/Seagram/Canal Plus*, OJ (2000) C 311/3;

Case M.2845 *Sogecable/Canalsatélite Digital /Vía Digital*, OJ (2002) C 166/6.

Case M.2876 *Newscorp/Telepiù,* OJ (2004) L110/73.

Case NN-70/98 *Kinderkanal/Phoenix*

Case NN-88/98 *News 24*

Case NN 631/01 *BBC Licence Fee*

House of Lords

R. v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd, [2001] UKHL 42.

1. Introduction

"The audiovisual is ... not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry par excellence. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities."[1]

1.1 *Casus belli*: culture/commodity dilemma[2]

The purpose of this thesis is to examine the existing European regulatory framework contributing to the protection of pluralism and diversity in the television broadcasting sector. The question being asked is whether there is a case for additional European-level measures aimed at protection of media pluralism and counteracting the negative effects of excessive concentration in the sector. Development of technology and the recent rapid changes in television broadcasting are accompanied by concentration trends which are dangerously growing beyond tolerable limits and crossing national borders. This causes concern not only for market efficiency, but also, and more importantly, for structural and internal media pluralism, which, according to Article 11(2) of the Charter of Fundamental Rights of the European Union,[3] deserve respect at the European Union level. Meanwhile, an attempt to introduce a media concentration directive in the mid-1990s is a story of missed opportunity[4] and as a result there is currently no binding media concentration regulation provided by the EU law.

The lack of regulation and coherent approach by the European Union to the issue of media concentration derives from a "culture/commodity" policy dilemma[5] which renders the broadcasting sector a "particularly complex object for legal regulation".[6] Media concentration triggers economic, political and cultural concerns and tackling these problems independently

---

[1] European Commission, 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age' (Communication) COM(1999) 657 final.

[2] The 'culture/commodity' struggle in media is well considered *inter alia* in the UNESCO Convention on Cultural Diversity; EBU 'Position Paper on the Commission Proposal for a Directive on services in the internal market', 8 December 2004, http://www.ebu.ch/CMSimages/en/leg_pp_directive_services_081204_tcm6-23334.pdf (accessed 8 April 2008).; see also Marsden C. and Verhulst S., 'Convergence: a Framework for Discussion', in Marsden C. and Verhulst S. (Eds.), *Convergence in European Digital TV Regulation* (Blackstone Press Limited, London 1999), 2; Goldberg, D., Prosser, T., Verhulst, S. (Eds.), *Regulating the changing media. A comparative study*, (Clarendon Press, Oxford, 1998), 145.

[3] Charter of Fundamental Rights of the European Union, OJ (2000) C-364/1.

[4] See Chapter 2.2.1 below.

[5] Marsden C. and Verhulst S., 'Convergence: a Framework for Discussion', n. 2, 2.

[6] Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, (Longman, London 1998), 1.

from one another is simply impossible. Meanwhile, for decades now there has been a "power struggle" between actors in the media arena and regulators, which has centred on deciding which of these interests should take the priority.[7] On the one hand there are arguments put forward for a liberal approach and the need to support further growth of big European media companies to make them able to compete in the global market. On the other hand, the pluralism, as an established common European value, must be respected and protected which requires a regulatory intervention. This clash between liberal and more protective regulatory approach has become nothing short of the "war of the worlds".

Some argue that running a media company is like running any other business. In this sense, concentration may be desirable and commercially justified. Indeed, in the current situation in the media sector characterised by rapid changes, convergence of technologies and inflated costs of premium media content, big horizontal and vertically integrated media conglomerates provide for a range of benefits. It is often said that only the "big ones" can take full advantage of the recent changes and reap the economies of scale and scope inherent in the sector. Cross-media mergers and more frequent diagonal concentrations between different sectors help media operators minimise the risks of failure in one of their markets. Concentration in the media industry may thus be seen as a natural and positive development.[8]

On the other hand, information which is the main product of the media industry is so much more than just a commercial commodity.[9] Mass media, quite correctly, is often referred to as the Fourth Estate.[10] Media and television in particular, have the ability to make governments fall or prevail, presidents win or lose. They can change dull people into heroes of mass imagination. We know all too well how certain political regimes of the last century manipulated nations' views with the use of television and newspapers. It is no different today – whoever controls mass media, rules people's minds. Therefore, it is essential that the media industry in Europe remains pluralistic and diverse. Only then, can the members of a democratic society "make an informed choice on a variety of public matters".[11] In addition,

---

[7] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, (Edinburgh University Press, 2006), 40, 74.
[8] McGonagle, M., *Media law*, 2nd ed. (Thomson, Round Hall, Dublin 2002), 426.
[9] Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, n. 6, 3.
[10] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 17.
[11] Ward D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', UNIDEM Campus Trieste Seminar 'The role of media freedom and pluralism in

not only news programmes, but also entertainment programmes contribute to the formation of public opinion. Therefore, as observed by Hoffman-Riem, "...the calls for pluralism are by no means limited to informational diversity in special news and current affairs programmes, but rather relate as well to the operation of broadcasting as a whole".[12]

Before turning to present in more detail the warriors for the two opposing causes and their arguments, it is essential to define the notions of media pluralism, diversity and concentration, which are central to this thesis.

Consumers of mass media are by no means a homogenous mass. Within each society there is a plurality of political, social and religious points of view and a diversity of cultures, interests, hobbies and passions. Media pluralism can therefore be best defined as "the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through the media".[13] Therefore protecting pluralism means ensuring that "many, if not all, points of view are represented in the marketplace of ideas".[14] On the other hand, this is only one "face" of media pluralism – the internal one, sometimes also called diversity. The second face is external or structural, relating to the existence of a number of media suppliers.[15] Apart from the external/internal face of media pluralism, the Council of Europe further defines two aspects of pluralism, which I would be inclined to more precisely call two aspects of *internal* pluralism: political and cultural. The former is the reflection of a "wide range of political opinions and viewpoints to be represented in the media" and the latter represents "the need for a variety of cultures which reflect the diversity within society to find expression in and to find themselves represented in the media".

---

strengthening democracy', Trieste, Italy, 24–28 January 2005, http://www.venice.coe.int/docs/2005/CDL-UDT(2005)004-e.pdf (accessed 13 August 2007).

[12] Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, (The Guilford Press, New York 1996), 298; see also Alger, D., *Megamedia. How giant corporations dominate mass media, distort competition, and endanger democracy*, (Rowman & Littlefield Publishers, 1998), 1.

[13] This is Council of Europe's 'working definition' of media pluralism Council of Europe; See Council of Europe, Explanatory memorandum to Recommendation R(99) 1 on Measures to promote Media Pluralism, (1999) *paras.* 3 and 4; Cavallin, J., 'European Policies and Regulations on Media Concentration', (1998) International Journal of Communications Law and Policy 1.

[14] Organisation for Economic Co-operation and development 'Media Mergers', 19 September 2003, http://www.oecd.org/dataoecd/15/3/17372985.pdf (accessed 8 September 2007).

[15] In this thesis I use the term structural pluralism in reference to external/structural pluralism and the terms internal pluralism or diversity in reference to internal pluralism.

It must be borne in mind that neither external nor internal nature of pluralism taken separately can guarantee a fully and genuinely pluralistic media market.[16] As noted by Gibbons "neither diversity of source nor of outlet can be guaranteed to produce diversity of content".[17] In the socialist regimes of Central and Eastern Europe, for example, external pluralism often existed – there were numerous "producers" of media content. However, there was no doubt about what point of view was presented in Central and Eastern European media at that time. This continues to be true nowadays in the era of free media – diversity of ownership *may* contribute, but does not necessarily have to result in the breadth and diversity of programming content. There is a need for additional regulation on content requirements for that to happen. On the other hand, internal pluralism within one media company is hard to achieve without the imposition of regulations, codes of practice or internal regulations aimed at guaranteeing the provision of diversified and unbiased content.[18] Therefore, for pluralism to exist both of its key attributes must come together; there must be both diversified ownership of media companies and different views and opinions being expressed.

With great simplification, one may say that there are basically three models of ensuring pluralism and diversity in media:[19] (i) market model (competition law is sufficient to guarantee plurality of providers and diversity of content), (ii) new media model (pluralism and diversity are "natural" consequences of economic growth and technical development), and (iii) public policy model (favours state intervention). The European Union currently presents a mixed model, since market and new media models intertwine with scraps of the public policy model.

Media pluralism and diversity are most endangered when media power is concentrated in the hands of just a few companies. Such concentration of power may take place through a natural growth of a company (through adding new channels or new subscribers and, thus, eliminating

---

[16] Ward, D., *The European Union democratic deficit and the public sphere. An evaluation of EU media po*licy, (IOS Press, Amsterdam 2004), 125.

[17] Gibbons T., 'Concentrations of Ownership and Control in a Converging Media Industry', in Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999), 157; see also Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 30.

[18] Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, n. 12, 284.

[19] Jakubowicz, K., 'Legislative guarantees of plurality of information sources', Implementation of constitutional provisions regarding mass media in a pluralist society, Collection Science and Technique of Democracy (1994) 13, 81-86.

other companies from the market), but most frequently by integration of media companies. The terms of media integration and concentration are often mixed up and used incorrectly as synonyms of each other, when in fact there are important differences between them. Media integration or industrial concentration can be defined as "all forms of more or less far-reaching combination of power and control over the activities of a company or a group of companies"[20] and is a concept which should be applied at the company level. Media concentration, on the other hand, happens at the relevant market level and can be defined as "an increase in the presence of one or handful of media companies in any market as a result of various possible processes: acquisitions, mergers, deals with other companies, or even the disappearance of competitors".[21] Therefore, integration of media companies is only one of the possible reasons for the concentration of the media market (the other being natural growth of a company and elimination of competitors).

The fact that a media company integrates by expanding into other media of a similar or different type, or into other countries or into different levels of the production process does not necessarily lead to concentration in industry. In fact the expansion into other geographic markets may lead to increased numbers of media companies and less concentration at national level, but greater concentration at EU level. Due to the complexity of media markets, it is very difficult to pinpoint exactly when media integration reached such a level that the market became concentrated. As will be explained below, in the media industry the possession of power and the risk of its abuse is dangerous for pluralism and diversity. Therefore, no matter what the reasons are for excessive concentration of the media market, the attempts to prevent it have focused on the search for this threshold point when concentration starts acting against the public interest.

There are five types of integration of media companies, which in turn may lead to five different forms of concentration of the media market: horizontal, vertical, multi-media (cross-media), multisectoral (diagonal) and international integration/concentration. It is vital to differentiate between these different forms since both of them affect pluralism and diversity in a different way and raises different competition problems.

---

[20] Lange, A., Van Loon, A., *Multimedia Concentration Regulation in Europe*, (IDATE, Montpelier and Institute for Information Law, Amsterdam 1990), 8.

[21] Sanchez-Tabernero, A., *Media Concentration in Europe. Commercial Enterprise and the Public Interest*, (The European Institute for the Media, Manchester 1993).

Horizontal integration takes place within one and the same media sector, for example when two television stations merge.[22] This type of integration is the quickest way to a concentrated media market – if unrestricted it leads to just a few companies operating in a given media sector and achieving oligopolistic profits. The impact of horizontal concentration in the market on pluralism and diversity can be very detrimental. The disappearance of media outlets diminishes external pluralism and may in turn lead to decreased diversity of content. On the other hand, competition problems arising from this type of media concentration are no different than in other industries (creating market power in the form of single or joint dominance, raising barriers to entry, etc.).

It is vertical integration which creates competition problems characteristic to the media sector. A media company integrates vertically when it strives to control, partially or completely, the channels of production and distribution of a particular media market. For example, a cable TV company that engages not only in channel distribution but also in content production. This gives a company greater market autonomy and insulates it from the pressures of downstream or upstream markets. This type of integration may not necessarily lead to market concentration. However, it is a logical step for horizontally integrated companies to expand into different levels of production and distribution. In fact this has been the most common trend in the recent years. The result is that very few vertically integrated companies exist in any given media market. The effect on pluralism and diversity is detrimental since the company controls both the content production and distribution. Moreover, the competition concerns are particularly serious (gate-keeper issue, foreclosure of the content markets, leveraging of market power and network effects).[23]

In multi-media or cross-media integration, a media company gains control of different media products in different media sectors. These days it is difficult to find genuine television or press companies. These are usually large vertically integrated conglomerates active in most media markets. For example, Rupert Murdoch's News Corporation has operations in eight industry

[22] For the European Commission's position on the assessment of horizontal mergers see Guidelines on the assessment of horizontal mergers under the Council Regulation between undertakings, OJ (2004) C-31/5.

[23] For the European Commission's position on the assessment of vertical mergers see Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, paras. 28-90.

segments: filmed entertainment, television, cable network programming, direct broadcast satellite television, magazines and inserts, newspapers and book publishing.[24] One owner decides on the editorial line and content of a great number and multiplicity of media products. The potential threat to pluralism and diversity is, therefore, apparent. Moreover, the combination of the deregulation of the audiovisual industry in Europe with the increased attractiveness, influence and profitability of the media business, has resulted in firms that are active in other sectors of the economy gaining control of media companies.[25] This so-called multi-sectoral or diagonal integration is not necessarily harmful for competition.[26] However, the support of vast resources of big businesses significantly strengthens the power of media companies. Strong media arms become in turn a source of influence and political power of potent business owners.[27]

Finally, as a logical consequence of all of the above integration processes, the big media conglomerates start investing abroad. Whereas national markets have become saturated and national competition rules often prevent further growth, liberalisation of the television market in Europe and the resulting abolition of legal barriers to foreign investment in media, has facilitated international integration. In the beginning this process leads to an increase of media outlets and this does not necessarily result in market concentration. However, big media companies have already started "the race ... to share out the European market".[28] Therefore, although now it would be difficult to talk about a dominant media company in Europe, further unhindered growth will inevitably result in a few conglomerates controlling European media markets.

The phenomenon of global media concentration is recent. Up until the 1980s media was owned and regulated at national level, hence media companies had no interest and no way of

---

[24] www.newscorp.com.

[25] One of the examples is General Electric (GE). Media arm NBC Universal operates alongside divisions including GE Commercial Finance, GE Industrial, GE Infrastructure, GE Consumer Finance or GE Healthcare.

[26] For the European Commission's position on the assessment of conglomerate mergers see Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, paras. 91-121; See also leading cases of the European Court of Justice and Court of First Instance on conglomerate mergers: Case C-12/03 P *Commission v. Tetra Laval* [2005] 4 CMLR 8; T-210/01 *General Electric v. Commission* [2005] ECR II-5527.

[27] For instance, there have been instances of NBC news reports from the war in Iraq with tanks, helicopters and weapons operating on GE technology featured in the background.

[28] Sanchez-Tabernero, A., *Media Concentration in Europe. Commercial Enterprise and the Public Interest*, n. 21.

entering into international mergers and alliances. Everything changed with deregulation and privatisation of the sector in the late 1980s, which coincided with the development of commercial television and satellite transmission technology.[29] Since then, there has been a notable trend of a few media companies "that are increasingly demonstrating pan-European structural features" to gain control over media sector.[30] These days, therefore, while the communications devices get smaller, the companies that manufacture them enlarge, "forging production, distribution and transmission enterprises into global conglomerates".[31] As a result, currently only approximately 50 media firms provide the bulk (in revenue terms) of the world's media content production and they own an overwhelming majority of cable channels and cable and satellite transmission systems.[32] An even smaller number, only the first nine firms on the list of world' biggest media companies[33], occupy dominant positions in many media markets. Moreover, these firms almost on a daily basis enter into joint ventures and agreements with each other.

As will be presented in more detail in Chapters 4 and 5 below, the European legislation currently in force fails to prevent this development. Chapter 4 deals with application of competition law to the television broadcasting sector and concludes that competition law by virtue of its focus on markets efficiency cannot be used as the only tool of EU intervention in media concentration which necessarily must also involve consideration of public interest. Chapter 5 analyses existing EU-level legislative measures contributing to the maintenance of pluralism and diversity in the sector, contained in the E-Communications framework (requirements of access, must-carry rules, or principles of interoperability) and the Audiovisual Media Services directive (country of origin principle, lists of events of major importance, European production quotas). The Chapter concludes that the measures do present some benefits, but overall they are flawed, fragmented and insufficient.

---

[29] McChesney, R.W., 'The nine firms that dominate the world', Global Policy Forum, August 2003, http://www.globalpolicy.org/globaliz/cultural/2003/0804media.htm (accessed 8 September 2007).

[30] Ward, D., *The European Union democratic deficit and the public sphere. An evaluation of EU media policy*, (IOS Press, Amsterdam 2004), 72

[31] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', in: Marsden C, Verhulst S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999), 37.

[32] McChesney, R.W., 'The nine firms that dominate the world', n. 29.

[33] TimeWarner, Disney, Bertelsmann, Viacom, News Corporation, Comcast, GE, Sony and Seagram; see McChesney, R.W., 'The nine firms that dominate the world', n. 29; Alger, D., *Megamedia. How giant corporations dominate mass media, distort competition, and endanger democracy*, n. 12, 33, 217.

This thesis places itself firmly on the culture side of the dilemma and attempts to demonstrate why it is vital for regulators to preserve media pluralism by counteracting excessive media concentration and safeguarding quality and diversity of content. There are various examples of how dangerous the lack of or disrespect of restrictions on such an excessive media concentration can be. Two most prominent examples concern the media empires of Rupert Murdoch and Silvio Berlusconi. Rupert Murdoch owns, among other media, a staggering number of 175 newspapers around the world, all of which present almost exactly the same editorial line and, in fact, they are not allowed to deviate from official positions. For example, in 2003 they all fiercely advocated for the war in Iraq. Silvio Berlusconi is not only the prime minister of Italy, but he is also the richest man in the country and an absolute media monarch. He or his relatives own or control three of Italy's four commercial television networks, two big publishing houses, two national newspapers, fifty magazines, the largest Italian movie production and distribution company and a big portion of the country's internet services.[34] He exploits the media dominance to boost his political campaigns and uses his political influence to promote his commercial interests.

This is why the concentration of power in the media sector may be dangerous from more than just purely economic point of view. What is more, it may be dangerous even if it is perfectly harmless for competition. As pointed out by McChesney, "by any standard of democracy, [the current level of global] concentration of media power is troubling, if not unacceptable",[35] and Conason even added that "the unaccountable political and cultural power of monopolised media [is] possibly the most serious affliction of democracy in our time".[36] And although some authors argue that it is not important who owns the media but what the media communicate,[37] I agree with others who believe that plurality of opinion, as one of the pillars of democratic societies, requires the presence of *several* media providers.[38] However, a difficult question arises immediately as to where the borderline lies between permissible and impermissible concentration in the media sector. This is not an economic but a political

---

[34] Moyers, B., 'Keynote address to the National Conference on Media Reform', Madison, Wisconsin, 8 November 2003, http://www.commondreams.org/views03/1112-10.htm (accessed 8 September 2007).
[35] McChesney, R.W., 'The nine firms that dominate the world', n. 29.
[36] Conason, J., comment on Bagdikian, B., *The New Media Monopoly* (Beacon Press, Boston 2004).
[37] Nieto, A., *Time and the information market: the case of Spain*, (Media Markets Monographs, University of Navarra, Pamplona 2001); see also Sanchez-Tabernero, A., Carvajal, M., *Media Concentration in the European Market. New Trends and Challenges*, (Media Markets Monographs, University of Navarra, Pamplona 2002).
[38] European Audiovisual Observatory, Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level' , Strasbourg 2001.

question and "judgments about the appropriate amount of diversity in a society are based on experience and prudence".[39]

1.2 The battleground: television broadcasting

This thesis concentrates on the risks the lack of protection for pluralism brings for just one sector. The one which is specifically sensitive, the one which is often called "the brain washer", "the time thief", "the stupefier" – television. It is fashionable to despise it, but it is impossible to ignore it. Notwithstanding its relatively short history - the technology on which it is based was developed early in the 20th century – television is without a doubt the most significant medium of all. The term "media" in general is used to describe systems of production and dissemination of information and entertainment and of exertion of various kinds of social controls.[40] Media include the institutions which determine the nature, programming and form of distribution and are associated with more or less elaborate forms of audience participation. Media is an incredibly complex and sensitive sector. The industry is characterised by a complexity of functions and relations. It involves content creation, publishing, delivery and reception, whilst the products vary from content through channels and means of delivery, to reception equipment. The narrower term of mass media refers to the "means of communication that reach large numbers of people, such as television, newspapers, magazines and radio".[41] It follows that the mass media sector engages in the production and distribution of information goods on a "one-to-many" basis.

The term "television" is on the one hand a technical term used to describe the technology of transmission of visual images of moving and stationary objects, generally with accompanying sound, as electromagnetic waves and the reconversion of received waves into visual images.[42] On the other hand it is the industry engaged in the production and broadcasting of television programs and it is probably the most important and influential type of mass media. In this thesis the term television covers television in analogue and digital form, whether broadcast

---

[39] Gibbons T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 173.
[40] Web dictionary of cybernetics and functions, http://pespmc1.vub.ac.be/ASC/MEDIA.html (accessed 8 September 2007); see also McGonagle, M., *Media Law*, n. 8, 1.
[41] Collins Concise Dictionary (Collins, 1997).
[42] Definition of television at www.answers.com.

terrestrially, *via* satellite or via cable.[43] Television broadcaster is, therefore, a provider of a channel or a number of channels which consist of a number of programmes produced either by the broadcaster himself or independently. Television companies are classified by the European Audiovisual Observatory[44] into the following main categories: (i) public radio-television companies; (ii) private television companies; (iii) pay-TV; (iv) programme packagers (offering programme packages via cable, satellite or terrestrially); (v) thematic television companies.

The opinion forming power of television broadcasting is much greater than any other medium. It is ubiquitous,[45] worldwide in scope and reach, it gives the viewers "a sense of participating in unfolding human events and provides a link and a social bond between men and nations".[46] As a well known saying goes "one picture is worth a thousand words". Concentration in this sector is all the more problematic because television is still the primary source of knowledge about the world for the majority of people. As noted by Noveck, "in the reflection of the television screen, we constitute ourselves as individuals; and this screen is a window through which we view our world".[47] Therefore, because people rely on television as the principal source of information external to their own experience, it is vital to ensure that television owners "do not exclude alternative possibilities".[48]

Television broadcasting is currently undergoing substantial and rapid changes. When, in the 1990s, Europemedia Research Group studied the patterns of the development of the Western European television sector, the main trends were privatisation and commercialisation, and it is this that triggered the first wave of increased concentration of television companies.[49] The disappearance of public service monopolies operating on the basis of the licensee fees only, marked the end of the first phase in the development of the television in Europe. The structure of the television landscape in Europe has changed drastically and irreversibly.

---

[43] Following the understanding accepted by the European Audiovisual Observatory; see Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level', European Audiovisual Observatory, n. 38.

[44] European Audiovisual Observatory, 'The financial situation of television companies in the European Union (1999-2004)', prepared by Andre Lange, September 2005.

[45] Trager R., Dickerson, D.L., *Freedom of Expression in the 21st Century* (Pine Forge Press, Inc., 1999), 154.

[46] Confalonieri, F., the Chair of Mediaset, speech at the second United Nations World Television Forum, 1997.

[47] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 63.

[48] Gibbons T., 'Concentrations of Ownership and Control in a Converging Media Industry' n. 17, 157.

[49] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, (SAGE Publications, 1998), 1.

When dual systems of public and commercial systems are well established and dominate European countries, as is currently the case, the main trends in the European television broadcasting sector can be described as consisting of: growing commercialisation, digitalisation, rapid technological change and convergence, inflation of content costs, liberalisation and deregulation.[50] All of these trends have led to the second wave of "merger mania", which has for the first time crossed national borders and has in turn led to the internationalisation of media concentration.

Growing commercialisation in the television broadcasting sector is a direct result of the elimination of public service monopolies in most countries in Europe. The former belief that television plays an important educational, societal and political role has been cast into doubt. To keep up with competition from commercial stations public service broadcasters ("**PSBs**") have chosen "adaptation" as the market strategy. Television content has changed and has become very similar on every station.[51] It is more and more often described as "infotainment" with educational and cultural programmes no longer on offer or in rapid decline. While in the past the reference group for most broadcasters consisted of citizens, this has now changed to consumers.[52] TV companies need market success in order to survive and the quality of programming is the price to pay. This trend is particularly dangerous for media diversity without which there is no democratic society.

However, the most talked about recent trend in the electronic media sector has without doubt been the digitalisation of media content. The European Commission expects that the transition from analogue to digital broadcasting in Europe will be well advanced by 2010, with a proposed deadline of early 2012 for phasing out traditional analogue terrestrial broadcasting.[53]

---

[50] Goldberg, D., Prosser, T., Verhulst, S., 'Regulating the changing media', n. 2, 8, 9.

[51] For instance in Ireland "CSI: Miami", and "CSI: Crime Scene Investigation" are offered by RTE2, Channel 6, and Living TV; "Desperate Housewives" by RTE2, Channel 4 and E4 and the repeats of "Friends" by RTE2, Channel 6 and E4 – source RTE Guide 19-25 April 2008 see also in general Open Society Institute, 'Television across Europe: regulation, policy and independence' (Monitoring Report) 11 October 2005, http://www.soros.org/initiatives/media/articles_publications/publications/Eurotv_20051011.

[52] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce* n. 49, 35.

[53] European Commission, 'Commission expects most broadcasting in the EU to be digital by 2010', press Release, IP/05/595, 24 May 2005.

Thus, the introduction and growing expansion of digital television, marks the third phase in the development of European television.[54]

The possibility of dematerialising media products and their transformation into packages of bytes, for the first time allows the transmission of audiovisual content via different networks, i.e. mobile, Internet, cable, satellite. Digital television allows for the proliferation of channels beyond the capacities of terrestrial frequencies and it renders the problem of the scarcity of frequencies a thing of the past. The resulting expansion of pay-television has induced competitive pressure. This in turn has lead to the inflation of costs caused by exceptional increases in prices paid for premium television content. For example, the price paid for the broadcasting rights of the Football World Cups of 1990, 1994 and 1998 amounted to 241 million ECU, the cumulative price paid for the same rights of the World Cups of 2002 and 2006 increased to a whopping 1.7 billion Euro.[55]

Digital technology has lead to the phenomenon of convergence, which has in the recent years stimulated the imagination of the owners of television companies and regulators alike. It has even become "something of a catchphrase when speaking about recent trends in the communications sector".[56] The coming together of traditionally separate media which has resulted in text, sound, video and voice becoming one "multimedia" product, has created seemingly endless possibilities . Convergence has led to the belief that the Internet will soon render other media forms obsolete. Furthermore, the unprecedented wave of investment into IT companies resulted in the creation of the "dotcom bubble", which spectacularly burst in the early 2000. Now it's all about the Web 2.0 – audiences taking control, grass-root contributors making their views known on numerous blogs and sites like YouTube, MySpace or Bebo. The Time magazine announced Person of the Year 2006 to be YOU. That is me and everyone who "seizes the reins of the global media, founds and frames the new digital democracy, works for nothing and beats the pros at their own game".[57] Overall, it is now very popular to proclaim the imminent death of television as we know it, that is as a traditional "point-to-multipoint"

---

[54] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 72

[55] Mendes Pereira, M., 'Vertical and horizontal integration in the media sector and EU competition law', Conference on the ICT and Media Sector within the EU Policy Framework, Brussels, 7 April 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_009_en.pdf (accessed 8 September 2007).

[56] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 107.

[57] Time Magazine, 'Person of the Year', 15 December 2006 / 1 January 2007, 31.

transmission of content,[58] and the dawn of the era of Internet and interactive services. New technologies are expected to take over, and our children will apparently not know what broadcasting meant; they will live happily in the era of podcasting. And yet, so far all studies and reports have shown that television remains the primary source of information for the majority of Europeans, and that not all consumers are willing to avail of the latest technological advances.

Finally, liberalisation and deregulation have for the last number of years consistently affected the European television sector. With the implementation of the Television Without Frontiers Directive the television sector has been liberalised right across the European Union. The introduction of the "country of origin" principle[59] means that a broadcaster is only subject to the rules of the country where it is established and it can broadcast to other Member States' territories without requiring a licence or overcoming other regulatory obstacles. In addition, Member States have for the most part relaxed their national anti-concentration rules and continue to answer the persistent industrial calls for further deregulation.

All the above recent developments have lead to an increased tendency towards concentration in the electronic media sector. As noted by the former Competition Commissioner Mario Monti "the sector has moved towards the concentration which seems inevitably to accompany globalisation".[60] Convergence allows television companies to seek not only economies of scale but the first time, economies of scope. The result is that it is now possible to use the same product in a number of different ways. In the era of the "dotcom bubble", the "Create once, Place everywhere" motto dominated the media sector.[61] Media companies embarked on unprecedented processes of vertical integration with content providers and telecommunications companies. This meant they could exploit their products at every single level of the value chain. The renowned mergers between AOL and Time Warner, Vivendi and

---

[58] Bratkowski, P., 'Death of television', *Newsweek Poland* 30/2004; see also Graham A., Davies G., *Broadcasting, Society and Policy in the Multimedia Age* (John Libbey Media, 1997).

[59] Article 2a of the consolidated version of the AVMS directive, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (accessed 28 April 2008).

[60] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', British Screen Advisory Council, The Cavendish Conference Centre, London, 26 November 2001, http://www.bsac.uk.com/reports/monticompetition.pdf (accessed 8 September 2007).

[61] Mendes Pereira, M., 'Vertical and horizontal integration in the media sector and EU competition law', n. 55.

Vodafone or Endemol and Telefonica happened during this time. As observed by BusinessWeek Online in the beginning of 2004,

> "apart from a brief respite in the post-September 11 economy, the media business has been consolidating steadily for more than a decade. But the deals of the past few months have upped the stakes. It's not longer enough to have more content than the other guy. You need distribution to win".[62]

However, as the belief in the endless potential of the Internet proved premature and the "dotcom bubble" burst, the return of big horizontal mergers is evident. Media companies start selling off some of their downstream or upstream units and look for alliances with companies on the same level of value chain to recoup losses and to strengthen their positions in the fight for the ever more expensive premium content. The merger between NewsCorp and Telepiù in Italy, Carlton and Granada in the UK or the most recently announced acquisition of NTL by UGC in Ireland illustrates this trend. Moreover, the deregulation of the audiovisual sector in most European countries allowed investors from outside the media sector to enter the broadcast market.

Finally, national markets have become saturated and further growth of large media companies is often prevented by national competition rules. Therefore, unhindered by regulatory obstacles, removed by the Television Without Frontiers Directive, and encouraged by the lack of any regulatory anti-concentration measures at European level, the integration of media companies more and more often crosses national borders.[63] As noted by Ward, media companies "have developed an increasingly pan-European strategy".[64] The examples of Bertelsmann, Vivendi Canal+, RTL Group or BSkyB are the most telling. Bertelsmann, for instance, is a German-based media conglomerate, having 24 TV stations and 14 radio stations in ten countries and holding stakes in content production, new media, music, magazine and book publishing, is the largest European and third largest global media company.[65] And all the

---

[62] 'Mega Media Mergers: How dangerous?', *BusinessWeek Online*, 23 February 2004.
[63] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 21.
[64] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 91.
[65] Albarran, A.B., Mierzejewska, B, I., 'Media Concentration in the US and European Union: A Comparative Analysis', 6th World Media Economics Conference, 12-15 May 2004, http://www.cem.ulaval.ca/6thwmec/albarran_mierzejewska.pdf.

above mentioned companies "have shown movement towards either closer cooperation with one another or expansion into new markets through mergers and acquisitions".[66] As noted by former Competition Commissioner, Mario Monti:

> "The success of Bertelsmann and Vivendi on the global stage certainly demonstrates rather well that the existence of national markets in Europe is no bar to the creation of an effective global enterprise. In many ways it may be easier for a European company to expand into different countries, acutely aware of the linguistic and cultural nuances of national markets".[67]

Moreover, apart from the growing number of European media companies investing abroad, more and more US media giants such as TimeWarner or News Corporation, are becoming active in Europe. The media concentration process has thus gained an international dimension.. In addition, those giant media companies have only one goal in mind: profit maximisation accompanied by expansion into new markets. Their aggressiveness removes the argument of many that the dawn of the Web 2.0 era ended discussions on media concentration. Web 2.0 was supposed to be all about the "long tail". Endless numbers of content creators "stealing attention from traditional media".[68] However, giant traditional media companies are slowly buying the new Web 2.0 outlets. NewsCorp's acquisition of MySpace, Google buying YouTube and Doubleclick, and Microsoft "eyeing" Yahoo are only a few of the telling examples. Thus, if anything, in the era of new media, scale matters more than ever, and discussions on media concentration are therefore not "antiquated", they just gained a new dimension.

The current situation in the television broadcasting sector may, therefore, be summarised in one sentence: we live in an era of a digital revolution which is "transforming media and communications industries world-wide, leading in particular through convergence to a considerable growth of delivery means, without any respect to national borders".[69] The result

---

[66] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 90.
[67] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?, n. 60.
[68] Weber, J., 'Big media still dominate in Web 2.0 era', *Times OnLine,* 7 May 2007.
[69] Westphal, D., 'Media Pluralism and European Regulation', (2002) European Business Law Review 5, 459-487, Doyle, G., *Media ownership*, (SAGE Publications, 2002), 1.

is that the new wave of "merger mania" has shifted from locally or regionally based print media to nationally and internationally based audiovisual media.[70]The ever increasing pressure on deregulation means that a growing number of mergers in the television industry is predicted in the coming years. Motta and Polo observe that there are many empirical and historical grounds to believe that the broadcasting industry will maintain a high level of market concentration. They provide two main reasons:

> "First, success in the industry depends crucially on the attractiveness, or perceived quality, of the programmes. To have a large audience share, firms have to invest heavily in programme quality. Such an investment represents a fixed cost (i.e. it is independent of the number of viewers who receive the programme) that not all the firms can afford. Second, broadcasting involves different vertical stages of production. The existence of bottlenecks at any of these stages might have serious repercussions for the entire vertical chain".[71]

Digitalisation and convergence have not erased the bottlenecks, they just shifted their position in the value chain – from spectrum scarcity to relative content scarcity and technical bottlenecks to access to content, such as conditional access systems. This makes owners of these bottlenecks instantly dominant. All in all, media industry is becoming more and more concentrated despite the popular view that new technologies will lead to a fragmented market structure. On the contrary, in 2006 there were 448 traditional media deals worth a total of $55.5 billion, and in the first five months of 2007 – 372 deals worth $93.8 billion.[72] Every business consulting firm predicts that in 2007 even more mergers and acquisitions will take place in the sector.[73] The trend towards concentration, therefore, has not slowed down because technology has changed. Acquiring competitors is still the preferred means of securing more viewers and subscribers as this will always be far easier than working on better content and innovating new ways to attract audiences.[74] As noted by Philip Lowe, Director General of Directorate General for Competition in the European Commission:

---

[70] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 43

[71] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', (1997) Economic Policy 12, 326.

[72] Stone, P., 'One Down (Thomson/Reuters – So Much For The 'British' News Agency, Now It Is Going To Be Canadian) And One To Go (News Corp./Dow Jones), And There May Be Many More To Come', www.followthemedia.com, 16 May 2007.

[73] Hedges, M., 'It is a Fight to the Death : Branson v. Murdoch', www.followthemedia.com, 28 March 2007.

[74] *Ibid.*

"The *marked trend* towards concentration in the European communications and media sectors during recent years in our view entails two dangers. The first danger is the creation of significant market power of undertakings – or even monopoly – that significantly impedes competition, ultimately to the detriment of consumer welfare. This very often coincides with the second danger, which by the way – as competition authorities – we have no remit to control, namely the possibility for a limited number of media companies to curtail media pluralism, diversity and freedom of information".[75]

All the above trends imply that the main question of this thesis, that is whether EU-level policy in the public interest is still needed in the television broadcasting industry, is as crucial as never before.[76] Today, the generation-old forecast of the renowned Canadian media theorist Marshall McLuhan has been fulfilled – the development of cable and satellite technologies has meant that television has crossed borders and brought us together into a "global village".[77] As observed by the UN Secretary General Kofi Annan, this global reach of television can on the one hand, "be a tremendous force for good. It can educate great numbers of people about the world around them. It can show us how much we have in common with our neighbours, near and far. And, it can shed light on the dark corners, where ignorance and hatred fester."[78] On the other hand, one must not forget that television these days wields enormous political power and by reporting or not reporting particular events, can influence governments' actions and people's perception of these actions. Therefore, control over global television equates to having global rule of minds and souls.

And this is despite the recent fashion to proclaim the death of broadcasting as we know it. In reality, as noted by Tongue, viewers' behaviour "will not change as fast and as radically as predicted by some. Not all will want to be interactive all the time – passive viewing will continue as a major pastime".[79] Television in a traditional sense will, therefore, remain the

---

[75] Lowe, P., 'Media Concentration and Convergence: Competition in Communications', Oxford Media Convention, January 13, 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_002_en.pdf (accessed 8 September 2007), emphasis added.

[76] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 295, 296.

[77] McLuhan, M., *The Gutenberg Galaxy* (University of Toronto Press, 1962).

[78] Annan, K., UN Secretary General, address at the World Television Day, 21 November 2003, http://www.un.org/News/Press/docs/2003/sgsm9007.doc.htm (accessed 8 September 2007).

[79] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', in: Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999) 133; Alger,

only medium able to create knowledge common to masses, which is the basis of social communication and bond and constitutes a vital element in the functioning of democracy. As long as societies exist they will desire this "common knowledge" and television broadcasting will always survive. In fact, television is still the primary source of information for most people in Europe[80] and television viewing in Europe has been constantly increasing over the past 10 years.[81] As Noveck observes,

> "television is one, if not the primary means of political socialisation today. It is through television that we seek information to make informed public choices about our political institutions and leaders. It is from television that so many derive a form of entertainment, companionship, education and political engagement".[82]

Moreover, the continuing importance of television is derived from the fact that media consumers expect different standards from broadcasting than from other media, especially the press. As Barendt observes, "while [the public] expects the print media to be biased or to have selective coverage, it has relied on ... television to provide objective news and a comprehensive range of programmes to inform as well as to entertain".[83] This is why the need to safeguard pluralism and diversity is much more profound in audiovisual than in any other media source.[84]

As for the regulation of television, development of cable and satellite broadcasting led to a revolution in the regulatory approach in the European Union. The problem of scarcity of frequencies has disappeared undermining the technical rationale for public-service monopolies, which until the late 1980s characterised national broadcasting systems. Suddenly obsolete regulatory policies dissuaded commercial media investment and the proper

---

D., *Megamedia. How giant corporations dominate mass media, distort competition, and endanger democracy*, n. 12, 21.

[80] Open Society Institute , '4000 channels in Europe, but what's on TV', press release, 11 October 2005, http://www.eumap.org/pressinfo/press_releases/media/europe/englishpr.pdf (accessed 8 September 2007); see also Marsden, C., Verhulst, S., 'Convergence: a Framework for Discussion', n. 2, 2; Tongue C., 'Culture or Monoculture? The European Audiovisual Challenge' n. 29, 135; McGonagle, M., *Media law*, n. 79, 387.

[81] Open Society Institute, 'Television across Europe: regulation, policy and independence' (Monitoring Report) n. 51, 39.

[82] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age' n. 31, 44.

[83] Barendt, E., *Freedom of Speech*, 2 ed., (Oxford University Press, 2005) 448.

[84] Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, n. 12, 267; Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 79-80.

functioning of the internal market was threatened. The need for pan-European de-regulation meant that the European Union had to get involved. The result was the adoption, in 1989, of the directive on television broadcasting, known as the Television Without Frontiers Directive ("**the TVWF Directive**"),[85] which introduced mutual recognition for trans-frontier broadcasts. The Television Without Frontiers Directive was adopted in the spirit of neo-liberalism which praised broadcasting deregulation as a "liberation" of television from its historical bonds.[86] The "fathers" of the Directive believed that the removal of technical and regulatory barriers to market entry would be sufficient for television in Europe to become a medium that would be characterised by multiple and diverse products and the rule of "consumer sovereignty".[87]

However, the reality proved to be far more difficult. The Directive itself encouraged increasing cooperation and cross-border mergers between the largest European media groups.[88] Moreover, in the growing number of media outlets and almost unlimited stream of information provided by the Internet, television companies embarked on the fight for audience. This inevitably led to the loss in quality of programmes.[89] Only those which attract the biggest numbers of viewers are profitable. This fierce fight for audience is one of the main reasons behind increasing concentration in the television industry. One must not be misled by the increasing number of channels. This trend is not followed by the increasing number of television companies and substantial diversification of the offering. On the contrary, our screens are being dominated by "a narrow range of films and products made, marketed and distributed by an oligopoly of media operators".[90] Despite the multitude of channels, just 50 channels share approximately 75% of the European market.[91] There is a growing fear that if no action is taken, programme offers of multiple channels owned by a diminishing number of

---

[85] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, (1989) OJ 331/51, amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ (1997) L 202/60.

[86] Humphreys, P., 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', 1995, http://www.psa.ac.uk/journals/pdf/5/1995/hump.pdf (accessed 8 September 2007), 1403.

[87] *Ibid.*, 1403.

[88] Harcourt, A., *The European Union and the regulation of media markets*, (Manchester University Press 2005) 65

[89] Open Society Institute , '4000 channels in Europe, but what's on TV', n. 80; see also in general Open Society Institute, 'Television across Europe: regulation, policy and independence', n. 51.

[90] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 127

[91] McGonagle, M., *Media law,* n. 8, 385.

commercial television stations, may slowly begin to reassemble each other and the process of "dumbing down" will continue.

Currently, the phenomenon of convergence stimulates the minds of the regulators. In December 2007 the TVWF directive was replaced by the "Audiovisual Media Services Directive" ("**the AVMS Directive**").[92] The change of the name is set to indicate that in the era of converged technologies, television as we know it is becoming a thing of the past. However, Gibbons rightly observes, that "there is a fatalistic – if not deterministic – quality about the progression of the convergence debate".[93] It is assumed by the European Commission and most national regulators that convergent digital technology will absorb the earlier analogue. And this is presumed to automatically render older forms of regulation redundant as far as converged media are concerned. As a consequence, there is little place for the issues of ownership and control in recent policy discussions of media convergence.[94] I agree with Gibbons' conclusion that "even if particular features of ownership regulation will be rendered obsolete by convergence, it does not follow that policy choices about media pluralism in general will also disappear".[95] This is all the more important, because contrary to popular belief,

> "the arrival of new media and in particular the digital convergence of the information and communications industries [is] driving a marked trend towards media concentrations as large, generally internationally-ambitious, private media corporations [seek] to exploit new economies of scale and scope".[96]

In fact, much of the investment in new media has come from large corporations, including Bertelsmann, News Corporation, Vivendi, Liberty and AOL Time Warner. In fact, Rupert Murdoch has been reported to say that he had set aside around 1 billion dollars to purchase

---

[92] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ (2007) L 332/27.
[93] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 155.
[94] *Ibid.*, 155.
[95] *Ibid.*, 160.
[96] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', 2005, http://regulation.upf.edu/ecpr-05-papers/phumphreys.pdf (accessed 8 September 2007), 15-16.

Internet sites and alleviate the threat to lose money to online media.[97] This creates the risk that the new digital media landscape will still be dominated by a few powerful international media corporations.[98]

Therefore, in modern integrating Europe the aim must be not only to encourage healthy growth of television companies while protecting effective competition, but also to promote pluralism and diversity in media. Since, as noted by the European Broadcasting Union,

> "a free, pluralistic media system which functions properly is essential ... not only to national democracies, but also to the democratic foundations of ...[Europe] itself. Such a system is also a means of fulfilling the political, cultural and social needs of European citizens and of 'European society' as a whole".[99]

However, the goal to support the growth of media companies often "clashes" with the goal of maintaining pluralism and diversity, and this is what makes the media sector so very specific, sensitive and resistant to any attempts of pan-European regulation of media concentration.

1.3 The warriors and their arguments

The subject of threats posed by media concentrations has frequently and recurrently been discussed at European level. In fact, as McQuail and Siune observe, "the history of [the whole] European media policy can to a certain degree be regarded as a continued debate about the effects, results and consequences of media concentration".[100] However, the overall result of these discussions may be summarised in one sentence: "there has been much concern expressed, but precious little action has been taken".[101]

---

[97] Stone, P., 'Murdoch puts his money where his mouth is – he's setting aside another $1 billion to buy Internet sites, and he's close to gobbling up a search engine', www.followthemedia.com, 23 January 2006.
[98] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 15-16.
[99] European Broadcasting Union, 'EBU comments on the Charter of Fundamental Rights', 11 May 2000, http://www.ebu.ch/CMSimages/en/leg_charter_fundamental_rights_tcm6-4367.pdf (accessed 13 August 2007).
[100] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 191.
[101] Peters, B., 'Corporate Media Trends in Europe', Contribution to the CPBF conference on the 'Communications Revolutions – who benefits?', 2001, http://keywords.dsvr.co.uk/freepress/body.phtml?category=&id=102 (accessed 8 September 2007).

The main obstacle to any positive outcome seems to be the impossibility of overcoming the conflict of priorities, which one could say has over the years amounted to a "war of the worlds". Tongue notes that in the recent years, the European debate around the future of broadcasting has polarised.[102] The reason was the emergence of new delivery systems and the phenomenon of convergence. At one end of the battle field the Pluralist Army highlights the need to safeguard public service broadcasting and maintain rigid regulation of concentration in the media sector. The pluralist soldiers believe that the protection of pluralist opinion, freedom of choice, diversity and quality of media content and the understanding of European cultural identity is an absolute "must" in modern, democratic and integrating Europe. However, at the other end of the battle field waves the flag of "the neo-liberal paradise... a completely unregulated broadcasting settlement dictated only by the whims of the market".[103] The Liberal Army not only praises a consolidated media market but also contends that there is simply no legal basis for pan-European legislation aimed at protecting pluralism and diversity. Therefore, the liberalist soldiers not only point out economic considerations of effective and unhindered competition as the aim for regulation, but also emphasise that this in fact may be the only justification for action at European level.

(i) Advocates for liberalisation

The comments and lobbying of the opponents of positive intervention to safeguard media pluralism have to a large extent shaped by the discussion and the current outlook of the regulation of media concentration in Europe. The core argument of the advocates for liberalistion is that the emerging global concentrated commercial media system does create certain benefits and there are many arguments raised in favour of the liberal approach to the media ownership issue in the European Union. Those who present this line of reasoning, often claim that consolidated media markets might actually further the objectives of opponents to unhindered growth of media companies for a number of reasons.[104]

First of all, it is claimed that *received economic wisdom* suggests that aiming for conglomerate status is the only way for media companies to become successful and internationally

[102] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 128; Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, n. 12, 309.
[103] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 128.
[104] Knee, J.A., 'Should we fear media cross-ownership?', (2003) Vol. 26, 3 Regulation., 16-20

competitive.[105] Is it not true that only large media groups are best suited to reap economies of scope and scale inherent in the media sector and exacerbated by convergence and technological change? Doesn't the possession of multiple media outlets provide opportunities for cross-media promotion, allowing the sharing of information, expertise, media products and rights, and the spreading of risk? These not-to-be-missed opportunities seem to justify the uncontrollable growth of media companies. Investing in new technical systems, whether it be cable, satellite or digital TV, marketing the new services and technologies, setting up conditional access systems for pay-TV, etc., all require substantial capital sums which can only be provided without risk by large media groups.[106] Moreover, the increase in the number of transmission modes, which was not followed by the increase in the amount of available content, meant more competition between broadcasters for scarce valuable media input. This situation has significantly inflated the cost of "premium content", i.e. the rights to popular sports events, especially football, and recently released movies. The result is that, again, only large media companies with deep pockets can afford them.[107] In summary, therefore, it indeed seems that "a high level of international and multimedia concentration is virtually a *structural necessity* and goes hand in hand with the media market".[108]

Secondly, it is a popular belief that the European Union should support the unhindered growth of media companies as leading to the creation of "European champions", who would be capable of competing with the omnipresence of American rivals.[109] The expansion of multi-channel distribution possibilities in Europe has not been followed by a boost in programme production capacity. In fact, new commercial broadcasters produce very little of their own programmes and since they are not subject to any public-service obligations they have sacrificed the quality of programming and rely heavily on imports from the United States.[110] The result is a constant concern about the spiralling deficit in the balance of audiovisual trade with the United States. In 2002 this deficit exceeded 8 billion dollars and it can be expected to

---

[105] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', in Andrew, J., Crook, M., Holmes, D., Kolinsky, E., (Eds.) *Why Europe? Problems of culture and identity, Vol.2: Media, Film, Gender, Youth and Education* (Macmillan, New York 2000).

[106] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.

[107] *Ibid.*, n. 111.

[108] Hoffman-Riem, W., *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries*, n. 12, emphasis added.

[109] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 69.

[110] Humphreys, P., 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', n. 87.

increase in years to come.[111] Allowing European media companies such as RTL Group, Bertelsmann, Vivendi Canal+ or BSkyB, to concentrate and expand is, therefore, seen as an appropriate remedy.[112] This argument is only strengthened by placing the big, strong European media companies at the forefront of the Lisbon Strategy, to make Europe the most competitive, knowledge-based economic area in the world, by 2010.[113]

Furthermore, there are opinions that single ownership of many media outlets can actually boost pluralism and content diversity. First of all, as pointed out by James Gattuso, while media companies with only one station tend to compete for a lowest-common-denominator market, owners with several stations are able to target niche markets with different programming on each station.[114] Moreover, it may seem that the bigger media companies get, the more capable they actually become of "protecting their independence and autonomy from political, cultural, economic and other vested interest groups in general".[115] Whereas only small, independently owned media firms may "pull punches when covering local car dealers, real estate, and industry"[116] only the "big fish" can "consistently hold big businesses and big governments accountable".[117] Therefore, if indeed true, it would seem that concentration in the media sector not only does not hamper pluralism, diversity and quality of content, but in fact helps to boost it!

Finally, the recent key argument, the "golden antidote" for all pluralism related concerns, is that "the arrival of new technologies undermines the rationale for stringent restrictions on media ownership. This is based on the assumption that new technologies *per se* bring about a significant increase in choice and diversity. According to this reasoning, Internet and the roll-out of digitalisation render concerns about excessive media concentration obsolete, as currently there are hundreds of competing channels and literally anyone and everyone can

---

[111] Data from the European Audiovisual Observatory website.
[112] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 89.
[113] See Europa portal glossary at http://europa.eu/scadplus/glossary/lisbon_strategy_en.htm; European Commission "Growth and Jobs" at http://ec.europa.eu/growthandjobs/index_en.htm.
[114] Gattuso, J., 'The Myth of Media Concentration: Why the FCC's Media Ownership Rules are Unnecessary', http://www.heritage.org/Research/InternetandTechnology/wm284.cfm (accessed 8 September 2007).
[115] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 44.
[116] Kennedy, D., 'Monopoly Money', *Boston Phoenix*, 17 January 2002.
[117] *Ibid.* .

speak online. As argued by Gattuso[118] and Knee[119], opponents of relaxed media ownership rules are mistaken in their claims that a liberal approach would reduce diversity in an already concentrated market, where big media companies are already limiting what people see and hear.[120] Both Gattuso and Knee argue that despite many mergers in the media industry in recent years, currently there is in fact more diversity and competition in the media than at any other time in history, thanks to development of cable, satellite, Internet, as well as unmatched growth in the number of new broadcast stations. This explosion in sources of news and information over the recent decades should have "muted concerns that a single monolithic news source could arise to dominate the media".[121] The conclusion is that consumers face "a bewildering and unprecedented amount of choice"[122] and the real danger lies elsewhere other than in the imaginary existence of harmful media monopolies. It is in fact the outdated and *unnecessary* restrictions in media companies' growth which limits the ability of media outlets to use resources as effectively as possible with a claimed detriment to consumers. Admittedly, Gattuso and Knee are American authors, but their voices are just as vital here in Europe, where most of the lobbying against regulation is done by American-originated or American-associated media companies.[123]

The convergence and new technology craze that has overcome regulators means that the issue of ownership controls in the media sector is gradually played down. As Gibbons notes,

> "there is a widespread assumption that ownership rules are related to sector structure and that, when that disappears, so does need for regulation. The disappearance of separate media sectors is associated with the development of a full "electronic publishing" market which will operate on the same principles as the current publishing markets for which regulation is minimal".[124]

---

[118] Gattuso, J., 'The Myth of Media Concentration: Why the FCC's Media Ownership Rules are Unnecessary', n. 115.
[119] Knee, J.A., 'Should we fear media cross-ownership?', n. 105.
[120] Gattuso, J., 'The Myth of Media Concentration: Why the FCC's Media Ownership Rules are Unnecessary', n. 115.
[121] Knee, J.A., 'Should we fear media cross-ownership?', n. 105.
[122] *Ibid.*
[123] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 105.
[124] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 172.

The above arguments are put forward by a number of actors at the media scene. At the forefront of the fight for a liberal approach to media industry one not surprisingly finds commercial media companies and their various supporters and allies often disguised as "independent" think tanks, foundations or research organisations. They invoke economies of scale and scope and reliance on advertising as the key arguments in favour of big consolidated media conglomerates. Apparently, only the "big ones" may reap in full the opportunities created by technological innovation, afford the high costs of sophisticated equipment and establish new products and services.[125] For example, advertisers base their willingness to pay for advertising time and space on the size of their audience therefore, the bigger the media company the greater chance it has to attract advertisers and earn more money.[126] Moreover, as already discussed, media companies wrongly argue that the bigger they get, the more apt they actually become at protecting plurality, diversity and quality of content. They claim that large media groups are more resistant to any form of political, cultural or social pressure. They are better suited to maintain high media quality standard and they are actually the only ones able to engage in investigative journalism.[127]

Therefore, media companies will support regulation of media concentrations only insofar as it leads to facilitating their growth, not hampering it. They have advocated for the harmonisation of national media ownership rules to eliminate obstacles to cross-border investment and thus to their pan-European growth. What media companies would actually like to see is harmonising the rules "down", i.e. relaxing them or even abolishing them.

Any attempt to curb the media companies' ability to grow, faces ferocious lobbying from industry veterans. In the US, between 1998 and 2004, broadcasters spent €249 million lobbying the federal government, including spending €27 million on federal candidates and lawmakers. "This would normally be called bribery; at the FFC, it's just business as usual".[128] While no similar data is available for the European Union, one could be forgiven for suspecting that the situation is similar.

---

[125] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce,* n. 49, 44.
[126] Organisation for Economic Co-operation and development (OECD), 'Media Mergers', n. 14.
[127] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 44.
[128] Goodman, A., Goodman, D., 'Why Media Ownership Matters?', *Seattle Times*, 3 April 2005.

National governments, sympathetic to arguments or susceptible to lobbying and the influence of media companies have tended to indeed relax media ownership restrictions. Since the early 1990s the increasing de-regulatory pressure and the ambition to create "national champions" forced countries like Germany, France and the United Kingdom to loosen their grip on the levels of media ownership and restrictions to cross-media mergers.[129] In the discussion on the need to introduce a media ownership directive, some Member States raised arguments that harmonisation of media ownership rules will not bring any significant improvement, "since the main obstructions to cross-border expansion by European media companies are cultural and linguistic barriers, not expansion disparities in national regulations".[130]

In the European Commission itself, voices have been heard saying that the technological progress and "not-to-be-missed" opportunities concentration brings, calls for a relaxation of national limits to media concentrations. In 1994, in the middle of a discussion on the directive on media ownership restrictions, the Bangemann High-Level Group in the DG Information Society produced an extremely liberal report called "Europe and Information Society", known as the "Bangemann report".[131] The paper argued that existing national restrictions impede media companies from taking advantage of new possibilities brought about by technological change.[132] It called for allowing oligopolistic media structures, in order to enable European media companies to effectively compete with non-European (mainly American) rivals. The report is often referred to as "a credo to guarantee freedom from regulation"[133] to European media companies. It is worth noting that until 1993 the father of the report, Commissioner Bangemann, was responsible for the portfolio on media ownership. After the matter was transferred to DG Internal Market, Bangemann started openly advocating for liberalisation.[134]

---

[129] For instance, Germany relaxed restrictions on ownership of broadcasting companies in 1996, France loosened the limitations in the television and radio sectors in 1994 and the UK 1996 Broadcasting Act de-regulated restrictions on broadcasting and cross-media ownership; See Doyle, G., 'From 'Pluralism' to 'Ownership': Europe's emergent policy on media concentrations navigates the doldrums', (1997) The Journal of Information Law and Technology 3; Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 21.

[130] Doyle, G., 'From 'Pluralism' to 'Ownership': Europe's emergent policy on media concentrations navigates the doldrums', n. 130, 5.

[131] European Commission, High-Level Group on the Information Society, 'Europe and the Global Information Society; Recommendations to the European Council', 26 May 1994, http://Europa.eu.int/ISPO/docs/basics/docs/bangemann.pdf (accessed 8 September 2007).

[132] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 109.

[133] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 216.

[134] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', (1998) Journal of Common Market Studies, 36-3.

Furthermore, in 1997 – the same year as DG Internal Market presented the second draft directive introducing restrictions to media ownership – DG Information Society again emphasised that the growth in merger activity will be a natural and inevitable consequence of convergence. In the Convergence Green Paper,[135] mentioned above, DG Information Society argued that only big media companies are able to "straddle the whole value chain within the converged environment, so that the emergence of major players will inevitably rely on partnering to varying degrees".[136] Hence, the whole debate on the dangers of growing media concentration was conspicuously missing in the convergence debate. The issue of pluralism of media was simply regarded as already being dealt with by "other Community action".[137]

The Convergence Green Paper carried the message that convergence must lead to liberalisation of the audiovisual sector. This false conclusion is the result of the incorrect assumption that *regulatory* convergence is the inevitable outcome of *technological* convergence.[138] Therefore, the Green Paper contributed to framing the debate on media concentration in terms of deregulation "to a level where only competition law might constrain the new media".[139] In the end, following the failed attempt to introduce EU-level rules on media concentration, it was this initiative which led to the current policy line in the European Commission; protection of public interests such as pluralism is regarded as only secondary to encouraging convergence and progress of technology.

(ii) Advocates for safeguards for pluralism

Whilst the arguments of advocates of liberalisation in the sector appear reasonable and laudable, they also seem to come to us as if we know them off by heart. In fact, we may sometimes have the impression that wherever we turn we only hear about the benefits of a

---

[135] European Commission, Convergence of the Telecommunications, media and Information Technology, and the Implications for Regulations, towards an Information Society Approach (Green Paper), n. 129; for detailed analysis of the Convergence Green Paper see Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 111-120.

[136] European Commission, Convergence of the Telecommunications, media and Information Technology, and the Implications for Regulations, towards an Information Society Approach (Green Paper), n. 129.

[137] Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', the ECPR Joint Research Sessions, Mannheim, 26-31 March 1999, Workshop 24: 'Regulating Communications in the Multimedia Age', http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w24/Humphreys.pdf (accessed 8 September 2007).

[138] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 132.

[139] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 156.

consolidated media market. This is because these arguments are fostered by media companies who possess the means of communication and can shape the message we receive. If something is repeated in the media over and over again, we start perceiving it as a fact. On the contrary – if we do not hear about something, we may just as well think it does not exist. The most vivid example of this phenomenon was the process of recent deregulation of the media ownership regime by the US Federal Communications Commission in 2003. The FCC hearings were not covered by mainstream media and if it wasn't for the independent "media activists" it would have gone completely unnoticed by the public. As pointed out by Amy Goodman and David Goodman:

> "You would think that FCC deregulation, affecting millions of Americans, would get major play in the media. But the national networks knew that if people found out about how one media mogul could own nearly everything you watch, hear and read in a city, there would be revolt. The solution for [the media] was simple: they just didn't cover the issue for a year".[140]

There is no reason to believe that European media would behave any differently. The Convergence Green Paper is probably the best example. As Tongue observed, the document "was in reality, not drafted to rationalise the future of broadcasting and telecommunications; it was drafted to serve certain narrow commercial interests... The dominance of lobbyist's thinking in the Convergence Green Paper was blatant".[141]

Moreover, one must bear in mind that the articles applauding the benefits of concentrated media markets and lobbying for a *laissez-affaire* approach to media concentration, are often published under the aegis of foundations and think tanks which, are financed by, *inter alia*, the media industry's money. For instance, Gattuso and Knee mentioned above published under the auspices of the Heritage Foundation and Cato Institute respectively. The Cato Institute, one of the most influential think tanks in the USA, which has many media related publications on its website, had Rupert Murdoch and John Malone, two of the most influential global media moguls, on its board of directors. Foundations and think tanks of this kind have a specific policy perspective. The Cato Institute's mission is to broaden the parameters of public policy

[140] Goodman, A., Goodman, D., 'Why Media Ownership Matters?', n. 129.
[141] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 140.

debate to allow consideration of the traditional American principles of limited government, individual liberty and free markets.[142] Likewise, according to its website, the Heritage Foundation is devoted to the principles of free enterprise, limited government, and individual freedom.[143] The companies, organisations and bodies who fund them share this perspective and, obviously the authors who publish under their aegis write against the backdrop of this policy perspective. Therefore, one must also read the arguments bearing this perspective in mind and not necessarily take them as totally independent.

Should we then really believe and take for granted without questioning the arguments that concerns of pluralism and diversity are just "populist rhetoric"[144] and the reality is that a consolidated media market actually best serves European consumers? And if so, should the European Union be promoting the relaxation of national media ownership rules? To answer this question, it is necessary to look beyond media companies' and their lobbyists. Only this way can one discover the truth as to whether all the claimed benefits of concentrated media markets are far overweighed by the dangers they actually pose to pluralism, diversity and in the end, to democracy. In fact, it has been said that all the arguments in favour of allowing concentration in the media sector are "clear fallacies".[145]

First of all, it is by no means true that the bigger a media company gets, the more it contributes to pluralism and diversity.[146] Although one must certainly allow a certain *caveat*, that sometimes big media companies indeed use their rich resources to engage in impartial investigative journalism resulting in valuable, high quality and diverse pieces of content. On balance however, they have minimal interest in quality journalism or public affairs except for that which serves the business and advertisers.[147] This was bluntly admitted by the CEO of one of the biggest media companies in the US, "We are here to serve advertisers. That is our raison d'etre".[148] Giant television groups do not do very much more than "commercially carpet-bomb

---

[142] See the Cato Institute's website http://www.cato.org/about.php.
[143] See the Heritage Foundation's website: http://www.heritage.org/about/.
[144] Gattuso, J., 'The Myth of Media Concentration: Why the FCC's Media Ownership Rules are Unnecessary', n. 115.
[145] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79,132.
[146] Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, n. 6, 88.
[147] McChesney, R.W, 'The nine firms that dominate the world', n. 29; Alger, D., *Megamedia. How giant corporations dominate mass media, distort competition, and endanger democracy*, n. 12, 163.
[148] *Advertising Age*, 2 March 1997.

every aspect of human life"[149] and the concentrated media market results in reducing competition to attracting viewers through sensationalism rather than quality, detailed reporting.[150] As noted in the Open Society's Monitoring Report "Television across Europe: regulation, policy and independence, "Investigative journalism and minority programming are scarce commodities in both public and commercial television. Newscasts have often become markedly tabloid...".[151] Even Ted Turner, himself the creator of one of the world's greatest media enterprises, noted:

> "When you lose small businesses, you lose big ideas. People who own their own businesses are their own bosses. They are independent thinkers ... They are quicker to seize on new technologies and new product ideas. They steal market share from the big companies, spurring them to adopt new approaches. This process promotes competition, which leads to higher product and service quality, more jobs, and greater wealth".[152]

Further, consolidation of media markets not only fails to foster political accountability but very much to the contrary – "it poses a very serious threat to democratic pluralism"[153] "by concentrating control of information, ideas and opinion-forming in the hands of a limited number of media owners".[154] First of all, it is not true that large media companies are more resistant to political or other forms of pressure. In reality politicians often find loyal allies in big media corporations and, hence, it is in fact much more difficult for those with political or economic power to influence and control larger numbers of smaller media firms.[155] Secondly, giant media companies start exercising significant influence themselves in line with a certain viewpoint. Berlusconi's and Murdoch's media empires serve as the best examples. In their, and all the other giant media companies' cases, "conglomerate journalism" discourages in-depth investigative reporting and instead of journalistic integrity it encourages company loyalty.[156] Indeed, quoting Eric Severeid, a renowned American news commentator: "... the

---

[149] McChesney, R.W, 'The nine firms that dominate the world', n. 29.
[150] Shah, A., 'Corporate Influence in the Media. Media Conglomerates, Mergers, Concentration of Ownership', http://www.globalissues.org/HumanRights/Media/Corporations/Owners.asp (accessed 8 September 2007).
[151] Open Society Institute, 'Television across Europe: regulation, policy and independence', n. 51, 22.
[152] Oliver, E., 'Small media players ensure competition', *The Irish Times*, 5 September 2005.
[153] Understood in its 'internal' incarnation.
[154] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.
[155] *Ibid.*
[156] Lorimer, R., Scannel, P., *Mass Communications: A Comparative Introduction* (Manchester University Press, 1994).

bigger the information media, the less courage and freedom of expression they allow. Bigness means weakness...Courage in the realm of ideas goes in inverse ration to the size of the establishment".[157] Although some claim that nobody is really confused about what approach to independent journalism these companies take,[158] I dare to say that in many instances people are indeed puzzled and treat the information they receive from the likes of Mediaset or Fox as pure fact. Moreover, although it is true that only big media possess the means to consistently hold big business and big government accountable,[159] it is even more true that when "big media is owned by big business there is less criticism of big business or related political issues in big government".[160] In fact, "the last thing media corporations want to do is rock the boat, as long as they can do their business".[161] In view of all the above, knowing that the global media world is shared between a small group of companies interrelated and connected by complex webs of joint ventures and alliances, how can anyone claim that big media equals pluralism and diversity?

Turning now to the arguments of the need to promote "European champions", the truth is that they may no longer even exist. There are no pure European media companies anymore – foreign, mainly American, shareholders have invested in the majority of them or some cases have completely bought them out.[162] In 2000 out of approximately 450 television companies registered in the European Union, the European Audiovisual Observatory identified 264 which were under majority control of investors from outside the community. 239 of these companies were controlled by United States' investors, representing 13.3 billion Euro of assets, or 87.2% of foreign assets.[163] The lobbying to promote European champions and therefore against any regulation in media concentration in Europe is therefore misleading, as it comes in fact from the media companies of American origin or American associations. A leaked 1995 briefing in

---

[157] *Ibid.*

[158] Knee, J.A., 'Should we fear media cross-ownership?', n. 105.

[159] Kennedy, D., 'Monopoly Money', n. 117.

[160] Shah, A., 'Corporate Influence in the Media. Media Conglomerates, Mergers, Concentration of Ownership', n. 151.

[161] McChesney, R.W., 'The political economy of global media', 1998, http://www.waccglobal.org/wacc/publications/media_development/archive/1998_4/the_political_economy_of_global_media (accessed 8 September 2007).

[162] Harcourt, A., 'European policy and legal framework for media ownership – Aims, obstacles and effectiveness', Regional conference for South-East European and new EU member countries on 'Concentration of media ownership and its impact on media freedom and pluralism, Bled, Slovenia, 11-12 June 2004, http://www.mirovni-institut.si/media_ownership/conference/pdf/Harcourt.pdf (accessed 8 September 2007).

[163] Most recent available data from the European Audiovisual Observatory, which is the only body in Europe providing this type of data.

which the US government sets out its global strategy for promoting American audiovisual exports to Europe, is the most poignant example of this. It called to: (i) avoid any increase in broadcasting content regulation in Europe; (ii) avoid *useless* quarrels about culture; (iii) work towards deregulation; (iv) increase the number of alliances and investments in Europe; and (v) seek (discreetly) the support of European operators for the US position.[164]

The next ill founded claim is that there is no need to worry about concentrating media markets when the progress of digitisation leads to hundreds of television channels, and there is the Internet where almost everyone can express themselves freely. In reality this is not a case. First and foremost, technology cannot be *the* answer to every public interest concern in the media sector. Pluralism and diversity will not be the natural result of digitisation leading to channel abundance. In reality it is only transmission systems that are becoming more diverse and differentiated. And although the resulting channel multiplication caused audience fragmentation, there is unaltered intense competition for large audiences and an increased bias towards mass-appeal programming.[165] Humphreys rightly observes that "digital media ... might be able to give us five hundred channels, but the quality, honesty, fairness, content and interactivity of those stations cannot be guaranteed by the spectacular features of the technology, or the robust competitiveness of open markets".[166]

Therefore, a consolidated television market despite providing multiple channels will in fact not be pluralistic at all, as the majority of the channels are still owned by a handful of conglomerates. Furthermore, it will not be diverse either as the general feeling is that hundreds of channels simply offer "more of the same". The increase in available spectrum means that profit-oriented commercial broadcasters will always be looking for cheap ways to fill air time and this quite simply means repeating cheap US programmes.[167] An increase in the number of channels does not equal an increase of providers or increase in diversity. The European Parliament pointed to this phenomenon in its 2005 Resolution on Television Without Frontiers Directive where it stressed that:

---

[164] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 105.
[165] Humphreys, P., 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', n. 87.
[166] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 45.
[167] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 135.

"particular care should be paid, in order to ensure pluralism of opinion and diversity of programme distribution, to preventing, when drafting Community or national regulations on digital switchover, the majority of new digital distribution services from falling under the control or decisive influence of large, capital-rich, multinational media groups – particularly those with interests outside the EU".[168]

Therefore, the existence of numerous media outlets and multiple channels will not guarantee pluralism and diversity of content if they are owned by a handful of large media companies. This is what Arino calls the "multi-channel paradox",[169] when the multiplication of channels simply means that "each owner controls even more formidable communications power".[170] Without any regulation, "there is no guarantee that digital interactive television will be democratic and public-interest oriented".[171] One may even risk suspecting that there is a guarantee that it will not.

In relation to the belief in the unending potential of the Internet to remedy concerns about giant media companies, influencing what people know about the world, one must bear in mind that the largest media, telecommunications and computer firms have done everything they could to "colonise the Internet, or at least neutralise its threat".[172] Giant media-Internet mergers such as that of AOL and TimeWarner, are a fine example of this. The result is that the Internet is not as diverse as it appears to be. According to Jupiter Media Metrix, a company that tracks the Internet and conducts technology analysis and measurement, in the United States the total number of companies that control 60% of all minutes spent online declined by 87%, from 110 in March 1999 to 14 in March 2001.[173] The top 20 online news sites are owned by 16 large media companies. The top five sites get more traffic than the other 15 combined.[174] In addition, as pointed out by Danny Schechter, executive director of the MediaChannel.org, it is cheaper for websites to buy someone else's news than generate their

---

[168] European Parliament, Resolution on the application of Articles 4 and 5 of Directive 89/552/EEC ('Television without Frontiers'), as amended by Directive 97/36/EC, for the period 2001-2002, P6_TA(2005)0322.
[169] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', (2004) 54 Communications and Strategies, 99.
[170] Bagdikian, B., 'The Media Monopoly', 6th ed., (Beacon Press, 2000), 223-224.
[171] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 42.
[172] McChesney, R.W., 'The nine firms that dominate the world', n. 29.
[173] Shah, A., 'Corporate Influence in the Media. Media Conglomerates, Mergers, Concentration of Ownership', n. 151.
[174] Hindman, M., Cukier, K.N., 'More Media, Less Diversity', *The New York Times*, 2 June 2003.

own.[175] In the end, the web-surfers do not bother searching for news in the almost infinite amount of websites, but end up on the biggest and most well known sites, which either get the news from agencies like Reuters and Associated Press or are the websites of broadcast companies. The result is that a handful of the biggest media companies not only own most of the television channels but also control the majority of the content accessed online.[176] As Hindman and Cukier point out:

> "There's an even greater media concentration online than in the offline world... While regulation must remain flexible to account for technological change, the Internet shouldn't be invoked to justify diluting existing safeguards. In praising the Internet, let us hope that current regulators don't misunderstand it".[177]

Moreover, Internet will not replace television, as many convergence enthusiasts like to assert, in their quest for liberal regulatory regimes. Not only are "consumers the creatures of habit and tradition"[178] and they will not easily discard of their beloved "tellies". The Internet has a predominantly different function to the television and consumers will most likely continue to see it as something separate. McGougan rightly summarises the video streaming services offered by the Internet technology as

> "the addition of new services for viewers, complementing the traditional services provided by television. Just as radio did not dispense with newspapers, and television did not replace radio, so, when its price and ease of use make it suitable for a mass audience, the Internet will come to be adopted by viewers in addition to the existing media".[179]

Finally, and probably most interestingly, it is not true that *economic efficiency* dictates that convergence and progress of technology renders the removal of restrictions on media

---

[175] Schechter, D., 'Why the latest news about online news ain't so good', 2000 at http://www.mediachannel.org/views/dissector/lessnews.shtml (accessed 8 September 2007).

[176] One study showed that AOL Time Warner accounted for nearly a third of all user time spent online. As to the cable channels, in USA of the 91 major cable networks 79 are part of the worldwide multiple network groups such as Time Warner. Viacom, NBC or Disney; see Moyers, B., 'Keynote address to the National Conference on Media Reform', n. 34.

[177] Hindman, M., Cukier, K.M., 'More Media, Less Diversity', n. 175.

[178] McGougan, J., 'The challenge of convergence to audiovisual regulation: Is the current regulatory framework approaching its sell-by date?', in: Marsden, C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, 1999), 178.

[179] *Ibid.*, 181.

concentration inevitable. While mono-media expansion does indeed produce some economic gains, cross-media ownership, in particular between television and newspapers is free of economic synergies.[180] Therefore, even pure economics cannot be used to justify media companies' quest to enlarge in every possible direction.

The above arguments for the need to safeguard media pluralism and cultural diversity are widely recognised internationally.[181] In Europe, organisations and institutions which view concentrations in the media industry as a potential threat to pluralist opinion as well as to diversity and quality of content are either those whose main objective is to safeguard the human right to impartial information, or those who represent democratic and social values within more economically oriented structures.[182] With strong support from trade unions and journalist organisations, the Council of Europe, the European Parliament and the Economic and Social Committee have tirelessly fought to include public interest considerations in the assessment of media mergers that are of pan-European significance.

The Council of Europe safeguards the freedom of expression and information, and hence, it has approached the media concentration issue from the human rights perspective and cherished pluralism and diversity.[183] Within the European Union the views are divergent; on the one hand, media sector is perceived as vital because of its contribution to technological innovation, economic growth and employment. Indeed, media in general and the audiovisual sector in particular, are to play a substantial role in realising the Lisbon Strategy of making

---

[180] Doyle, G., 'Convergence: 'A unique opportunity to evolve in previously unthought-of ways or a hoax?', in: Marsden, C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, 1999), 144; see also Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', (1998) 16 Cardozo Arts & Entertainment Law Journal, 451-473.

[181] See for instance the Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the General Conference of UNESCO at its 33rd session, 2005.

[182] Goldberg, D., Prosser, T., Verhulst, S., 'Regulating the changing media', n. 2, 146.

[183] See for instance Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, 19 January 1999; Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' DeputiesCouncil of Europe, 'Media Diversity in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, December 2002; Council of Europe, 'Media Pluralism in the Digital Environment', report by the Steering Committee on the Mass Media, October 2000; Council of Europe, 'Transnational Media Concentrations in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, November 2004; Council of Europe, Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies;

Europe the most competitive, knowledge-based economic area in the world by 2010.[184] This inevitably presupposes allowing European-based media companies to grow into "European champions", with concerns of pluralism and diversity left aside. On the other hand, pluralism and diversity of the media continue to be seen as having fundamental importance for the cornerstone of democracy in Europe – the freedom of expression.[185] The European Court of Justice proclaimed that "in the light of Article 10 paragraph 2 [of the European Convention on Human Rights], there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms".[186]

At the institutional level, while the European Parliament and the Economic and Social Committee have concurred with the Council of Europe and consistently pressed for a regulation aimed at protection of pluralism and diversity in the European media, the European Within the European Commission, different Directorates General ("**DG**") pursue different objectives.[187] For example, liberalisation trends of DG Information Society have been inconsistent with DG Culture's pluralistic ideas. DG Internal Market's failure in its reconciliatory attempts to introduce more democratic values through the "backdoor" of protecting the smooth functioning of the Internal Market has meant that differences of opinion within the Commission have persisted and even deepened over time.

Actors on the media scene are not acting in harmony either. While media companies understandably lobby for a *laissez-affaire* approach to their constant endeavours to grow, federations of journalists and trade unions support the Council of Europe and the European Parliament in their efforts to safeguard pluralism, diversity and journalistic ethics in media.[188]

---

[184] European Commission, Growth and Jobs Strategy (Lisbon Strategy), http://ec.europa.eu/growthandjobs/key/index_en.htm (accessed 8 September 2007); see also European Parliament, Draft report on the application of Directive 89/552/EEC Television Without Frontiers, 2003/2033(INI).

[185] European Commission, 'Europe's way to the information society – An action plan', COM(94)347 final, 19 July 1994, European Commission 'Principles and guidelines for the Community's audiovisual policy in the digital age', n. 1; see also Albarran, A.B., Mierzejewska, B.I., 'Media Concentration in the US and European Union: A Comparative Analysis', n. 65.

[186] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media.*, ECR [1991] I-4007, para.22; Case C-353/89 *Commission v The Netherlands*, ECR [1991] I-4069, para.29; Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media*, ECR [1993] I-487; paras.9 ff. Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* ECR [1994] I-4795, para.19; Case C-368/95 *Familiapress*, ECR [1997] I-3689, paras. 18 and 26.

[187] Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, n. 6, 5.

[188] Klimkiewicz, B., 'Media Pluralism: European Regulatory policies and the Case of Central Europe', European University Institute Working Paper, RSCAS No. 2005/19, 7-8.

Failure to reconcile the diverging priorities of different European organisations, institutions and bodies, combined with contradictory lobbying efforts from the industry actors, has resulted in a lack of any form of regulation, despite the attempts to adopt a media concentration directive in the mid 1990s (see Chapter 2.2.1 *infra*). As a result, only market power in the media sector is currently controlled at European level by the European Commission's DG Competition. Both the TVWF directive and its latest version, the AVMS directive, contain very few specific provisions aimed at counteracting growing media concentration in Europe. Vital concerns of pluralism and diversity are left to the Member States which more often than not lack sufficient powers to stand against giant media conglomerates.

Positive integration, that adopting a media concentration directive would entail, necessitates harmonisation of market correcting measures, which requires agreement in the Council of Ministers and the Parliament. Admittedly, in the sensitive field of broadcasting, this is very difficult to achieve.[189] However, the fact that positive integration is more difficult to achieve than negative integration in the form of competition law, does not discharge the European Union of responsibility. There is no excuse for the European Union which "has plainly provided little positive integration in the audiovisual field".[190] Competition law is absolutely no substitute for specific anti-concentration rules in the media sector aimed at protecting pluralism and diversity of media output. This situation is severely criticised by the European Parliament, which believes that the growth of commercial media "tycoons" in Europe facilitated by recent technological changes in the media sector and the resulting removal of national barriers, has cast doubt on whether the Member States are still best placed to deal with the problem.[191]

Therefore, the transformation of media again calls for regulatory action at European level. In particular, growing multi-media empires exercising ever bigger political influences are more

[189] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation' n. 97, 1.
[190] *Ibid.*15-16.
[191] See for instance European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights)', 5 April 2004, A5-0230/2004.

and more often seen as a clear danger to democracy in Europe. As graphically described by McChesney:

> "A spectre now haunts the world: a global commercial media system dominated by a small number of super-powerful, mostly US-based transnational media corporations. It is a system that works to advance the cause of the global market and promote commercial values, while disintegrating journalism and culture not conducive to the immediate bottom line or long-run corporate interests. It is a disaster for anything but the most superficial notion of democracy – a democracy where to paraphrase John Jay's maxim, those who own the world ought to govern it".[192]

This fear is only exacerbated by the current liberalisation trends prevalent both at national and EU level. Modern media regulators seem to believe that liberalisation of media markets is in the best interest of *consumers.* The belief in the European tradition of broadcasting in the public interest is slowly becoming obsolete. Meanwhile, it is obvious that while liberal markets may well serve the "shopping choices of consumers",[193] they will never address the interests of *citizens.* Public interest regulation of television must not be neglected, because, as observed by Tongue, "to treat digital television and other communication technologies as neutral widgets would be an abandonment of European political culture".[194] Tongue believes that the EU must decide now whether it wishes to allow a handful of powerful corporations to make huge short-term profits, or whether it will assert the public interest.[195] She adds that politicians of today will fail future generations unless they ensure that the public gets the media it deserves, with "a wider diversity of culture, more reliable news, an extension of agreed public service values to ensure that our window on the world is not distorted by disinformation and commercial concerns".[196]

The seriousness of the matter is only emphasised by the fact that even the Pope has voiced his concerns in the debate on media concentration. In a message to the Pontifical Council for Social Communications, a Church body responsible for matters relating to the use of the

---

[192] McChesney, R.W., 'The nine firms that dominate the world' n. 29.
[193] Noveck, B.S., Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 37.
[194] *Ibid.*, 63.
[195] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 112.
[196] *Ibid.*, 111.

media, Pope Benedict XVI acknowledged that the "ascendancy of the electronic media coincides with its increasing concentration in the hands of a few multinational conglomerates whose influence crosses all social and cultural boundaries".[197] With mergers and acquisitions in the European media industry predicted to gather pace in the coming years,[198] the time is indeed nigh for a public-service oriented "re-regulation" of broadcasting in the European Union.[199]

It seems, therefore, that because all of the arguments for a consolidated media market and liberal approach to media concentration can be rebutted, they can in fact be treated as fallacies. Safeguarding pluralism in the media sector should be the priority for modern Europe. There are at least two major reasons; firstly, the more media companies that are present on the market, the more "watchdogs" compete to discover abuse and ultimately to present the "truth".[200] Secondly, dispersed ownership of media is simply a must, because quoting Bagdikian:

> "narrow control, whether by government or corporations, is inherently bad. In the end, no small group, certainly no group with as much uniformity of outlook and as concentrated in power as the current media corporations, can be sufficiently open and flexible to reflect the full richness and variety of society's values and needs".[201]

This had all been confirmed by the European Commission as early as 1992, in its first Green Paper on Media Ownership and Pluralism (see below in Chapter 2.2.1).[202] Having studied the possible defining features of pluralism, the Commission concluded that it is neither the content nor the number of channels or titles that definitely presupposes a pluralistic outlook of the media market. Pluralism must be assessed by the number of media owners (private) or controllers (public). In this respect, the Commission believed that "concentration of media access in the hands of a few is *by definition* a threat to diversity of information" and

---

[197] 'Pope decries media concentration, 'destructive' contents of the web', *Monsters and Critics*, 9 March 2007, http://tech.monstersandcritics.com/news/article_1275082.php/Pope_decries_media_concentration_destructive_contents_of_the_web (accessed 8 September 2007)

[198] Burt, T, 'European M&A to gather pace', *Financial Times*, 6 February, 2005.

[199] Humphreys, P. 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', n. 87.

[200] Baker, C.E., 'Media Concentration: giving up on democracy' (2002) Florida Law Review 54-5, 839-919.

[201] Bagdikian, B., 'The Media Monopoly', 6th ed., n. 171, 223-224.

[202] European Commission 'Pluralism and Media Concentration in the Internal market: An Assessment of the Need for Community Action' (Green Paper), COM(92)480 final, 20, emphasis added.

conversely "multiplying the number of alternative controllers increases the probability of diversity of information".[203]

Therefore, the argument of this thesis is that Europe needs to be a vigilant guard of the pluralist television market, even if it was to run counter to market efficiency and "perceived economic wisdom". The race to achieve Lisbon goals cannot overshadow the need to safeguard the fundamental pillars of democracy. Contrary to the arguments of lobbyists against regulation, market and new technologies fail to secure media pluralism. And where the market fails, the law must step in.

1.4 Sources and methods

This thesis argues that the EU's impact on the broadcasting sector has been strongly de-regulatory[204] and it adds to and updates the body of literature advocating for action at EU level that will be specifically addressed at dangers posed to pluralism by excessive media concentration. It also joins the calls to introduce a legal basis for EU competence in this field. Main sources of academic literature in the field include "New media monopoly" by Ben Bagdikian,[205] "The European Union and the regulation of media markets" by Alison Harcourt,[206] "The European Union's democratic deficit and the public sphere. An evaluation of EU media policy" by David Ward[207] and "Media Ownership" by Gillian Doyle.[208] The "New media monopoly" is the sixth edition of Ben Bagdikian's book "Media Monopoly" first published in 1983. It offers an overview of assets held by the five largest media companies in the world and presents the effects such narrow control has on the media and their offer. Although limited to the United States, "New media monopoly" is a seminal book in the area and the conclusions it reaches apply generally. Alison Harcourt's book explores how the European Union has tried to regulate national media markets and uses the media industry as a case-study for the analysis of new modes of EU governance. A starting point for David

---

[203] *Ibid.*, 20, emphasis added.
[204] Humphreys, P., in 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 23, poses a question whether the impact was more de-regulatory or re-regulatory and states that this remains unclear: 'whether or not the EU's impact has been de-regulatory or re-regulatory is a question deserving further ... academic research'.
[205] Bagdikian, B., '*The Media Monopoly*', n.171.
[206] Harcourt, A., *The* Eur*opean Union and the regulation of media markets*, n. 89.
[207] Ward, D., *The European Union democratic deficit and the public sphere. An evaluation of EU media p*olicy, (IOS Press, Amsterdam 2004).
[208] Doyle, G., *Media ownership*, n. 69.

Ward's book is the recognition of a democratic deficit in the European Union. The book's main conclusion is that the European Commission's policy is to blame for the decline and commercialisation of the television sector in Europe, and, therefore, there is a need for the review of the EU policy in the area. And finally, "Media ownership" by Gillian Doyle offers and interesting analysis of why media ownership matters and how it relates to media pluralism. It focuses mainly on the case study of the United Kingdom.

The thesis' contribution to the existing literature is first of all, a detailed and up-to-date comparison of parallel efforts in this field by the Council of Europe (Chapter 2.1) accompanied by the European Court of Human Rights on the one hand (Chapter 3), and the European Union on the other (Chapter 2.2). Secondly, there will be an analysis of currently available European (Chapters 4 and 5) and national (Chapter 6) tools together with the most recent and controversial examples of their failure. The choice of four Member States in Chapter 6 was dictated by the desire to present an example of one of the biggest, most influential, but also one of the most liberal media markets in Europe (United Kingdom), an example of a smaller Member State heavily influenced by its bigger neighbour (Ireland), an arena of the most spectacular abuses of media pluralism in recent years (Italy), and a representative of new Member States from Central and Eastern Europe and the one where plans to introduce cross-media ownership restrictions resulted in major political scandal and the resignation of the government (Poland).

Secondly, Chapter 7 suggests adoption of a regulation and provides details for its contents.

Finally, Chapter 8 includes a proposal of the solutions which could be applied immediately, given the current sphere of EU competence and, as discussed in Chapter 7, remote prospects for a prompt introduction of a legal basis for more binding EU action. Every effort has been made to ensure that the law is as stated on 30 April 2008.

Apart from literature research, the methods used to produce this thesis included (i) legal research of existing European and national legislation and case-law; (ii) policy research (speeches, public statements, submissions to consultations, reports, mission statements); industry research (websites of media companies such as www.newscorp.com, www.mediaset.it, www.bertelsmann.com and many others; websites run by media specialists

following and commenting on the recent developments such as www.followthemedia.com or www.mediachannel.org; contacts with industry representatives and specialists – personal or during conferences and seminars) and case-studies of failures in the industry (such as Italy under Berlusconi – discussed in Chapter 6.1.3, or *Rywingate* scandal in Poland discussed in Chapter 6.1.4) to test whether they could be prevented or remedied were there European regulation in place.

Yet another voice in the debate on media concentration and threats to pluralism is vital. There is a continuing need for constant awareness raising aimed at keeping the matter on the agenda and working towards a regulation in the future. If the political climate is currently unpromising, the subject should not be just abandoned. On the contrary, there is a need to work towards changing the approach. This is one of the tasks for lawyers – if there is a valuable interest to protect by law and politicians are reluctant to do so, lawyers should work towards changing the attitude. Being a lawyer is not only about mechanically executing the law, as adopted by politicians. It is also about influencing what *should* be the law – both now and in the future. Lawyers often see law in an "insular" way – as a self-contained phenomenon existing in a social or political vacuum.[209] They tend to overlook broader social forces that are behind the law and which the law stimulates. This thesis attempts to convey a broader look at the law and it is a lawyer's voice calling for a regulation in an area which is currently suffering from the lack of EU-level rules. The maintenance of the situation of the continuing national liberalisation tendencies enabled by the lack of the EU-level legislation in the public interest will operate to the detriment of European citizens who, as a result, will receive less and less diverse television content of constantly diminishing quality.

[209] Robertson, G., Nicol, A., *Media Law*, 4th ed. (Penguin Books, London 2002), xvi.

2. European approach to media concentration regulation – the clash of values[210]

"If the claims of two (or more than two) types of liberty prove incompatible in a particular case, and if this is an instance of the clash of values at once absolute and incommensurable, it is better to face this intellectually uncomfortable fact than to ignore it, or automatically attribute it to some deficiency on our part which could be eliminated by an increase in skill or knowledge; or, what is worse still, suppress one of the competing values altogether by pretending that it is identical with its rival – and so end by distorting both".[211]

2.1 Council of Europe

Although the attention of this thesis centres primarily on the European Union's attempts to control media concentration, it is also necessary to examine, if even briefly, the activities of the Council of Europe in this area, as "their impact on the [European Union's] policy and lawmaking processes is considerable".[212]

The Council of Europe was founded in 1949 and its central role is protection and promotion of human rights in Europe. Article 1 of its Statute[213] declares that "the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". This aim shall be common actions taking form of conventions and agreements.

The Council has 47 Member States[214] and its main institutions are: (i) the Committee of Ministers – the decision-making body, whose conclusions may in appropriate cases take the form of recommendations to the governments of members; the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations;[215] (ii) the Parliamentary Assembly, consisting of 636 members (318 representatives and 318 substitutes) from the national parliaments; (iii) the Congress of Local

---

[210] See Komorek, E., 'European attempts to regulate media concentrations. Persisting conflict of interests', (2004/2005) Hibernian Law Journal 1, 53-83.
[211] Berlin, I., *Four essays on liberty*, (Oxford Paperbacks, Oxford 1969).
[212] Westphal, D., 'Media Pluralism and European Regulation', n. 69.
[213] Council of Europe, Statute of the Council of Europe, 5 May 1949 available at: http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm (accessed 28 April 2008)
[214] See the list of the Council of Europe's Member States available at: http://www.coe.int/T/e/com/about_coe/member_states/default.asp (accessed 28 April 2008).
[215] Article 15(b) of the Statute of the Council of Europe, London, 5.V.1949 http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm (accessed 28 April 2008).

and Regional Authorities; and (iv) the secretariat headed by a Secretary General, elected by the Parliamentary Assembly. This institutional framework prepares and negotiates conventions, which are the main legal instruments of the Council of Europe. Negotiation culminates in a decision of the Committee of Ministers establishing the text of the proposed convention, which is then opened ratification, by Member States. Therefore, conventions of the Council of Europe are non-coercive and are not statutory acts of the Council, since they owe their legal existence to ratification by the Member States.[216]

However, there is one convention, the ratification of which has become a condition of membership of the Council and that is the European Convention on Human Rights ("**ECHR**"),[217] adopted in 1950. It sets forth a number of fundamental rights and freedoms[218] and the Member States have undertaken to secure these rights and freedoms to everyone within their jurisdiction. Most of the Member States of the Council of Europe are *monist* which means that the act of ratification automatically incorporated the Convention into their national law, enabling the national courts to take full account of its provisions when deciding cases. Ireland, as a *dualist* state, had to adopt a separate legislation to give full effect to the Convention. It only did so in 2003 when the European Convention on Human Rights Act was adopted. This renders Ireland as one of the last Member States to incorporate the Convention into its domestic law. Before the Act was adopted, Ireland was bound by the Convention by virtue of international law. This meant that individuals could bring proceedings against Ireland to the European Court of Human Rights in Strasbourg. However, the Convention was not binding *in* Ireland as without a specific legislation giving it effect in Irish law, it placed no obligation on public bodies in Ireland. The European Convention on Human Rights Act 2003 is an example of an indirect and interpretive incorporation of the Convention into the national law. It has four main elements: (i) Section 2(1) provides that the courts must interpret the national law in a manner that is compatible with the provisions of the Convention; (ii) according to Section 5(1), where such interpretation is impossible, the High Court or Supreme Court may issue a *declaration of incompatibility* of a national legal instrument with the

---

[216] Council of Europe, About Conventions and Agreements in the Council of Europe Treaty Series (CETS), available at: http://conventions.coe.int/general/v3IntroConvENG.asp (accessed 28 April 2008)

[217] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

[218] Right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination.

Convention. Such a declaration does not render the law in question invalid. It obliges the prime minister to bring any such declaration to the attention of the Irish parliament; (iii) under Section 3(1) "organs of the State" must perform their duties in a manner compatible with the convention; and finally (iv) anyone who suffers injury, loss or damage as a result of a failure of an "organ of the State" to act in the Convention-compatible manner, is entitled to damages. The Convention also established international enforcement machinery in the form of the European Court of Human Rights which deals with individual and inter-State petitions. Once domestic judicial remedies have been exhausted, an individual may seek redress in the Court for an alleged breach of the Convention by a member state. The machinery of the Court is, therefore, "not a substitute for national courts, but is, in a sense, an extension of them".[219]

States against which a violation of the Convention is found by the Court are obliged to take all necessary measures to remedy the violation. If there is no appropriate and total remedy in the national law, the European Court of Human Rights may order the member state to pay financial compensation to the injured party. The execution of judgments of the Court is supervised by the Committee of Ministers. In addition, the effect of the judgments of the Court may extend beyond the actual case when the state is required to modify their legislation and practices for the future.[220] The Secretary General may request the Member States to provide explanations on the manner in which their domestic law ensures the effective implementation of the Convention.[221]

Turning now to the role of the Council of Europe in promoting and safeguarding media pluralism, it must be observed at the outset that the Council associates the need for diversity and pluralism in the media with the fundamental right to freedom of expression and information. It believes that Article 10[222] of the European Convention on Human Rights is

---

[219] Council of Europe, Directorate General of Human Rights and Legal Affairs, Explanatory document on the European Convention on Human Rights, available at: http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM (accessed 28 April 2008); for the unique situation in Ireland see Kilkelly, U. (ed), *ECHR and Irish Law*, (Jordans, 2004), and in particular the following chapters: Kilkelly, U. 'Introduction', pp. liii-lviii; O'Connell, D, 'The ECHR Act 2003: A Critical Perspective', pp. 1-11; and Hogan, G., 'Incorporation of the ECHR: Some Issues of Methodology and Process', pp. 13-33.

[220] Council of Europe, "The Council of Europe and the protection of human rights", booklet, available at http://www.coe.int/T/E/Human_rights/prothr_eng.pdf (accessed 28 April 2008)

[221] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms-summary of the Treaty, available at http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm (accessed 28 April 2008).

[222] Article 10 (1) of the ECHR: 'Everyone has the right to freedom of expression. This rights shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

"the basic framework for media pluralism on the European scale".[223] Not only therefore does it confirm the existence of the basic human right to media freedom but it also imposes a duty on the Council of Europe's Member States to guarantee pluralism and diversity in the media in order to ensure freedom of information and a properly functioning democracy.

The European Court of Human Rights has, on numerous occasions, held that without a variety of voices and opinions the media cannot fulfil their contributory role to democracy.[224] It has also concluded that Member States of the Council of Europe not only have a right, but indeed an obligation to adopt measures aimed at protecting media pluralism as a necessary prerequisite for a full realisation of the freedom of expression.[225] Chapter 3 deals in detail with the judgments of the European Court of Human Rights in the area of freedom of expression and media pluralism.

In addition to remedying the breaches of the right to freedom of expression and information in individual cases, the Council of Europe has since 1989 worked towards creating common regulatory initiatives aimed at guaranteeing the ex ante protection of media pluralism and diversity. Numerous bodies and committees established over the last decade have produced ever more detailed and rigid reports. Many of these reports have resulted in recommendations that have been adopted by the Council of Europe's Committee of Ministers. The Council's Directorate General of Human Rights and Legal Affairs has a Media and Information Society Division. In addition, there are five specialist sub-groups or bodies within the Council of Europe, which deal with media: (i) Steering Committee on the Media and New Communication Services; (ii) Standing Committee on Transfrontier Television; (iii) Group of Specialists on media diversity; (iv) Group of Specialists on public service media in the Information Society, and (v) Group of Specialists on Human Rights in the Information Society.[226]

---

authority and regardless of frontiers'; Article 10(2) allows Member States to introduce restrictions of freedom of expression, but only provided they are 'prescribed by law', 'are necessary in a democratic society' and pursue a legitimate aim in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

[223] Council of Europe, 'Media Diversity in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, December 2002.

[224] For detailed discussion on the case-law of the European Court of Human Rights see Chapter 3.

[225] Van Loon, A. 'Freedom versus access rights in a European context', in Marsden, C.T., (Ed.), *Regulating the Global Information Society*, (Routledge, 2000), 287.

[226] See website of the Media and Information Society Division within the Directorate General of Human Rights and Legal Affairs of the Council of Europe,

Having started with "shy" suggestions of information exchange in the beginning of the 1990s, the Council of Europe's stance evolved towards suggesting in 2004, the need for a convention on media diversity in Europe. All of this has been aimed at assisting the Member States in the realisation of the 'obligation' imposed by the European Court of Human Rights to provide for adequate measures aimed at safeguarding media pluralism.[227]

Thus, to start a more detailed analysis of the Council of Europe's work in this area, one must first mention the Committee of Experts on Media Concentrations and Pluralism (hereinafter MM-CM),[228] established in 1991 and tasked with conducting an in-depth examination of the impact of media concentrations on pluralism.

The Committee introduced a procedure for periodic exchanges of information between Member States aimed at establishing the degree of media concentration and national measures taken to control it. The exchange of information was intended, first of all, to provide Member States with points of reference when introducing or reforming media ownership laws, and secondly, to help the Council of Europe in determining whether there is a need for the introduction of harmonised measures at European level.

The MM-CM prepared a recommendation on measures to promote media pluralism, which was adopted and presented to Member States by the Committee of Ministers of the Council of Europe, on 19 January 1999.[229] The recommendation identified a range of possible measures to guarantee media pluralism and also recommended that Member States should consider the inclusion of these in their domestic laws on media ownership. One of the main measures recommended was thresholds for permissible levels of media ownership, based on either audience share, revenue / turnover or capital share. Companies exceeding these thresholds would not be awarded additional broadcasting licenses. Moreover, Member States were encouraged to introduce specific media authorities empowered to act against media concentrations threatening pluralism and diversity. However, if the Member States did not

---

http://www.coe.int/t/e/human_rights/media/Contacts_en.asp#TopOfPage (accessed 28 April 2008).

[227] Van Loon, A. 'Freedom versus access rights in a European context', n. 226, 287.

[228] The official abbreviation applied by the Council of Europe.

[229] Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, 19 January 1999.

consider it appropriate, the recommendation stressed that, general competition authorities should take pluralism and diversity considerations into account in their assessment of media mergers. Finally, it was recommended that Member States should encourage media companies to strengthen editorial and journalistic independence, voluntarily, through self-regulation.

This was all very general and appeared as if the Council was just "examining the field" by stating the obvious and enumerating various measures already present in various Member States. The Council appeared to fail to take a critical point of view as to what it actually viewed as the preferred solution.

The work and efforts of MM-CM have also led to the introduction of the provision of pluralism to the Council of Europe's main legislative instrument in the media sector is the Convention on Transfrontier Television. In 1998 the Amending Protocol to the Convention added Article 10(a). This amendment provided that Member States, "in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction ... endanger media pluralism".[230] Art.35(1): This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the Convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe. The Protocol entered into force on 1 March 2002. Although laudable, the words "shall endeavour" create nothing more than a "please try hard" obligation for Member States. With no sanctions, which the Council of Europe admittedly is not empowered to impose, this Convention was even weaker than the EC Television Without Frontiers Directive. Although this Directive only mentioned pluralism in recitals, at least it admits that "it is essential for the Member States to *ensure* the prevention of any acts which may promote the creation of dominant positions which would lead to restrictions on pluralism".[231]

---

[230] Council of Europe, Standing Committee on Transfrontier Television (T-TT), Amending Protocol to the European Convention on Transfrontier Television, CM(98)94, Strasbourg 12 May 1998.

[231] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ (1989) L331/51, emphasis added.

In 1999 the MM-CM was succeeded by another body set up to examine if and how media pluralism is influenced by new technologies and convergence. The work of the Group of Specialists on Media Pluralism (hereinafter MM-S-PL)[232] resulted in the publication in 2000 of a report on media pluralism in a digital environment.[233] While acknowledging that digital television is able to offer more channels and more services, the MM-S-PL was concerned whether this would coincide with increased pluralism of content. As it happens, the MM-S-PL expressed doubts that this would actually be the case.

The report observed that technological convergence and emergence of new delivery systems naturally pushes companies to strive for control over both content production and its transmission and delivery. This growing vertical integration of media companies, which renders access of independent content providers to major platforms more difficult, was described as one of the biggest obstacles for effective pluralism in digital television. This was actually a much bolder statement and a more realistic appraisal of the situation than the "hurray" approach to convergence presented by the European Union at this time.[234]

The report, therefore, recommended introducing different types of *ex ante* control rules aimed at "unbundling" vertically integrated companies. The MM-S-PL admitted that on several occasions EC merger control was successful in preventing the emergence of dominant vertically integrated conglomerates.[235] It nevertheless rightly pointed to mechanisms such as must-carry obligations for dominant players, technical regulations to open gateways, or cross-ownership restrictions as necessary to ensure access to platforms and protect pluralism. This was particularly the case where competition authorities would allow mergers, viewed as beneficial to the development or introduction of new technologies, for example, in the *Newscorp/Telepiù*[236] case. In this case, the European Commission allowed a merger to near

---

[232] The official abbreviation applied by the Council of Europe.
[233] Council of Europe, 'Media Pluralism in the Digital Environment', report by the Steering Committee on the Mass Media, October 2000.
[234] See comments in Chapter 2.2 on the 1997 Convergence Green Paper (European Commission, 'Convergence of the Telecommunications, Media and Information Technology, and the Implications for Regulations, towards an Information Society Approach (Green Paper)', n. 129.
[235] See, for instance, Case IV./M.469 *MSG Media Service* where the European Commission forbid a joint venture between Bertelsmann, Kirch and Deutsche Telekom.
[236] Case COMP/M.2876 *Newscorp/Telepiu.*

monopoly and justified it by the difficult economic situation of the two merging platforms and the interest in growing a digital platform and to provide continued digital service to users.[237]

After the sixth Ministerial Conference on mass media policy held in Krakow, Poland, in June 2000, yet another body was established to assist the Council of Europe's Steering Committee on Mass Media. The Advisory Panel on Media Concentrations, Pluralism and Diversity Questions (hereinafter AP-MD)[238] produced two extensive reports outlining the recommendations on the ways in which to protect pluralism and diversity in the increasingly consolidated European media sector. Both reports mark the toughening of the Council's stance and the transition from general observations and statements, to more concrete proposals.

Thus, the 2002 Report on Media Diversity in Europe[239] contained much more detailed and stringent recommendations than the 1999 Recommendation on measures to promote media pluralism. Firstly, not only did it emphasise the need for pluralism in the ownership structure of media companies, but for the first time, it also clearly stressed that the Council of Europe's opinion should be, that in order to secure genuinely diversified and pluralistic media content many, and indeed competing, sources of information are necessary. The current situation, whereby media companies become more and more reliant on the supply of content by a few existing news agencies renders even fierce competition between television stations or newspapers absolutely meaningless in terms of providing for pluralism and diversity. Secondly, the report went on to point out the shortcomings of competition law in the protection of pluralism and diversity in the media sector. It confirmed that from a media pluralism perspective, competition legislation deals only with a minority of relevant cases and, thus it cannot ensure satisfactory protection against media concentrations that are unquestioned from the competition point of view, but at the same time are harmful to pluralism.

The conclusion, therefore, was that there is definitely a need for sector-specific regulation of media concentrations. Acknowledging the existence of various national laws in this area, the

---

[237] Ungerer, H., 'Application of Competition Law to Media – some recent issues', Nera Conference, Brussels, 22 June 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_019_en.pdf (accessed 8 September 2007).
[238] The official abbreviation applied by the Council of Europe.
[239] Council of Europe, 'Media Diversity in Europe', n. 184.

report recommended the audience share approach, as the best way of measuring the level of ownership in the media sector. The report also seemed to favour the view that controlling one third of the measured market is reasonable. This was far more concrete than the 1999 Recommendation's general observation on existing methods. For the first time, a body established under the auspices of the Council of Europe actually took a position as to what is deemed necessary to *ex ante* protect pluralism in the media sector.

Nevertheless, despite outlining fairly detailed rules for preferable models of control of media concentrations the authors of the report were at that point in time, very wary of directly suggesting taking action at European level. The observation was made that the European media markets differ in culture, size and characteristics. There are also different legal and administrative traditions among the European countries and therefore, no common or single regulatory model will be suitable for all European countries. Although it did claim that it did not intend to introduce obligatory measures, for which the Council of Europe obviously has no mandate, the report may still be seen as recommending a common model for the protection of pluralism in the Council's Member States, i.e. a maximum 1/3 of the market for a single media owner based on audience share. Notwithstanding the fact that such a "one size fits all" model proved unworkable during the work on the media concentration directive in the European Union, it is nonetheless impressive to see that the Council of Europe was not discouraged by the failure of the directive and perseveres in order to find a common solution.

However, the second report prepared by AP-MD in November 2004 entitled "Transnational media concentrations in Europe"[240] went even further in its recommendations. It no longer tried to disguise the need for a common European regulatory framework. Expressing serious concerns about the impact of the growing number of transnational media concentrations has on media pluralism and the inability of individual countries to counteract the negative effects of this trend, the report emphasised the need for action at European level. It recommended the Council of Europe not only to initiate the ongoing monitoring of transnational media concentrations, but also to "urgently study the appropriate means, including a convention, to prevent the negative impact that this phenomenon may have on freedom of expression, pluralism and diversity".

[240] Council of Europe, 'Transnational Media Concentrations in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, November 2004.

The great set-back for the authors of the report was the rejection by the Parliamentary Assembly of the Council of Europe of the recommendation to join forces with the European Union to confront the crisis of media concentration in Europe. This caused dismay in journalists' circles, which criticised the "missed opportunity" and "making noise" without the suggestions of concrete action.[241] Nevertheless, it will be interesting to follow the Council of Europe's subsequent actions, with a hope that a convention on transnational media concentration will eventually materialise and will stimulate the imagination of the European Union's regulators. In my view, such a convention could sum up all the work that has been done to date and at should, at the very least include the following recommendations: (i) the introduction of an adequate pan-European media concentration monitoring system; (ii) increased media ownership transparency, through strengthening the information exchange system; (iii) more emphasis on the necessity of upholding national legislation that is aimed at limiting media concentration coupled with an adequate system of enforcement; and (iv) an endorsement of the positive measures supporting media pluralism (financial support mechanisms, etc.).[242] However, one must not forget that the significance of such a convention should not be overestimated given its non-coercive nature that is the need for Member States to choose to ratify it.

More recently, the Council of Europe produced a resolution on Cultural Diversity and Media Pluralism in Times of Globalisation. This was accompanied by an Action Plan, adopted during the 7th European Ministerial Conference on Mass Media Policy that was held in March 2005 in Kyiv (Ukraine).[243] In the resolution the Ministers noted, as they had on numerous occasions, the increasing trend towards concentration in the media sector, both in Europe and worldwide. They stressed that to prevent a potentially harmful impact of media concentrations on pluralism, the adoption of sector specific rules designed to safeguard plurality and diversity in the media, is vitally important. The Ministers also emphasised the need for the transparency of media ownership, the importance of monitoring media concentrations and the need for a single

---

[241] European Federation of Journalists, 'EFJ expresses dismay over Council of Europe 'Missed Opportunity' to conform media concentration crisis', www.ifj.org, 29 June 2004.
[242] Ward, D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', n.9.
[243] Council of Europe, 7th Ministerial Conference on Mass Media Policy, Kyiv (Ukraine), 10-11 March 2005, 'Integration and Diversity: the new frontiers of European media and communications policy', adopted texts, MCM(2005)005.

European voice in international discussions on media concentrations. Interestingly, the Ministers pointed to the Council of Europe as an appropriate framework for the exchange of information and experience on these issues. They also pointed to the Council to address the transnational aspects of media concentrations in Europe. Consequently, in the Action Plan the Council of Europe undertook to continue to monitor the development of media concentrations in Europe as a political priority and, where appropriate, suggest legal or other initiatives which it may consider necessary in order to preserve media pluralism.

To ensure these promises were met, in January 2007 the Committee of Ministers of the Council of Europe adopted a declaration aimed at protecting the role of the media in democracy, in the context of media concentration.[244] This was accompanied by two recommendations – one on Media pluralism and diversity of media content,[245] and the other on the remit of public service media in the information society.[246] In the declaration the Ministers alerted the Member States to the risk of misusing the power of the media in a situation of strong concentration. They also drew attention to the usefulness of regulatory measures that guarantee full transparency of media ownership and counteracting excessive media concentration. In the recommendation on media pluralism, the Council of Europe yet again stressed the need for Member States to introduce measures to safeguard structural pluralism as well as content diversity in the media. The Ministers recommended the adoption and maintenance of sector specific rules aimed at ownership regulation by introducing thresholds, access regulation and content regulation. It is probably one of the most strongly worded recommendations so far issued by the Committee of Ministers.

As confirmed by the second recommendation on the remit of public service media, the Council of Europe is a vocal advocate of public service broadcasting as a "counterweight" for concentrating commercial media and clearly supports pluralism. In this regard, the earlier recommendation of the Council of Europe's Parliamentary Assembly on Public Service

---

[244] Council of Europe, Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[245] Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

[246] Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

Broadcasting[247] is highly significant. The recommendation notes that public service broadcasting which is a vital element of democracy in Europe is challenged by "political and economic interests, by increasing competition from commercial media [and] by media concentrations". It therefore recommended that the Committee of Ministers should adopt a new major policy document on public service broadcasting and called on the Member States to "reaffirm their commitment to maintaining a strong and vibrant independent public broadcasting service, whilst adapting it to the requirements of the digital age".[248] The latest recommendation explains the Council's understanding of the remit of public service broadcasting as consisting of five elements: (i) a reference point for all members of the public, offering universal access; ii) a factor of social cohesion and integration for all individuals, groups and communities; iii) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards; iv) a forum for pluralistic public discussion and a means of promoting broader democratic participation for individuals; and v) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

The above outline of the history of the Council of Europe's regulatory efforts, aimed at guaranteeing the *ex ante* protection of pluralism and diversity leaves the impression that the Council would like to see itself as "a vehicle for European harmonisation of legislation"[249] in the area of media concentrations. Moreover, and very importantly, the Council of Europe (through the European Court of Human Rights) provides the forum for individual consumers in Europe to complain in cases of breaches of the right to freedom of expression and information, caused by a lack of pluralistic media structures. This is probably the only existing pan-European mechanism that is able to effectively enforce the principle of media pluralism.

However, there are problems with these aspirations. Firstly, given the much stronger powers of the European Union coupled with the absence of a legal basis for the Council of Europe's decisive legislative action, the goal of having the Council as the vehicle for European

---

[247] Recommendation 1641 (2004) of the Parliamentary Assembly on Public Service Broadcasting, 27 January 2004.

[248] For broader discussion on public service broadcasting as a counterweight for concentrating commercial media see Chapter 8.4 below.

[249] Cavallin, J., 'European Policies and Regulations on Media Concentration', n. 13, 6.

harmonisation may seem overly ambitious or simply unrealistic. Indeed as some have commented, whereas the pronouncements of the Council of Europe "serve an important rhetorical function, [they] are not the primary driving force in contemporary European media policy" and they are in any event, "trumped" by the Community rules.[250] The failure to accept the recent recommendation to join forces with the European Union has met with harsh criticism from journalists. Secondly, the mechanism of protection before the European Court of Human Rights is principally of an individual nature and has an *ex post* effect. Regrettably therefore, it cannot be seen as sufficient (see Chapter 3 for a more detailed discussion on this issue).

Nevertheless, the Council's input to the discussion, by constant awareness-raising through its numerous reports, declarations, recommendations and conferences[251] should not be entirely underestimated. For example, the monitoring mechanism of transnational media mergers may in effect prove a more efficient tool of control than any formal legislative action, the prospects for which currently seem remote. In addition, the imminent convention on transnational media concentrations will apply to all 47 Member States of the Council of Europe and therefore will apply to all 27 Member States of the European Union. Although not as powerful a tool as an EU Directive, since it would owe its legal force to the Member States' decision to ratify it, such an instrument may stimulate and encourage the decision-making process in the European Union. If it were possible for Member States to reach agreement over a Council of Europe's convention, agreement over a more rigid EU instrument could be the very next step. Finally, given the evident lack of will on the European Commission's side to take any initiative aimed at acting against excessive media concentration, the role of the Council of Europe becomes even more profound. The European Commission itself has apparently tried to relieve itself of the duty to safeguard pluralism and directly pointed to the Council of Europe as "the only organisation at pan-European level dealing with the human and democratic dimension of communication".[252]

---

[250] Noveck, B.S, 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 38.

[251] For instance, a conference on 'Concentration of media ownership and its impact on media freedom and pluralism', held in Bled, Slovenia in 2004.

[252] European Commission, 'Media Pluralism – what should be the European Union's role?', (Issues Paper for the Liverpool Audiovisual Conference) July 2005, http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/ispa_mediapluralism_en.pdf (accessed 8 September 2007).

Table 1. Instruments adopted by the Council of Europe in the field of media pluralism

	Date	Instrument	Main findings
Conventions	1989	Convention on Transfrontier Television	Article 10a (added in 1998): "Member States, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction … endanger media pluralism"
Resolutions	2005	Resolution the Committee of Ministers on Cultural Diversity and Media Pluralism in Times of Globalisation, accompanied by an Action Plan	- Need for transparency of media ownership, the importance of monitoring media concentrations and the need for a European voice in international forums discussing media concentrations; - Action Plan: to monitor the development of media concentrations in Europe as a political priority and, where appropriate, suggest legal or other initiatives which it may consider necessary in order to preserve media pluralism
Recommendations	1994	Recommendation No R(94) 13 on Measures to promote media transparency	5 Guidelines: (1) Access by the public to information on the media, (2) Exchange of information on media transparency between national authorities, (3) Disclosure of information when granting broadcasting licenses to broadcasting services, (4) Disclosure of information following the grant of broadcasting licenses to broadcasting services, (5) Exercise of the functions of the service or authorities responsible for ensuring transparency in the running of broadcasting services
	1999	Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism	- Recommendation to introduce thresholds for the admissible level of media ownership, based on either audience share, revenue/turnover or capital share; - Encouragement to introduce specific media authorities empowered to act against media concentrations threatening pluralism and diversity. - General competition authorities should take pluralism and diversity considerations into account in their assessment of media mergers. - Member States recommended to encourage media companies to strengthen editorial and journalistic independence voluntarily through self-regulation
	2004	Recommendation 1641 (2004) of the Parliamentary Assembly on Public Service Broadcasting	Call on the Member States to "reaffirm their commitment to maintaining a strong and vibrant independent public broadcasting service, whilst adapting it to the requirements of the digital age"
	2007	Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content	Recommendation of the adoption and maintenance of sector specific rules aimed at ownership regulation by introducing thresholds, access regulation and content regulation
	2007	Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society	Explanation of the Council's understanding of the remit of PSBs as consisting of five elements: (i) a reference point for all members of the public, offering universal access; ii) a factor of social cohesion and integration for all individuals, groups and communities; iii) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards; iv) a forum for pluralistic public discussion; and v) an active contributor to audiovisual creation
Declarations	2007	Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration	Member States alerted to the risk of power misuse of the media in a situation of strong concentration and their attention drew to the usefulness of regulatory measures guaranteeing full transparency of media ownership and counteracting excessive media concentration
Reports	2000	Media Pluralism in the Digital Environment	Recommendation to introduce different types of *ex ante* control rules aimed at "unbundling" vertically integrated companies – mechanisms such as must-carry obligations for dominant players, technical regulations to open gateways, or cross-ownership restrictions as necessary to ensure access to platforms and protect pluralism
	2002	Media Diversity in Europe	- Emphasis on a need for sector-specific regulation of media concentrations; - Recommendation of the audience share approach as the best way of measuring the level of ownership in the media sector (one third of thus measured market is tolerable)
	2004	Transnational Media Concentrations in Europe	- Need for action on the European level; - Council of Europe recommended to "urgently study the appropriate means, including a convention, to prevent the negative impact that this phenomenon may have on freedom of expression, pluralism and diversity"

2.2 European Union

2.2.1 Lost battle for a media concentration directive in the 1990s

Notwithstanding the Council of Europe's valuable input to the discussions on the ways to regulate excessive media concentration, the European Union is far more empowered to constitute a locus of harmonising re-regulation. In the structure of the European Union, the European Parliament has for some time pressed for harmonisation in this field. And although it is the Commission which is indicated as the most important actor in EU policy formation, the Parliament's agenda setting role cannot be underestimated.[253] The Parliament has consistently and strongly advocated for making the protection of pluralism and diversity the main objective of regulatory action.[254] Thus, it has consistently called for stringent restrictions on the levels of media ownership. Moreover, it was the European Parliament which placed the issue of threats to pluralism and diversity posed by media concentrations on the European Union's agenda.[255]

In the 1980s, during the process leading to the adoption of the Television Without Frontiers Directive, the Parliament, on several occasions, requested that the European Commission either introduce limits to media concentration in the text of the directive, or adopt separate media concentration legislation to accompany the main liberalising instrument. In the 1985 Resolution, the 1986 official request to the European Commission and the 1987 Barzani Report the European Parliament pressed for the legal powers for the Commission to safeguard pluralism within the context of the Television Without Frontiers Directive.[256]

Unfortunately, these efforts did not succeed in convincing the Commission that liberalisation of the media industry does not automatically lead to greater pluralism and diversity. As a result, while generally admitting in one of the recitals that it is essential for Member States to ensure the prevention of any acts which could lead to restrictions on pluralism, the Television Without Frontiers Directive contains only very limited reference to media concentration (see Chapter 5 for a more detailed discussion on this issue).

---

[253] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 62.
[254] Goldberg, D., Prosser, T., Verhulst, S., 'Regulating the changing media', n. 2, 146.
[255] Harcourt, A., 'The European Commission and regulation of the media industry', (1998) Cardozo Arts & Entertainment Law Journal 16(2), 425-449.
[256] *Ibid.*

Therefore, because the Directive had the effect of liberalising the European media market, but does not however contain any limitations to the level of media concentration, media companies are now free to grow and form alliances at the European level. It should be noted, that media companies have taken full advantage of this opportunity. As long as such growth is not stopped by DG Competition on market power grounds there are no obstacles to European-wide media mergers. .

The European Parliament has not, however, given up its quest to introduce harmonisation legislation aimed at protection of pluralism and diversity, in the context of media concentrations. On the contrary, rapid growth in the number of important media mergers in the early 1990s intensified the Parliament's work and resulted in the adoption of a number of further resolutions and reports calling on the Commission to consider specific media concentration legislation.

Expressing its well known view that restrictions on media concentrations are "essential in the media sector, not only for economic reasons, but also, and above all, as a means of guaranteeing a variety of sources of information and freedom of press",[257] the Parliament stressed that a "process of unlimited and unchecked concentration in the media threatens the right to information, editorial independence and journalists freedom".[258] Thus, the European Union must play an active role in defending these core values. The Parliament strongly emphasised that current competition legislation alone, is not sufficient to guarantee diversity of opinion and pluralism. Moreover, in view of the European and worldwide dimension of concentration in the media, the issue cannot be only be regulated at national level.[259]

Therefore, the Parliament requested the Commission to submit a proposal for effective measures to combat or restrict concentration in the media. It seemed that the Parliament would preferably see these "effective measures" to take the form of an anti-concentration directive aiming not only at harmonising national provisions on the concentration of media ownership,

---

[257] European Parliament, Resolution on media takeovers and mergers, OJ (1990) C68/137.
[258] *Ibid* .
[259] European Parliament, Resolution on media concentration and diversity of opinions, OJ (1992) C 284/44.

but also at guaranteeing diversity of opinion and pluralism where the proposed concentration has a European dimension.

To this end the European Parliament made an interesting suggestion, to establish a European equivalent for national media regulatory bodies – an independent European Media Council. This Council would, among other activities, be responsible for submitting to the European Commission reports and opinions on proposed mergers that have a Community dimension.[260] This would actually be extremely helpful. I agree with the Parliament that mergers that have a Community dimension for competition purposes also have a Community dimension for the sake of pluralism. The role of such a body could to begin with be simply advisory and its creation, based on the consent of all Member States, would most likely not exceed the European Union's mandate.

In the 1990 Resolution on media takeovers and mergers, the Parliament also requested that the Commission ensure that the future legislation: (i) guarantees minimum professional standards; (ii) protects journalistic ethics; and (iii) safeguards freedom of expression for all those working in the media.[261] In addition, those Member States which do not have media ownership rules in place should be forced by the Commission to adopt them.

Unfortunately, although the Commission responded to the Parliament's calls and embarked on troublesome and lengthy negotiations about the possibility of a directive on media concentration, these proposals were largely ignored. Throughout the process, initiated by the Commission's 1992 Green Paper on pluralism and media concentration in the internal market, the European Parliament continued to press for strict restrictions on European media ownership.[262] However, as will be explained in more detail in Chapter 2.2.1 below, despite two extensive rounds of consultation and two draft directive proposals, no tangible results were produced. The Parliament lost the battle, for the second time.

---

[260] European Parliament, Resolution on media concentration and diversity of opinions, n. 260.
[261] European Parliament, Resolution on media takeovers and mergers, n. 258.
[262] European Parliament, Resolution on the European Commission's Green Paper 'Pluralism and media concentration in the internal market, 29 January 1994, OJ C44/177; European Parliament, Resolution on concentration of the media and pluralism, 2 October 1994, OJ C323/167.

As mentioned earlier, despite the lobbying against regulation by media companies supported by Member States, growing pressure from the European Parliament in the beginning of the 1990s forced the European Commission to begin analysing the possibilities for regulating media ownership at pan-European level. The history of the arduous drafting of the directive shows that the European Commission was not consistent in this process. As the media ownership portfolio travelled through Directorates General until it finally found a home in DG Internal Market, the emphasis and opinions were changing.

The Commission's aim was to attempt to reconcile the opposing interests and concepts of harmonisation. DG Culture sought to protect pluralism and the freedom of media in Europe. DG Information Society was the advocate of extreme liberalisation and consolidation in the media industry, and DG Competition has always been of a position that competition rules, in the way they are shaped, are sufficient and must remain the only tool for regulating concentrations of power in the media industry. Therefore, the Commission in its endeavour to answer the Parliament's call for media specific regulation found itself not only in between the battle of fiercely contradictory rationales for regulation voiced by media companies and Member States on the one hand, and the European Parliament supported by the European Economic and Social Committee and the Council of Europe on the other. It also had to face conflict within its own structures. Thus, the task lying ahead of the Commission appeared to be doomed right from the beginning...

The process of a failed attempt to introduce a media ownership directive has been extensively discussed in existing academic literature.[263] For the purposes of this thesis it is useful to recall the decisive battles of the 1990s' "war for a media concentration directive" in order to understand the realities of the law-making process in the European Union and to realise the obstacles facing any possible future action in this field.

[263] See, *inter alia*, Doyle, G., *Media Ownership*, n. 69; Doyle 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181; Harcourt, A., *'The European Union and the regulation of media markets*, n. 89; Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135; Hitchens, L.P., 'Media Ownership and Control: A European Approach', (1994) The Modern Law Review 57.

1992 Green Paper on media concentration and pluralism and its follow-up

Initially, the media ownership portfolio was allocated to DG Information Society, which was at the time, chaired by Commissioner Bangemann.[264] The location influenced the outlook of the first phase of the battle for a media ownership directive and helped to shape the rationale that was chosen.

In December 1992 the first Green Paper entitled "Pluralism and media concentration in the Internal Market"[265] was published. This initial response by the Commission to the European Parliament's call for specific media-ownership regulation, designed to protect pluralism, conceded that neither Community antitrust rules, nor its merger control regime were able to address the threats media concentration and multi-media ownership posed for pluralism.[266] In this regard, it seemed to coincide with the Parliament's view.

However, in reality the efforts of Commissioner Bangemann and his DG were, at the time, mainly centred on "kick-starting" the information society and creating conditions favourable to the growth of media companies into "European champions".[267] Therefore, what the Green Paper was in fact concerned with was the *overregulation* of the media industry by the Member States and hence the conclusion was that there is a need for harmonising Member States' media ownership rules. The variance of these rules constituted an obstacle for the proper functioning of the Internal Market. This ultimately meant, it was an obstacle to the *growth* of European media companies.

As to the burning issue of protecting pluralism, the Green Paper clearly stated that "protection of pluralism as such, is primarily a matter for the Member States", and hence there is "no need for action at Community level". The Community's role in this respect is merely to ensure that its own activities do not adversely affect pluralism. However, the Green Paper was happy to conclude that pluralism would most certainly be achieved through the realisation of the

---

[264] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 376-377.
[265] European Commission, Pluralism and Media Concentration in the Internal market: An Assessment of the Need for Community Action (Green Paper), n. 171.
[266] European Commission, Communication to the Council and Parliament on Audio-visual Policy, COM(90)78, paragraph 2.2.3; see Westphal, D., 'Media Pluralism and European Regulation', n. 69, 463.
[267] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 376-377.

internal market, by creating opportunities for media companies.[268] Hence, the promotion of pluralism at EU level was treated by the Green Paper as nothing more than a positive "side effect" of the realisation of the Internal Market.

Having concluded that there might be a need for action at Community level to ensure proper functioning of the Internal Market and competition, which in turn would promote pluralism, the Green Paper suggested three possible courses of action. These ranged from: (i) the proposal of no action at all at the pan-European level; (ii) the light touch of improving levels of transparency; to the most radical option (iii) positive intervention in the form of a regulation or a directive aimed at harmonising Member States' media ownership rules.

The Green Paper seemed to favour the third option, i.e. positive action based on Internal Market principles which were found to be the only possible legal basis for the directive. Thus, the Green Paper stated that the need for a harmonising directive arose, because the existing patchwork of media ownership rules across Europe, caused legal uncertainty, and therefore is an impediment to cross-border investment. Thus, the situation hindered the proper functioning of the Internal Market. However, the Green Paper offered no concrete proposals as to the outlook of the eventual directive.

In general, and in accordance with Commissioner's Bangemann's views, the first Green Paper was clearly designed to pave the way for the liberalisation of the industry. In fact, it was aimed at strengthening European media companies in order to allow them to compete globally. Therefore, it was not the Green Paper's intention to propose regulation preventing further concentration of European media markets.[269] This was disappointing and clearly against the calls of the European Parliament, which indeed had raised the issue as a concern of pluralism.

1994 "Follow-up" Green Paper

The consultation process which followed the publication of the first Green Paper culminated in a public hearing in 1993, and confirmed the existence of the greatest obstacle to any

[268] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264, 591.
[269] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 378.

positive action – the clash of priorities and possible lack of legal basis for the European Union to legislate "in matters of democratic concern".[270]

The European Parliament supported by the European Economic and Social Committee, was in favour of action at EU level, but voiced serious concerns about basing Community action on the Internal Market and industry arguments, and treating the protection of pluralism at the EU level as a mere "side effect".[271]

Moreover, the public consultation confirmed the anticipated antagonism among industry actors.[272] The submissions were for the most part predictable. Member States, protecting their own sovereignty in the media sphere, generally favoured no action. Large media corporations campaigned for no change to the current situation, or else only change aimed at further liberalisation. For instance, Berlusconi's Fininvest stated that "before setting limits to ownership or creation of television networks, a positive approach would insist on action to create the greatest possible space for freedom of enterprise and freedom of thought".[273] BSkyB added that that while the regulation was inappropriate and premature, should it in any event be introduced, it ought to be based on the "most liberal regime operating amongst the Community Member States".[274] On the other side of the barricade were public organisations, bodies like the Independent Television Commission, trade union groups, associations of journalists and smaller media companies. They criticised the liberalism of the current national laws and advocated for strict regulation and explicit reference to the need to protect the pluralism of media at European level.[275]

---

[270] Harcourt, A., 'Support for regulation and transparency of media ownership and concentration – Russia, Study of European approaches to media ownership', http://www.medialaw.ru/e_pages/publications/e-conc.htm (accessed 8 September 2007).
[271] European Parliament, Resolution on Pluralism and Media Concentration, (1995) OJ C166/133; The Economic and Social and Committee, Opinion on Commission Green Paper, 93/C304/07.
[272] Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181, 451-473.
[273] Fininvest Comunicazioni, 'Considerations on the Advisability of Action at EC Level on Ownership and Control of Concentrations in the Communications Sector', March 1993, quoted in Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264, 596.
[274] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264, 596-597.
[275] *Ibid.*, 591.

The dispute became even bitterer in 1993 when the media ownership portfolio was moved to its "permanent home" in DG Internal Market, then chaired by Commissioner d'Archirafi.[276] The portfolio's former "father", Commissioner Bangemann, withdrew support for the initiative as he considered that any subsequent regulation may weaken European media companies.[277] Open conflict with DG Information Society ensued. In 1994 the aforementioned Bangemann Report revealed this "clash of priorities" within the structures of the European Commission itself, and provided strong arguments for media companies who were opposing restrictions on media ownership.

The open conflict with DG Information Society meant that the second Green Paper, entitled "Follow-up to the consultation process"[278] issued in 1994, embarked on an even more difficult task. This was to reconcile pluralism with the Internal Market in order to please the European Parliament, whilst at the same time trying to gain the support of Commissioner Bangemann by inscribing into the proposed harmonising action the liberalising arguments based on the concept of "Information Society". To this end, the Green Paper "declared itself to be both a follow-up to the 1992 Green Paper and an initial response to the Bangemann Report".[279]

Therefore, justification for the need of Community action was supplemented. This time the Green Paper stated that national laws on media ownership must be harmonised, because the current patchwork not only causes lack of legal certainty for the media industry and impedes cross-border investment, but also constricts the growth of the Information Society within the Internal Market.

Secondly, although the Green Paper was still mainly concerned with enhancing the competitiveness of European media firms, no longer stressed liberalisation as its primary objective. Instead it emphasised the need to harmonise the Member States' media ownership laws, without stating whether it would be following the lesser or greater regulated Member

---

[276] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 72.
[277] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 378.
[278] European Commission, Communication from the Commission to the Council and the European Parliament, 'Follow-up to the Consultation Process Relating to the Green Paper on Pluralism and Concentration in the Internal Market – An Assessment of the Need for Community Action', COM(94)353 final.
[279] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 73.

State.[280] This adhered more closely to the Internal Market framework of the DG that was responsible for the portfolio.

At around the same time, it was obvious that leaving pluralism concerns completely aside would result in protests from the European Parliament. This would leave little chance of the Parliament supporting a directive based solely on Internal Market principles. The lack of insistence on harmonisation aimed at liberalisation of national media ownership rules was most likely aimed at quietening down the worries of the European Parliament and other supporters of the pluralistic framework for regulation. With the increased decision making powers of the European Parliament, conferred on it by the Maastricht Treaty, its support for the initiative became crucial. In particular considering the delay in the adoption of the Voice Telephony directive[281] caused by the Parliament's non-hesitation to use the new powers. The first draft for the Voice Telephony directive was proposed by the Commission in 1992. However, in 1994 the European Parliament used for the first time the veto powers granted to it by the Maastricht Treaty and rejected the proposal for the directive. Only after the Commission presented a revised draft it was adopted in 1995.[282]

As well as attempting to reconcile all conflicting interests, the "Follow-up" Green Paper was also more concrete than the 1992 Green Paper, in that it discussed the possible policy instruments and in particular the use of audience share to measure media concentration. This was, in one way or another, a form of bowing down to DG Competition. To this end, the Commission ordered two technical studies on possible policy instruments. One was on the "Feasibility of using audience measures to assess pluralism"[283] and the other was on the definition of "media controller".[284] The second round of consultation was launched after this, with a questionnaire and both reports were circulated to interest groups.

---

[280] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 380.
[281] Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, now repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
[282] Bekkers, R., *Mobile telecommunications standards: UMTS, GSM, TETRA, & ERMES*, (Artech House, 2001), 95; See also Sauter, W., 'The Rejection of the ONP Voice Telephony Directive by the European Parliament' (1994) 5 Utilities Law Review 176.
[283] Goodhall, Alexander & O'Hare (GAH), Feasibility of using audience measures to assess pluralism (1997).
[284] European Institute for the Media (EIM), 'Transparency of Media Control' (1994).

The work on the initiative was, however, difficult. The rejection and withdrawal of the first draft directive from the College of Commissioners led to a surprising decision by Commissioner d'Archirafi not to pursue the idea. Over the next two years the idea was not completely forgotten, thanks to the dedicated staff of DG Internal Market who carried on the work despite the lack of support from their own Commissioner.[285] Things started looking more encouraging in 1995, when after the induction of the new Commission, Commissioner d'Archirafi was replaced by Commissioner Monti. The staff of DG Internal Market responsible for media ownership portfolio gained an "outspoken ally".[286] Monti made the media ownership initiative his priority and launched a third consultation with interest groups.

Understanding the importance of the Parliament's support, DG Internal Market started incorporating "arguments of the pluralist frame" into the draft directive.[287] The media ownership draft had become much tighter and was ambitiously aimed at reconciling the opposing economic and democratic interests by attempting to "inscribe the ... quest for pluralism in the logic of the Internal Market".[288] Monti's objective was to lobby for support from the fiercest promoters of pluralism – the European Parliament's Committee on Culture, Youth, Education and the Media (hereinafter the Culture Committee).[289] On 26 September 1995, Commissioner Monti delivered a speech in which he told the Culture Committee:

> "I have to repeat once again that there is no contradiction between the objective of pluralism and that of the internal market. Indeed, the internal market cannot operate smoothly unless an equivalent level of protection of pluralism obtains throughout the Community. In the absence of common rules, Member States will always be free to erect legal barriers and thus discharge themselves of their responsibility to protect pluralism at Community level".[290]

---

[285] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 380.
[286] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 382; Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 76.
[287] *Ibid.*, 81.
[288] Beltrame, F., 'Lawmaking in the European Union', paper prepared for the W. G. Hart Legal Workshop, Institute of Advanced Legal Studies, 1996.
[289] Harcourt, A., 'The European Commission and regulation of the media industry', n. 256, 437.
[290] Monti, M., 'Pluralism and Media Concentration', speech to the European Parliament's Committee on Culture, Youth, Education and the Media, 26 September 1995.

At that stage, after four years of consultation, Commissioner Monti believed that he had managed to reconcile the quests to level the playing field across the Community, for Information Society and for the protection of pluralism.[291] Therefore, DG Internal Market felt confident it had support for its harmonising action from the media industry, the Member States and the European institutions.

The 1996 draft directive proposal

In July 1996 the first proposal for a directive on media concentration materialised. With a working title "Directive on media concentration and pluralism", the act introduced a 25% upper limit of audience share at regional level, 14-15% at national level and 10% at European level. The percentages of audience share applied both to mono- and cross-media ownership.

The draft directive did not distinguish between markets of different sizes – the same fixed upper limits for media ownership would apply to markets at the local, regional or national level. It thus seemed to have reconciled the diverging priorities. It would introduce a level playing field and legal certainty for media companies and provide "equality of pluralism for all European consumers".[292]

However, Commissioner Monti's confidence in support from interested parties proved to be somewhat premature. The draft was resubmitted three times to the College of Commissioners and eventually failed to gain their support. In July, when the first draft was presented, Commissioner Bangemann, not surprisingly, found it too stringent. In September the resubmitted draft was opposed by the Culture Commissioner Oreja who could not agree with the fact that the directive was not based on the principle of pluralism.[293] In October, the European Parliament's Culture Committee in its Tongue report severely criticised the draft for the same reasons.[294] Finally, after yet another resubmission in December, both Bangemann and Oreja continued opposing the draft each on different and very much diverging grounds[295]

---

[291] Harcourt, A., 'The European Commission and regulation of the media industry', n. 256, 437.
[292] Doyle, G., 'From 'Pluralism' to 'Ownership': Europe's emergent policy on media concentrations navigates the doldrums', n. 130, 6.
[293] Harcourt, A., 'The European Commission and regulation of the media industry', n. 256, 438.
[294] *Ibid.*, 438.
[295] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 82.

– that it was too stringent and too lenient, respectively. The fate of the 1996 draft had thus been decided.

The 1997 draft directive proposal

Commissioner Monti had no other choice but to embark on the conciliation process with two unconvinced Commissioners. To the surprise of many he managed to win the support of both, and the fourth draft of the directive, submitted in March 1997, achieved a majority of vote at the College of Commissioners.[296] The victory, however, was bitter-sweet.

Fighting for the support at any price, DG Internal Market had to give up many of its original ambitions. First of all, with the title of the draft directive changed to "Media ownership in the Internal Market", pluralism appeared to disappear from the primary objectives of the harmonising action. Secondly, the upper limits for media ownership were also amended. Only the national-level limitations were retained and they were divided into an upper limit of 30% of audience share for mono-media ownership (for radio and television broadcasters in their own transmission areas) and upper limit of 10% for multi-media ownership (total media ownership in a Member State). The limits of 25% at regional level and 10% on the European level were abandoned. Moreover, Member States were given the right to exclude any broadcaster from the limits, provided that they were not simultaneously infringing the limits in more than one Member State and that other "appropriate measures" were taken to secure pluralism. A special opt-out was also introduced for public service broadcasters.

The introduction of a "flexibility clause" such as this, meant that DG Internal Market's withdrawal from the initial goal, of imposing a fixed minimum level of diversity of ownership for all European markets brought the whole rationale for the legislation into question.[297] While the proposal in theory provided a uniform set of limits to media ownership and prevented Member States from introducing more restrictive rules, the introduction of the "flexibility clause" in practice resulted in the preservation of status quo. Member States could exclude media companies from the limits and hence keep the previously existing lower restrictions of

[296] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 82; Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135, 386.
[297] Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181.

media ownership. The legal uncertainty remained. In this sense, the 1997 draft directive came as a disappointment for the supporters of regulation, as ultimately the initial objectives of harmonisation were left unaccomplished. Moreover, the Commission gave up its initial ambitions in order to boost support for the draft, and unfortunately this did not materialised either.

The last act of this heavily politicised play was performed by several large media companies.[298] They targeted the President of the European Commission, Jacques Santer, with ferocious lobbying against the draft directive. In addition, German Chancellor Helmut Kohl, in a letter to President Santer, dated August 1997, expressed "his resistance to the entire project of common regulation, arguing that it is a matter for national regulation".[299] Commissioner Monti and his DG Internal Market were ultimately defeated when President Santer officially expressed his objection to the initiative. Thus, it was the high level political considerations which decided the fate of the five-year long saga of harmonising efforts.

Reasons for the failure to adopt the media concentrations directive

DG Internal Market in the mid 1990s proved itself to be a failure in terms of conciliating the two worlds – advocates of even further liberalisation and the defenders of strict structural safeguards for media pluralism. Striving for support for harmonisation, DG Internal Market undertook the ambitious task of attempting to reconcile the opposing economic and democratic interests. As economic welfare and pluralism are separate rather than conterminous goals[300], their reconciliation required making trade-offs which from the beginning seemed very difficult, and eventually proved to be impossible. As noted by Doyle, "the failure to move forward decisively on one or another of these options may be attributed, in large measure, to the range of conflicting opinions within Europe about the aims and the substance of a collective policy on media ownership".[301]

---

[298] In particular News International, Springer, ITV and CLT; see Harcourt, A., 'The European Commission and regulation of the media industry', n. 256, 439.
[299] Cavallin, J., 'European Policies and Regulations on Media Concentration', n. 13, 9.
[300] Organisation for Economic Co-operation and development (OECD), 'Media Mergers', n. 14, 9.
[301] Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181.

Commercial media companies were prepared to support the harmonisation of national media ownership rules, but only insofar as it went "downwards". They agreed with the aim to level the playing field, but only by relaxing or even abolishing national restrictions. In the first draft of the directive, however, the Commission proposed fixed percentages for permissible levels of media ownership. Having at least four players in any particular media sector and ten players in the media market as a whole, does not seem as such a rigid requirement, it was still too robust for the media industry. Not surprisingly, Commissioner Bangemann, who was at that time seen as an advocate for the sector, opposed the 1996 draft as being too severe.

Moreover, the introduction of fixed limits regardless of the size of the market was not a prudent thing to do. Different markets can support different levels of diversity of ownership.[302] Smaller countries, for example Finland, can only support two broadcasters and the introduction of a third would be too costly and economically impractical. On the other hand, the proposed limits would, in some larger markets, allow even further growth of the media companies than national laws actually permitted. Finally, disregard for the division between national and local markets could result in the situation whereby a media supplier with a local ownership of above 30%, but national ownership below that limit would be treated just as severely as a "media tycoon", with a national level of media ownership above 30%.

The "flexibility clause", introduced in the 1997 Draft, was an attempt by DG Internal Market to remove these concerns and please the media industry. However, whilst this solved one set of problems, it created another. First of all, the opposition of the European Parliament, which has always pressed for robust limits for media ownership as a guarantee for pluralism, was unavoidable. Secondly, the "flexibility clause" brought back the legal uncertainty for the media industry, for which the Commission had intended to fight in the first place. Without European legislation potential investors could at least be certain that only national laws would apply.[303] Therefore, if adopted, the directive would have actually worsened the situation.

---

[302] Doyle, G., 'From 'Pluralism' to 'Ownership': Europe's emergent policy on media concentrations navigates the doldrums', n. 130, 6.
[303] *Ibid.*, 8.

Nonetheless, one must not forget that the ultimate failure of the harmonising initiative was due to high level political resistance which emerged during the last stage of the process.[304] The inability of the Commission to reconcile opposing interests certainly fuelled this political opposition, but it is doubtful that it would ever be eliminated, even if the "golden solution" could be found. Humphreys notes that

> "The EC's 'non-policy making' on the thorny issue of 'pluralism' was ultimately to be explained by the fact that it was unable to override both the determined resistance of influential Member States (notably Germany) and powerful vested interests in the media field (like the European Publishers Council and large media corporations)". [305]

Failure to enact a media concentration directive, which exemplifies "the EU's liberal bias towards negative integration",[306] has exposed the European Union to serious criticism. It has been characterised by Doyle as a "lost opportunity to provide Community-wide action at a time when a directive in this area appears both necessary and urgent".[307] The Commission's approach to the issue has often been described as "fraught with inconsistencies, featuring an endless stop-go-stop modus operandi".[308] This is claimed to have granted strategically precious time to already dominant players, and resulted in irreversible market concentration.[309]

Indeed, many media mergers of the 1990s have allegedly taken place in order to avoid restrictions, which would have been introduced by the directive.[310] Therefore, the Commission has not only failed to prevent future mergers, in addition, the lengthy discussions regarding the introduction of the directive, actually caused the market to concentrate even further without any negative implications for media companies. The result is that the liberalised European market for audiovisual services coupled with the lack of any pan-European instrument counteracting excessive concentration on the supra-national scale, encouraged media

---

[304] Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 77.
[305] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 16.
[306] *Ibid.*, 16.
[307] Doyle, G., 'Towards a pan-European directive? From concentrations and pluralism to media ownership', (1998) Communications Law 3-1, 14; see also Ward, D., The European Union democratic deficit and the public sphere. An evaluation of EU media policy, n. 16, 77.
[308] Kaitatzi-Whitlock, S., 'Pluralism and media concentration in Europe: media policy as industrial policy', (1996) European Journal of Communication 11(4), 477.
[309] *Ibid.*, 477.
[310] McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, n. 49, 203.

companies to concentrate and expand internationally. Apart from the European merger control rules, which are not without boundaries (see Chapter 4 below for detailed analysis), there is currently no instrument in place to counteract this trend. This is very unfortunate. Even if the proposed directive based on the logic of "one size fits all" was indeed ill-thought from the beginning, this should not have discouraged the Commission and caused it to behave like a spoiled child who drops its toys and says "if that's the way it is going to be, I'm not playing anymore!" The work should have continued and other solutions explored. Instead, there exists an apparent legal vacuum in this area and the Commission turns its back to any call for action, cowardly covering itself with a comfortable "no legal basis" shield.

The best example of this sort of behaviour was an episodic come back to the subject in 2003, during what was much broader consultation on the White Paper on Services of General Interest.[311] As mentioned earlier, the Commission used this opportunity to respond to the European Parliament, which had requested that the Commission return to the issue of media concentration in its 2002 Resolution. Despite admitting that concentration of the media sector was progressing[312], the White Paper spared a mere 7 lines for the issue and "no apparent need" as well as the immortal "no competence" were returned as the answer to media concentration and pluralism concerns. This was all despite several interesting submissions in the consultation process that suggested creating a legal basis that would take pluralism issues into account in the application of Community competition rules. The authors of the White Paper simply chose to ignore these proposals.

The results of the Liverpool Audiovisual Conference in 2005 were admittedly slightly more promising in this respect (see Chapter 2.2.2 below for a more detailed discussion). Although no concrete proposals had been made and there were no provisions relating to the issue of media concentration were included in the legislative proposal for the revision of the Television Without Frontiers Directive.[313]

---

[311] European Commission, 'Services of general interest (White Paper)', COM(2004) 374 final.
[312] European Commission, 'Services of General Interest, (Green Paper)', COM(2003) 270 final, 22 and 45.
[313] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final, 13 December 2005.

In summary, all currently existing EU-level instruments that allegedly contribute to the promotion of pluralism are simply not enough (see Chapters 4 and 5 for a detailed discussion). Despite the Commission's claims to the contrary, there is still a need for measures at the EU level aimed specifically at counteracting media concentration.

2.2.2 Current policy line of the European Union: the triumph of liberalism

The Parliament is still fighting

The lost battle for the media ownership directive resulted in the current lack of any provisions in secondary Community legislation that would be aimed specifically at safeguarding pluralism in the media sector. Out of the two opposite policy lines pursued by the Commission in the mid 1990s, the convergence project prevailed. From the late 1990s onwards, the EU agenda concerning broadcasting regulation was overtaken by a debate about the appropriate methods of stimulating and reaping the benefits of the convergence of broadcasting, telecoms and IT,[314] leaving concerns of pluralism for Member States to address.

Nevertheless, the "war" is far from being over. The European Parliament, in accordance with its democratic character and vocation, is not stopping in its efforts to bring the issue of media concentration legislation, back at the European Union's agenda. It regularly calls for the Commission to return to discussions on positive action in this area. In the 2002 Resolution on media concentration,[315] the Parliament noted that the media market had changed considerably since the issue was last discussed at European level, in the mid 1990s. Therefore, it called on the Commission to present an updated Green Paper by the end of 2003. The Parliament also asked the Commission to consider the possibility of a European-level regulatory framework that would safeguard freedom of expression and pluralism in the media industry and to preserve and encourage cultural diversity. Most importantly, however, this time the Parliament insisted on changing the Treaty establishing the European Community ("**EC Treaty**")[316] in order to introduce a clear legal basis for the Commission's action in this field. To this end, the Parliament called on the Commission to submit to the European Convention an appropriate proposal that would give freedom of the media a stronger basis in the EC Treaty. The Commission addressed this issue in the Green Paper on Services of General Interest,[317] in which it sought the views of interested parties, as to whether the Commission should re-examine the need for Community action in the area of media concentration. This was actually

[314] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 17.
[315] European Parliament, Resolution on media concentration, 20 November 2002, OJ (2004) C25E/205.
[316] Treaty establishing the European Community, consolidated version OJ (2002) C325.
[317] European Commission, 'Services of General Interest (Green Paper)', n. 283, 22 and 45.

a perfect time for such an initiative. The work on the European Constitution was ongoing and there was still time to lobby for the introduction of a legal basis for media ownership regulation. However, in the report on public consultation in the Green Paper and then in the subsequent White Paper on Services of General Interest[318] of May 2004, the Commission's only response was a disappointingly brief statement that there is "little support for a Community initiative on media pluralism" and the issue "should be left to Member States". Therefore, given that the momentum and timing for the media ownership initiative was so perfect, the indifference displayed by the Commission to the Parliament's call, is all the more regrettable.

However dismayed the European Parliament was by the unsatisfactory response from the European Commission, it continued its struggle. The growing concern of ever bigger "media empires", either exercising significant political influence or indeed owned by politicians, provided the background and rationale for the report of 5 April 2004.[319] Responding to the calls of Italian Members of Parliament, the Parliament used the worrying state of affairs of the Italian media market, to exemplify the negative effects of the lack of an appropriate European legislative instrument.

The report deplored the fact that the protection of pluralism was no longer included in the priorities of the European Commission's strategic communications on the audiovisual sector. The report also disagreed with the fragmentation of EU regulation in the media sector. The Parliament, therefore, put forward a number of very concrete demands aimed at appeasing the situation. Not only, for yet another time, did the Parliament call on the Commission to submit a communication on the state of media pluralism in the EU and a proposal for a directive to safeguard media pluralism in Europe. The Commission was also asked to make the protection of media diversity the priority of EU competition law and to render the mere possession of a dominant position by a media company as harmful to pluralism. The Parliament also endorsed the introduction of a "pluralism" test to the EC Merger Regulation[320] and lowered the "European dimension" turnover thresholds for media mergers. The most controversial

---

[318] European Commission, ' Services of general interest (White Paper)', n. 312.

[319] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192.

[320] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), OJ (2004) L24/1.

suggestion however, concerned the proposal to adopt European legislation that would prohibit political figures or political candidates from having major economic interests in the media and would prevent any conflict of interest.

To date, the European Commission's only reaction to the report has been to emphasise the lack of a legal basis for a European legislative measure[321] and, as a result, no concrete action should be expected in the near future. This is indeed disheartening. First of all, the Commission had a chance to respond to the Parliament's useful advice and suggest introducing to the emerging European Constitution a legal basis for action on media ownership. Moreover, changes to the Merger Regulation could also have been proposed, as this was actually being changed at that time. If the introduction of the pluralism test in a merger review indeed requires a Treaty basis, lowering turnover thresholds for media mergers could probably be justified by the special characteristics of the sector. Secondly, certain of the Parliament's proposals were not outside the mandate of the European Union. Certainly creating an independent European Media Council with simple advisory powers or adopting soft law in the form of recommendations to the Member States, does not require changes to the current competences of the European Union. No matter how weak these instruments seem to be, they may actually help in building momentum for more rigid action. In any case, this would definitely be better than the Commission's cowardly choice, which is currently to do nothing. If the aim is, and in my view the aim *should* be, to create an "ever closer Union", temporary Euro-scepticism and a less than favourable political climate should not discourage taking positive action.

The two most recent emanations of the Parliament's continuing struggle to keep media pluralism concerns on the EU agenda are (i) the own-initiative report of 21 June 2005, also known as Weber Report (after the name of the Rapporteur Henri Weber),[322] and a draft Report on concentration and pluralism in the media in the European Union.[323] In the Weber report the

---

[321] See, for instance, Written Question P-1625/05 by Dimitrios Papadimoulis (GUE/NGL) to the Commission, Subject: Media concentration, http://www.Europarl.eu.int/registre/questions/ecrites/2005/1625/P6_QP(2005)1625_EN.doc (accessed 28 April 2008).

[322] European Parliament, Committee on Culture, Youth and Education, the Media and Sport, Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the 'TV Without Frontiers Directive'), as amended by Directive 97/36/EC, for the period 2001-2002, Rapporteur: Henri Weber, 21 June 2005.

[323] European Parliament, Committee on Culture and Education, Draft Report on concentration and pluralism in the media in the European Union, 7 March 2008, available at:

Parliament insisted that the ongoing revision of the Television Without Frontiers Directive should result at least in maintaining the present minimum standards for independent and European productions. The Report also contains a request to introduce minimum requirements for media pluralism at EU level as well as adopting measures aimed at preventing broadcasting from becoming entirely commercial. In the draft Report on concentration and pluralism in the media in the European Union, the Parliament yet again urges the Commission and the Member States to safeguard media pluralism, to ensure that all EU citizens can access free and diversified media in all Member States and to recommend improvements when needed. It also encourages the disclosure of ownership of media outlets to help to understand the aims and background of the media owner.

Notwithstanding the continuing persistence of the European Parliament, the analysis of the Commission's current approach allows certain suspicion that the chances for EU action aimed at specifically protecting media pluralism are rather slim, despite sometimes confusing statements and declarations to the contrary.

This confusion, and feeling of the lack of internal coherence in the Commission's approach, is the result of the impression the Commission seems to create, that it is actively doing something meaningful for the promotion and protection of media pluralism at EU level. It continues to acknowledge that competition rules alone are not sufficient in this respect and additional safeguards are necessary. To illustrate this finding, one should recall that former Competition Commissioner Mario Monti, who frequently stressed the importance of pluralism in regulating the media industry. He once said that "media plurality and diversity of opinion both within and across the media are fundamental to the health of an open, democratic society and they may not be assured by a simple free market approach".[324]

Moreover, in many of the Commission's communications and even some legislative acts dealing with issues relating to the media industry, the importance of safeguarding pluralism in the audiovisual sector is emphasised at the outset. One of the recitals of the Audiovisual Media

---

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-402.864+01+DOC+PDF+V0//EN&language=EN (accessed 2 may 2008).

[324] Monti, M., 'Does EC competition policy help or hinder the European audiovisual industry?', n. 60.

Services Directive,[325] the 1999 Commission Communication "Principles and guidelines for the Community's audiovisual policy in the digital age"[326] and even the Directive on a common regulatory framework for electronic communications networks and services ("Framework Directive"),[327] all stress that because the audiovisual sector is not an industry like others in that it helps to determine what we see and how we see it,[328] it should be subject to specific regulation in line with the general interest. Last but not least, Article II-11 paragraph 2 of the European Charter of Fundamental Rights and Liberties, solemnly proclaimed at the Nice Summit in December 2000 and later incorporated in the draft European Constitution and now the Lisbon Treaty, also emphasises the importance of pluralism in relation to the media by stating: "The freedom of information and pluralism shall be respected".

At first glance therefore, the Commission acknowledges the need for sector specific regulation, but does it mean that it predicts the eventual revival of the debate on a directive in this form or another? What is the Commission's position? Is it really an active guardian of media pluralism in Europe or are all the above statements and principles mere political declarations that don't have any practical significance? Is the Commission really *doing* something?

To answer these questions one should study the position of the two Directorates General which are at the forefront of the debate on the future of Community action in the area of media concentrations. DG Information Society and Media and DG Competition currently provide the most prominent statements and are the driving forces on the Commission's side in discussions in this area. It is worth noting here that DG Internal Market and DG Culture, which loudly called for a media ownership directive in the 1990s, now seem to have withdrawn their voice in this respect. DG Internal Market deals with the media only in respect of the freedom of establishment of media companies and the free movement of services. In this context it is currently only interested in national media ownership rules if they are too strict and thus

---

[325] Recital 16 of the consolidated version of the AVMS directive, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0552:20071219:EN:PDF (accessed 28 April 2008).

[326] European Commission, 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age', n. 1.

[327] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L108/33.

[328] European Commission, 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age', n. 1.

endanger the "smooth functioning of the Internal Market", i.e. unhindered cross-border investment and growth.[329] DG Culture on the other hand, concentrates mainly on actions actively supporting the development of cultural and linguistic diversity in the European Union. It sees the media sector as an important factor in this process, but its activities focus on promoting training in cinema and audiovisual media, the development and distribution of work, the preservation of audiovisual and cinema heritage and education in visual imagery. Hence, there is currently no evidence of communication on either DG Internal Market's nor DG Culture's side of the fence, on the dangers posed by excessive media concentration.

Therefore, it is worthwhile analysing the positions of DG Information Society and Media and DG Competition as they are virtually the only voices present and they most probably reflect the position of the Commission as a whole.

DG Information Society and Media

Viviane Reding, current Commissioner for Information Society and Media in the Barroso Commission, was responsible for the Education and Culture portfolio in the previous Commission. Significantly, it was the Education and Culture DG which "inherited" the media ownership portfolio after it was "shelved" in 1997. It was not at all surprising that she gave no support to the initiative. As a Luxembourg national she definitely considers large media to be of paramount importance for the economy of her country.[330] It seems that she has transported this belief to the European level and carried it with her to the new role as the Commissioner for Information Society and Media. In her speech entitled "The European Commission and media industry: The need for a new partnership" delivered on 5 November 2005 at the Congress of the European Newspaper Publishers' Association (ENPA) in Luxembourg, she revealed that President Barroso intends to give the issue of improving co-operation with the media industry even more attention than the former Prodi Commission.[331] To this end Commissioner Reding has been appointed "co-ordinator for relations with the media industry"

---

[329] See for instance European Commission's press release, 'Commission scrutinises Greek restrictions on media ownership', 10 July 2005, IP/05/987.

[330] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 84.

[331] Reding, V., 'The European Commission and media industry: The need for a new partnership', Luxembourg, 5 November 2004, Opening of the European Newspaper Publishers' Association Congress, http://ec.Europa.eu/commission_barroso/reding/docs/speeches/speech_lux_20041105.pdf (Accessed 8 September 2007).

which she boasts to be the first such one-stop-shop for the media industry within the European Commission. It is, therefore, all the more important to analyse her views with regard to the priorities of the Commission in this area.

Thus, the already mentioned speech at the ENPA congress is the only instance so far, at which Commissioner Reding spoke directly about the media concentration issue. She clearly admitted the fact that media pluralism is a cornerstone of democracy, and the EU and its Member States must take the action necessary to preserve it, each within its own sphere of competence. She stressed however that EU action is not only unnecessary, but also impossible since, and as emphasised by the White Paper on Services of General Interest, under the present Treaties, legislative measures against media concentration fall under the competence of Member States and it is, therefore, difficult to find a legal basis for legislative action on media ownership at EU level. Moreover, Commissioner Reding noted that even if there was a legal basis, there is simply no "one size fits all" formula for the prevention of media concentration throughout all Member States. Therefore, there is no need and no possibility for action and all the Commission will do is continue to carefully monitor the situation.

To alleviate the concerns that "carefully monitor" sounds dangerously like "do nothing", Commissioner Reding pointed to the "wide-ranging" possibilities the EU apparently has at its disposal to foster media pluralism in the EU. The most prominent example was, unsurprisingly, the Community competition policy which, as rightly described by the Commissioner, "plays a pivotal role in preventing the creation of dominant positions and ensuring market access". Thus, according to Reding, this and "other possibilities" must and will be conscientiously used to contribute to enhancing media pluralism throughout the EU. Still, one cannot help but wonder – is the prevention of a creation of a dominant position and ensuring market access really enough to guarantee pluralism? In particular, knowing that the Commission has allowed dominant positions that are near monopolies to appear in the European media markets.

Next, Commissioner Reding indicated that with regard to one of her stated political priorities, i.e. to strengthen European content and the European content industry, we should "agree that a simple *'no action whatsoever'* approach is not really an option for the years to come". The Commission will then explore all the possibilities of using "soft law", starting with a pompous

example of the Recommendation on the protection of minors and human dignity.[332] The Commissioner seemed proud of the fact that this is a soft law: there is no compulsory right of reply, the recommendation to the Member States is limited only to consider introducing measures into national law, and the Member States have a choice between the right to reply or "equivalent remedies". I would argue however, that while the use of soft law should be seriously considered not only for the media content but also media concentration issue, such extreme softness is not laudable. Not only is the instrument of a recommendation not binding anyway but if it is so "light weight" its usefulness must also be questioned. It actually does not change anything, apart from raising awareness and keeping matters on the agenda. Then again, perhaps this is all the European Union can and should be doing for the time being.

In all the other speeches and public addresses, Commissioner Reding's approach to the media concentration issue is concealed in the statement of the current priorities and suggested future actions concerning the sector. The picture of Commissioner Reding's mission that emerges from these statements is characterised by three "leitmotivs": (i) strengthening the European media industry through "light weight" regulation; (ii) cutting the "red tape"; and (iii) establishing the right balance between "light weight" regulation and protection of "common values".

Firstly, the ultimate priority is to help unleash all of the economic potential of the media sector.[333] According to the Commissioner, it has become critical to seize the opportunities offered by convergence in a competitive and global environment for the benefit of all citizens and of the EU economy as a whole. For the Commission, the principal characteristic of the European media industry seems to be that it makes a key contribution to growth and employment in Europe.[334] Therefore, the most important aim for the Commission should be to

---

[332] Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ (1998) L 270/48 and a Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, 30.4.2004, COM(2004) 341 final.

[333] Reding, V., 'New Rules for a Convergent Multi-Media World: The Need for a 'Light Touch'', IIC and Chatham House 36th annual conference, London, 10 October 2005, http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/590&format=HTML&aged=0&language=EN&guiLanguage=en (accessed 8 September 2007).

[334] Reding, V., 'Better Regulation for Europe's media industry: the Commission's approach', Audiovisual Conference – Between Culture and Commerce, Liverpool, 22 September 2005,

have a strong European media landscape that is able to face up to international competition, as is the objective of the Lisbon Agenda.[335]

For that to happen, and this is the second stated priority, the European policy-makers endeavour to ensure "a modern, flexible and open regulatory environment that does not stifle, but instead encourages innovation, investment and competition". In Commissioner Reding's own words: "my first policy priority is to use all the means and instruments at my disposal to ensure a modern, market-oriented regulatory framework for the converging digital economy and to stimulate the availability of online content".[336]

She added that "this is Europe's best bet for delivering sustained growth and skilled jobs".[337]

As to the second leitmotif, it is a well known fact that the Barroso Commission strives for "better regulation", by which it means less regulation, as described with the catchy phrase "cutting the red tape". In fact, simplifying EU legislation has been defined as a key aspect of the Barroso Commission's efforts to fulfil the Lisbon Agenda – i.e. restore economic growth and create more jobs in Europe. This implies a roll-back of unnecessary or outdated legislation if it is not in line with competitiveness and jobs goals. In addition, no new regulations should be enacted if they are deemed unnecessary for the growth of European companies.

Against this background, Commissioner Reding sees media industry as, first and foremost, the key contributor to growth and employment in Europe.[338] Therefore, to strengthen it even more and to allow it to grow internationally, as is the objective of the Lisbon Agenda and the i2010 strategy of the European Commission,[339] the Commission must make sure that media services are regulated to the least extent possible. Hence, there should be no further restrictive

---

http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/532&format=HTML&aged=1&language=EN&guiLanguage=en (accessed 8 September 2007).

[335] Reding, V., 'Europe, the media and European media policy', Congress of the Federal Association of German Newspaper Publishers, Berlin, 26 September 2005, http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/552&format=HTML&aged=1&language=EN&guiLanguage=fr (accessed 8 September 2007).

[336] Reding, V., 'New Rules for a Convergent Multi-Media World: The Need for a 'Light Touch'', n. 334.

[337] *Ibid* .

[338] Reding, V., 'Europe, the media and European media policy', n. 336.

[339] i2010 is the European Commission's strategic policy framework laying out broad policy guidelines for the information society and the media in the years up to 2010, see http://ec.Europa.eu/information_society/eEurope/i2010/index_en.htm (accessed 8 September 2007).

regulation for the media industry.[340] Self-regulation is given preference over regulatory intervention.[341] If there are any new legislation at EU level, it will be there only "to eliminate rules which are out-of-date, to simplify existing rules and procedures in a clear manner".[342] The ultimate aim is to remove regulatory excess step-by-step.[343] In this context, one cannot help but wonder – where is the regulatory excess for the media industry at EU level? All that remains is the liberal Television Without Frontiers Directive. There are no rules aimed at preventing excessive concentration in the media sector. Does this stance, therefore, mean that the EU will be encouraging the Member States to liberalise their national anti-concentration rules? If this were true, it would be a worrying perspective...

Admittedly, the third leitmotiv of the Commission Reding's mission is finding the best balance between a light burden on industry, aimed at encouraging successful cross-border services, and the protection of common values.[344] These "undisputed policy objectives" are for instance the – often invoked – protection of minors or the fight against racial hatred. However, the Commission's only duty here is to propose a framework under which these *shared European values* are protected. In general, therefore, media policy in a broader sense should be left to the Member States. In Commissioner Reding's opinion:

> "our most important aim is to have a strong European media landscape *as an expression of media pluralism* and to face up to international competition. Media policy in Europe is in essence a national responsibility, so the European Commission can only lay down a general framework and this must be filled out by the Member States in accordance with their national traditions. Only in the case of obviously cross-border issues does the European Commission itself have a mandate to take political decisions".[345]

In Commissioner Reding's speeches, media pluralism is conspicuously never mentioned as a common value in the need for protection. The above quote proves that the Commissioner views a competitive and strong European media industry, presumably composed of a handful of big "European champions", as the "reflection of pluralism". Therefore, strengthening the

---

[340] Reding, V., 'Europe, the media and European media policy', n. 336.
[341] Reding, V., 'New Rules for a Convergent Multi-Media World: The Need for a 'Light Touch'', n 334.
[342] Reding, V., 'Europe, the media and European media policy', n. 336.
[343] *Ibid* .
[344] Reding, V., 'Better Regulation for Europe's media industry: the Commission's approach', n. 335.
[345] Reding, V., 'Europe, the media and European media policy', n. 336, emphasis added.

media sector and leaving it only with symbolic regulation aimed at, for the most part, facilitating growth which in Reding's opinion is what the Commission will do to protect pluralism!

It is also interesting to note that Commissioner Reding's Directorate General for Information Society and Media is the one responsible for overseeing the upcoming revision of the Television Without Frontiers Directive. In the "Frequently Asked Questions" Memo of December 2005 the Commission was asked: "What does the Directive do in the field of media pluralism?" Interestingly, the answer was that:

> "the European Union is committed to protecting media pluralism as well as the right to information and freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights. *Important measures to ensure media pluralism at Community level are included in the Television without Frontiers Directive and are strengthened in this amending directive*".[346]

These measures to *ensure* media pluralism which are apparently included and strengthened in the new Directive are those on the promotion of European and independent productions and those requiring Member States to guarantee the independence of national regulatory authorities. Whereas, both measures are a vital contribution to pluralism, they by no means can *ensure* pluralism at the European level, as the Commission maintains.

This becomes all the more apparent after studying the European Parliament's reports on the revision of the Directive.[347] In all of the reports and subsequent resolutions, the Parliament noted that the proposed revised Directive introduces further liberalization and less regulation and it still contains no rules for controlling excessive media concentration. Hence, the Parliament has consistently called for measures to at least monitor media concentration at EU level. Furthermore, numerous oral and written questions from the Parliament to the Commission on why the Commission is not doing anything have been answered, in blunt terms by Commissioner Reding: "under the present Treaties, legislative measures against

---

[346] European Commission, 'The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions', 13 December 2005, MEMO/05/475, emphasis added.
[347] See European Parliament's reports A6-0202/2005, A5-0251/2003, A5-0286/2001.

media concentration fall under the competence of the Member States".[348] Consequently, the legislative proposal for the revised Television Without Frontiers Directive does not contain any concrete proposals or solutions on how to protect the European market form excessive media concentration, which is dangerous for pluralism and the pluralism-friendly measures which it does contain are by no means sufficient.

The fact that the EU refuses to act and believes that pluralism is not in need of special legislative protection from excessive media concentration at European level is particularly interesting and also worrying now that growing media concentration has become such a cross-border issue. I do not understand why the Commission thinks that Member States' national legislation cannot effectively protect minors or prevent racial hatred in the audiovisual context, but are perfectly suited to tackle giant media mergers which have an impact on the European, not national level.

DG Competition

This belief in the Member States' potential becomes even more apparent with the analysis of DG Competition's position.

Former Competition Commissioner Mario Monti conceded on numerous occasions that competition rules and free markets can only achieve productive and allocative efficiency. Which, in the media sector is "far from the only public policy objective that we as a society want to pursue", and that "plurality and diversity – fundamental to the health of an open, democratic society – may not be assured by a simple free market approach".[349] Nevertheless, Monti believed that pluralism concerns could be *partly* ensured by the competition rules themselves. For instance cases like *RTL/Veronica/Endemol,*[350] *MSG*[351] or *Bertelsmann/Kirch/Premiere*[352] were sufficiently problematic that the economic concerns

[348] See, for instance, Written Question P-1625/05 by Dimitrios Papadimoulis (GUE/NGL) to the Commission, Subject: Media concentration, n. 322.
[349] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?, n. 60.
[350] Case M.553, *RTL/Veronica/Endemol*, 20 September 1995.
[351] Case M.469 *MSG Media Service,* 9 November 1994.
[352] Case M.993 *Bertelsmann/Kirch/Premiere,* 27 May 1998.

about market concentration led to their prohibition. The application of the competition rules, therefore, ensured the maintenance of media plurality.

However, and as admitted by Monti himself, problems start in cases where a concentration triggers legitimate fears about dangers to pluralism but the market power is less than would trigger competition concerns. Monti's, and thus DG Competition's, answer to this is that Member States are free to implement additional anti-concentration rules. Moreover, where they are seeking to ensure media plurality, Article 21(4) of the EC Merger Regulation allows them to prevent mergers that would otherwise be approved under the EC competition rules.[353] Therefore, Monti's approach to the public policy objectives in the media sector was that they are entirely laudable, fully supported by the Commission and consistent with the Community's legal framework. Furthermore, the division of powers between the Commission and the Member States is assumed to work efficiently.

This has been further developed by Herbert Ungerer, the former Head of Unit responsible for media within DG Competition. It is, however, worth noting at the outset, that in his numerous speeches the recurrent theme was that the debate at the European level over the last decade has led to a broad consensus on basic goals for the media sector that are widely shared across the EU. These basic goals are, first of all, a *guarantee* for pluralism[354], as the basic public interest test for the media sector. According to Ungerer, pluralism is the "uncontested primary public goal in the media sector".[355] The second goal is the *maintenance of cultural diversity*, standing for the preservation of national identities. And the final aim is the *widening of choice*, where the task is to give access to new media. This is all very promising. The problem starts with his belief that these goals are in fact achieved at the EU level, in "a decentralised but *co-ordinated* manner"[356] through a combination of measures and institutions.

---

[353] See Chapter 4.1 below for a more detailed discussion on Article 21(4).

[354] Ungerer, H., 'Impact of European Competition Policy on Media', IESE Business School & School of Communication of the University of Navarra, Centre for Media Studies, Madrid, 15 February 2005, http://ec.Europa.eu/comm/competition/speeches/text/sp2005_002_en.pdf (accessed 8 September 2007).

[355] *Ibid* .

[356] Ungerer, H., 'Competition Policy and the issue of access in broadcasting markets: the Commission perspective', Vision in Business, Broadcasting Competition Law, Brussels, 14-15 January 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_001_en.pdf (accessed 8 September 2007), emphasis added.

First of all, in the media sector in Europe, which is now firmly based on the dual system of public and private broadcasters, the European Union recognises the important role of public service broadcasters in providing high quality programming. In fact, coexistence has apparently become the *ultimate guarantee for diversity and freedom of information.*[357] Dual systems of public and private broadcasters has proven to be "a sound basis for ensuring pluralistic formation of opinions and securing democratic structures of open expression and uncensored exchange of information – a basic value for the European Union and vital for EU membership".[358] Therefore, the EU boasts that it is safeguarding public service broadcasters using the Commission's approach to state aid. The 2001 Communication on the application of state aid rules to public service broadcasting,[359] which is the base level document in this area, on the one hand recognises the legitimate objective of public service broadcasting but on the other hand, "it balances this objective with the need to ensure that such broadcasters ... do not distort other markets".[360] Therefore, although the definition of the public service remit belongs to the Member States, the Commission is there to ensure that PSBs do not use that remit to distort other markets.

Secondly, Ungerer seemed to believe that, although the European Union lacks competence to regulate media ownership and protect pluralism, this is not such a mishap since the EC Treaty allows Member States to put into place their media regulatory framework, largely at their own will in accordance with Article 295 of the EC Treaty, which clearly states that ownership issues fall to the Member States. First of all, Article 21(4) of the EC Merger Regulation allows Member States to attach conditions or even prevent mergers even if allowed by the Commission, in order protect legitimate interests, such as pluralism.[361] Secondly, the allegedly *clarifying* debate on this issue which followed the 1992 EU Green Paper on pluralism and media concentration resulted in the consensus that: (i) Member States retain the right to issue national media laws relating to limits on media ownership; and that (ii) plurality of the media

---

[357] Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', Universita di Napoli, Naples, 20 September 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_013_en.pdf (accessed 8 September 2007).

[358] Ungerer, H., 'Competition rules and the media: are they determinant or complementary?', Panel contribution at European Media Law and Practices. Radio and Television Broadcasters, Istanbul, 1 April 2005, http://ec.Europa.eu/comm/competition/speeches/text/sp2005_004_en.pdf (accessed 8 September 2007).

[359] European Commission, Application of state aid rules to public service broadcasting (Communication), OJ (2001) C320.

[360] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?, n. 60.

[361] See Chapter 4.1 below for a more detailed discussion on Article 21(4).

is regarded as a legitimate interest of a Member State under EU law.[362] Moreover, following numerous calls from the European Parliament, Member States not only have the right to enact national anti-concentration legislation for the media sector, they also carry a *responsibility* and in fact an obligation to establish such effective controls and to implement them.[363]

However, despite acknowledging the necessity of such sector specific *ex ante* controls, Ungerer also points out that they should be limited to what is needed for achieving the public goals for which they are set up in the first place and they need continuous review.[364] This continuous review is in fact aimed, not at possible strengthening of the rules, but at determining at which point the general market regulation through competition rules will suffice and the additional rules can be scaled back even further. Thus, DG Competition views national media ownership rules as temporary at best.

Finally, according to Ungerer,[365] apart from just accepting national rules on PSBs and media ownership control, the EU does apparently provide a vital and active contribution to the achievements of the primary objectives for the media sector. He lists three main legal foundations on which current EU action in the media sector is based: the basic freedoms – in particular the freedom to provide services; the Maastricht and Amsterdam Treaties: the provisions relating to culture and the Protocol on public service broadcasting, and the EU competition order. These mandates allowed for the establishment of the fundamentals on which EU policy in this area is built. First of all there is the Television Without Frontiers Directive which sets the basic framework for the media at EU level. Secondly the European Convention on Human Rights sets Europe-wide goals, and the Lisbon Treaty (once ratified) sets an overarching framework at EU level. Particularly important is Article II-11 of the European Charter of Fundamental Rights which stipulates that "The freedom and pluralism of the media shall be respected". With the integration of the EU Charter on Fundamental Rights into Lisbon Treaty, media regulation and the safeguarding of freedom of expression and information will gain even higher prominence on the European Union's agenda. Finally, EU

---

[362] Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', n. 358.
[363] *Ibid.*
[364] Ungerer, H., 'Why can't the market decide?', Oxford IPPR Media Convention, 13 January 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_001_en.pdf (accessed 8 September 2007).
[365] Ungerer, H., 'Legal framework to secure open Media Markets and the Independence of the Press – the role of EU competition law', Conference on Democracy and Human Rights in the EU, Opole (Poland), 5 June 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_009_en.pdf (accessed 8 September 2007).

competition law is also a vital contributor of sound policies in the media sector and is the primary instrument for checking market power and foreclosure in media markets that remain highly oligopolistic. As pluralism requires the availability of choice, both between different opinions and offers within the same media, but also between different types of media, competition law, with its emphasis on open markets and free choice, is therefore also a vital contributor to the EU's action aimed at safeguarding pluralism.[366]

Overall, therefore, the approach of DG Competition to the issue of media concentration is rather simple. Despite acknowledging that pluralism is a fundamental goal for the media sector officials from DG Competition, unsurprisingly, believe that at EU level competition law plays a pivotal role.[367] As Ungerer explains, "applying strict competition controls to the sector and the related upstream and downstream markets is a necessary *pre-condition* for achieving effective and sustainable pluralism",[368] and "only a competitive market structure is a sound basis for sustainable plurality. The underlying, market power structures in the media sector are determining the development of the sector – and ultimately the efficiency and sustainability of media specific pluralism controls".[369] In the instances where competition law is indeed not sufficient to provide a desired safeguard for media pluralism – the Member States take over with their PSBs and anti-concentration rules.

Critical overview

In summary, the Commission views the current situation where pluralism is protected by EC competition law and some EU legislative measures complemented by national laws as entirely satisfactory. However, this simple approach of both DG Information Society and DG Competition, cannot escape some critical analysis.

First of all, the problem with this approach is that Member States are not so vigilant when using their powers. The mechanism envisaged in Article 21(4) of the EC Merger Regulation

[366] Ungerer, H., 'Competition rules and the media: are they determinant or complementary?', n. 359.
[367] Ungerer, H., 'Legal framework to secure open Media Markets and the Independence of the Press – the role of EU competition law', n. 366; Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', n. 358; Ungerer, H., 'Impact of European Competition Policy on Media', n. 355.
[368] Ungerer, H., 'Legal framework to secure open Media Markets and the Independence of the Press – the role of EU competition law', n. 366, emphasis added.
[369] *Ibid* .

has been explicitly mentioned and used in only one case.[370] Moreover, with the tendency towards liberalisation that is present in most Member States, it is not likely that it is going to be used more often. In addition, I don't think Member States are keen to run counter to the Commission's decisions. So there is clearly a gap here. When the Commission's competition decision cannot protect pluralism, Member States are very unlikely to do anything about it. So there is a *theoretical* mechanism in place but in practice it does not really work.

Secondly, it is not true, as DG Competition alleges[371] that Member States have not only the right but also the responsibility to enact media specific anti-concentration rules. Nowhere, in EU legislation is there such an obligation on Member States. Admittedly, the European Parliament has in a number of reports and resolutions called for Member States to introduce anti-concentration measures if they did not already have them, but this is in no way binding. Moreover, the Parliament has on numerous occasions requested measures from the Euro*pean Commission*, but this has conspicuously been omitted in the officials' speeches. The fact that the Lisbon Treaty inserts Article 1a to the Treaty on European union, which states that the European Union is founded on certain values which are common to the Member States in a society of pluralism, does not create any obligation on the Member States. And the much praised Charter of Fundamental Rights says in Article II-11, that pluralism must only be "respected" not "guaranteed". Furthermore, it should be noted that some of the wording has been changed under pressure from some Member States.

Thirdly, I cannot agree with DG Competition's belief that the continuous review of national media specific anti-concentration rules will at some point lead to a situation whereby the rules can be scaled back, and general market regulation through competition rules will suffice.[372] I think this should never happen since market forces alone will *never* guarantee pluralism. Therefore, the need for specific rules is clearly not just temporary.

---

[370] Case No IV/M.423 *Newspaper Publishing*, 14 March 1994.
[371] Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', n. 358.
[372] Ungerer, H., 'Why can't the market decide?', n. 365.

Moreover, I wouldn't say that applying strict competition controls in the media sector is a necessary *pre-condition* for achieving effective and sustainable pluralism.[373] I don't think safeguards for effective competition are pre-condition for the existence of pluralism or vice-versa. Safeguards for both should be in place simultaneously in order for the media sector to operate smoothly. In addition, the fact that there has been substantial media concentration in Europe, in spite of elaborate national pluralism controls being in place,[374] does not prove that EC competition law is in fact the ultimate cure. Moreover, it actually makes the need for a European instrument all the more apparent.

Furthermore, it is very difficult to understand the claim that the mid 1990s debate in the EU on a media concentration directive was "clarifying" and it resulted in the broad "consensus" on the division of powers in this area.[375] I see the debate as far from clarifying and the current *status quo* is the effect of the lack of agreement and ferocious lobbying, rather than the result of informed decision and a wide pan-European consensus. It looked like the fighting parties just got offended and returned to square one. The issue was left with resentment on both sides, not at all in a "broad consensus". If it was the case, why would the European Parliament, journalists' unions and other bodies continue to call for reviving the discussions?

Finally, ground rules for the sector are not set in a "decentralised but *co-ordinated* manner" as argued by DG Competition.[376] They are spread over many legislative acts, different Directorates General apply different priorities and the Commission's entire approach to the issue of media concentration is far from being coordinated. As noted by Goldberg, Prosser and Verhulst, "the Community's media and communications policy is certainly not the product of a single and unified Community vision of the sector".[377]

---

[373] Ungerer, H., 'Legal framework to secure open Media Markets and the Independence of the Press – the role of EU competition law', n. 366, emphasis added.
[374] *Ibid* .
[375] Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', n. 358.
[376] Ungerer, H., 'Competition Policy and the issue of access in broadcasting markets: the Commission perspective', n. 357, emphasis added.
[377] Goldberg, D., Prosser, T., Verhulst, S., 'Regulating the changing media', n. 2, 146.

In summary, the Commission's approach to media concentration is best summarised by the recent White Paper on Services of General Interest[378] of 12 May 2004, often quoted by Commissioner Reding. The White Paper stated:

> "Concerning media pluralism, the public consultation highlighted that, in the light of the differences that exist across the Member States, the issue should be left to the Member States at this point in time. The Commission concurs and concludes that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the Commission will continue to closely monitor the situation".[379]

Therefore, no specific Community measures should be taken on media pluralism at this stage and that the protection of pluralism should be left to the Member States.

This is very direct and the "pull the wool over ones eyes" type of statements by the Commission's officials cannot blur the overall conclusion that, for various reasons, the Commission is not willing to go back to any discussions on making pluralism a primary objective for Community action. If anything the protection of pluralism is seen as a positive side-effect of various other of the Community's activities. Apart from that, it is up to Member States, and the Commission does not take any further interest.

Therefore, although there is now a main point of reference for the media industry within the Commission, in the form of DG Information Society and Media (even though DG Culture and DG Internal Market deal with some specific aspects and DG Competition tackles antitrust and merger issues), the "new partnership" in the eyes of Commissioner Reding, and thus the entire Commission, will result in a relaxation of regulation and a more laissez-fare approach. Linking media under the same roof with information society, instead of culture or internal market, is significant in this respect. All of the statements issued by Commissioner Reding seem directed at pleasing the commercial media. Curbing excessive concentration in the sector is thus clearly outside the remit of this latest partnership and is certainly the last thing on the Commission's mind. "Lack of legal basis" and "competition law applies" continue to be used as shields, protecting the Commission from the accusations of non-activity.

---

[378] European Commission, 'Services of general interest (White Paper)', n. 312.
[379] *Ibid.*

As to DG Competition, it is noteworthy that the new Commissioner, Neelie Kroes, has addressed the media sector in a specific way in only one speech since taking up office at the end of 2004. In March 2006, she spoke in Vienna during the Austrian Presidency Expert Seminar on "Content for Competitiveness",[380] she emphasised the change that the media landscape had recently undergone, should be reflected in the regulatory framework which must ensure "fair competition, liberalised markets, and less red tape". Interestingly, she admitted that that, although open and efficient markets are the best way to provide consumers with quality products at reasonable prices, sometimes the market alone may not deliver fundamental policy objectives such as cultural diversity or high-quality public services. This is where she sees the role for state aid and public service broadcasting as upholding three essential values in the broadcasting sector: (i) pluralism (mentioned on the first place); (ii) universal access; and (iii) quality of content. Therefore, she stressed her main message to be that effective competition is only *one of the keys* to the future competitiveness of the sector. In some situations additional measures will be required to ensure protection of the core values in the broadcasting sector.

Although promising, this has been the only occasion so far that Neelie Kroes directly expressed her views about the media sector. It is worth noting that former Competition Commissioner Mario Monti was far more vocal in this respect. But then again, it may well be that Monti, who was the "father" of the mid 1990s media concentration directive, in a role as an Internal Market Commissioner, was simply proficient in the subject and spoke on it whenever he could, also in his new role of a Competition Commissioner.

Similarly, Herbert Ungerer, the former Head of Media Unit within DG Competition, fought tirelessly with consumer unfriendly initiatives in the media sector. In his absence, the commercial media industry hopes for his successor[381] to flow with the tide of the "new partnership". It is most probable that they will not be disappointed.

---

[380] Kroes, N., 'Strengthening the European Creative Industries in the Light of the i2010 Strategy', Opening address at the Austrian Presidency Expert Seminar: Content for competitiveness, 2 March 2006, http://Europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/140&format=HTML&aged=0&language=EN&guiLanguage=en (accessed 8 September 2007).

[381] Arianna Vannini replaced Herbert Ungerer as Head of the Media Unit in DG Competition, European Commission in 2004.

Nevertheless, the reasons for the need of anti-concentration directive given by Monti in 1995,[382] have not changed all that much: (i) the risk of the circumvention of national laws is still there, given the fast rise in transfrontier media activities; this renders national laws ineffective and might thus provoke serious conflicts between national authorities; (ii) there is still the need to create a level playing field; and (iii) the fear that Member States had launched projects to modernise/liberalise their national rules on media ownership and media activities is still there. What has changed is the way of the Commission's thinking. It now believes that progress in technology does not require concentration control, but simply access regulation.[383] If one assumes that there are three basic models for ensuring pluralism, then the Commission has now definitely moved from the public policy model to a mix of the new media and market models. As Hoffman-Riem notices, the paradigm in the European broadcasting regulation has shifted in several ways: from the trustee to the marker model, from cultural to economic legitimisation of the broadcasting system, from primacy of the communicators and recipients of information to primacy of entrepreneur and from special culturally based broadcasting regulation to economic regulation *via* competition law.[384]

However, competition law and enforcing access by regulation alone will not suffice. As noted during the annual meeting of EPRA[385] in 2001, "[market and new media models] in practice are *leading* into media concentration, bringing local media into the hands of big systems, loosing their identity. Both models are unfavourable to minority groups and representation of minority opinions".[386]

Therefore, these methods *must* be accompanied by additional regulatory measures aimed at ensuring pluralism in the media sector. The need to protect public interest by media regulation is not going to simply disappear. The shift in emphasis of media regulation from citizens to consumers happened only in the mind of the European Commission. Even though Philip Lowe, Director General of DG Competition, states matter-of-factly that: "the emphasis of

---

[382] European Audiovisual Observatory, Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level', n. 38.
[383] *Ibid.*
[384] Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, n. 12, 340-352.
[385] European Platform of Regulatory Authorities.
[386] Gerl, M., Slovenian Broadcasting Council, Working Group II 'Licensing Local Broadcasters', EPRA, Barcelona, 19-20 April 2001, www.epra.org/content/english/press/papers/EPRA200105a.doc (accessed 8 September 2007), emphasis added.

regulation has shifted away from protection of some broadly defined 'public interest' and from public utility management towards opening up markets, ensuring free and fair competition between producers and promoting the interests of *consumers*",[387] the truth is that consumers of media will remain first and foremost citizens whose right to "unbiased information, cultural representation and employment of their creativity"[388] must be protected. The Commission may loudly proclaim that in this day and age the "consumer is King", and its approach to the media pluralism issue may look like a direct quote from the commercial media company's submission. However, the reality will not change – there will always be a need for media specific regulation of concentration in the sector.

Futile hope for improvement?

Despite this worrying commercial media-oriented stance of the European Commission, the conclusions of the Liverpool Audiovisual Conference of July 2005 allowed for some degree of optimism. The conference's aim was, *inter alia,* to discuss the six "issues papers" produced by the European Commission in the process of the revision of the Television Without Frontiers Directive. Paper number 6 was entitled "Media Pluralism – What should be the European Union's role?"[389] The Commission concluded that in fact, there are currently many different measures in place on the European level aimed at safeguarding pluralism, even if a specific action against media concentration is not counted among them. The Commission recalled the European Institute's for the Media (EIM) report for the European Parliament[390] and the Commission's White Paper on Services of General Interest which both recommended monitoring media concentration as one of the fields where the Commission's activity could be improved. Apart from this, the Commission asked how the European Union could bring true added-value to the instruments that already exist, bearing in mind that maintaining the right

---

[387] Lowe, P., 'Media Concentration and Convergence: Competition in Communications', n. 75, emphasis added.
[388] Tongue, C., 'Public service broadcasting and European Community policy', address to the Experts Meeting on Public Service Broadcasting in Europe, Amsterdam, 17 February 1997, http://www.poptel.org.uk/carole-tongue/pubs/amster.html (accessed 8 September 2007).
[389] European Commission, 'Media Pluralism – what should be the European Union's role?', n. 253.
[390] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', Düsseldorf, 31 August 2004, http://www.epra.org/content/english/press/papers/European%20Citizen%20Information%20Project%20Final%REPORT.pdf (accessed 8 September 2007).

balance between safeguarding media pluralism in Europe and the possibilities for European companies to compete globally, is crucial.

The final report of the working group on media pluralism during the Liverpool conference provided some answers to this important question. First of all, the participants concluded that the notion of pluralism should have a clear definition agreed at European level, since currently it is often given different meanings. In particular, the old and new members of the European Union which threaten to apply double standards when dealing with pluralism issues. Furthermore, the working group's conclusion was that transparency of media ownership at the EU level must be increased. Only then will it be possible to determine if concentration is indeed excessive. In this regard, the working group widely supported the recommendation included by EIM in its report for the European Parliament, which was to establish a European Observatory focusing on media markets and concentration. The Observatory would run a data-base of information on media markets of EU Member States and the EU as a whole. Finally, the working group advocated for a stronger role in the EC Treaty for the European Parliament and all European institutions in the media field.

The above allowed for some hope that constant awareness raising will result in balancing the market oriented stance of the European Commission, with some public interest solutions. Therefore, the conclusions of the Liverpool conference were awaited with anxiety.

However, the only development, which constitutes the direct aftermath of the Liverpool conference, proved to be another disappointment. At the start of 2007, DG Information Society and Media announced a "three-step plan for advancing the debate on media pluralism within the European Union".[391] The plan consists of three elements which will be implemented by a specially created Task Force for Co-ordinating Media Affairs within DG Information Society and Media. The first step is a Commission Staff Working Paper on Media Pluralism. When the document was still in the planning stages, its brief description stated that, "given the concerns existing in a certain number of Member States about media pluralism, the

[391] See website of DG Information Society and Media http://ec.Europa.eu/information_society/media_taskforce/pluralism/index_en.htm (accessed 8 September 2007).

possibility of a harmonising Directive is being studied. This Staff Working Paper will be produced to help the ongoing reflection".[392]

Such language allowed for some hope that the conclusions of the Paper would establish a different approach than that of the Commission and the answer will not be yet another: "the possibility was studied but the conclusion was reached that no action is necessary". However, when the Staff Working Paper was finally issued, it simply confirmed the low profile that media pluralism was originally given by the European Commission.[393] The Commission analysed the existing national measures aimed at fostering media pluralism and counteracting excessive media concentration and concluded that the only action currently required at EU level is to commission an independent study on indicators necessary to measure pluralism in Member States. The study is the second step of the "three-step plan". Once the study is completed, the Commission will, in 2008 embark on the third step in its plan, and that is to issue a Communication on the indicators for media pluralism in the EU Member States, which will be followed by public consultation.

In summary, despite great anticipation and much hope, one cannot shed the feeling that "the three-step plan" is a road to nowhere. There is a distinct feeling that it is simply meant to quieten the demands of the European Parliament and the likes of the European Federation of Journalists (EFJ) who call on the Commission to take action on the issue of media pluralism. In fact, as Adam Watson Brown, responsible for the task force on coordinating media affairs within DG Media and Information Society, reportedly said in a meeting with the EFJ, "Commissioner Reding is not interested in harmonising media ownership laws throughout the European Union".[394]

The Commission is, therefore, yet again taking a very soft approach to the issue of media pluralism by ordering yet another study meant to serve as a basis for *future* discussions. The chairman of the International Federation of Journalists, Aidan White, is right to be sceptical

---

[392] Commission actions expected to be adopted : 05/06 - 12/06, http://ec.Europa.eu/atwork/programmes/docs/execution_report.pdf, (accessed 8 September 2007), 47, emphasis added.

[393] European Commission, 'Media pluralism in the Member States of the European Union (Staff Working Document)', 16 January 2007, SEC(2007)32.

[394] 'European Policy Briefing', *EURONEWS*-Bulletin of the European Federation of Journalists, June 2006, www.nuj.org.uk/binshow.php?id=1369&bin=4 (accessed 21 August 2007), 3.

about Brussels' eagerness to press ahead with the issue. He said that the Commission "does not want to lose friends in the media". He, however, remains hopeful:

> "If something can be done at EU level it would be to tackle this terrible hotchpotch of [media ownership] legislation. We need at least a basic common understanding about how media ownership can be regulated. If this study actually leads to that it would be a good thing".[395]

Nevertheless, the reality remains that there are currently no positive measures at European level aimed at controlling concentrations in the broadcasting sector. Furthermore, the current market-oriented approach of the European Commission signals little hope for such positive measures to appear in the near future. The "three step plan" is very unlikely to bring any positive change. It is, therefore, necessary to examine in the next three chapters the existing supra-national tools which may potentially be utilised to safeguard pluralism or curb excessive concentration in the media sector in Europe.

The next Chapter analyses the case law of the European Court of Human Rights which grants individual protection to persons (including legal persons) affected by the lack of pluralism in national media. Secondly, selected merger decisions of the European Commission are examined in Chapter 4 with particular emphasis on those in which the Commission managed to slip certain public interest objectives through a backdoor of competition analysis. Finally, Chapter 5 looks at fragmentary legislative measures adopted by the European Union, which contain legally binding provisions contributing to the maintenance of pluralistic media sector in the Member States.

---

[395] Beunderman, M., 'Brussels reluctant to regulate national media rules', *EUobserver*, 17 January 2007.

3. European tools I: Why the European Court of Human Rights will not suffice

3.1 Defending individual rights

The first question one must ask here is, "Is media pluralism a human right?" At the outset, there can only be one answer – a definite no. Media pluralism can, at the very best, be described as a "group right" or a "society right". Nevertheless, it has for decades been subject to scrutiny by the Council of Europe and its permanent body, the European Court of Human Rights. Both of these institutions called for human rights to be safeguarded in Europe. Admittedly, media pluralism has always come to their agenda as a prerequisite for the established human right freedom of expression, which is guarded by Article 10 of the European Convention on Human Rights ("**ECHR**").[396] Obviously, without pluralism, freedom of expression would be non-existent.[397] This chapter argues, however, that in time media pluralism has gained, to a large extent, an independent status in the work of the Council of Europe and in the judgments of the European Court of Human Rights.

The Council of Europe has expressed a belief that Article 10 of the ECHR is "the basic framework for media pluralism on a European scale".[398] Not only does it confirm the existence of the basic human right to media freedom, but also imposes a duty on the Council of Europe's Member States to guarantee pluralism and diversity of the media, in order to ensure freedom of information and a functioning democracy.

Article 10 paragraph 1 of the ECHR codifies the fundamental right to freedom of expression and impartial information. It states that:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

---

[396] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[397] Barendt, E., *Freedom of Speech*, n. 83, 447.
[398] Council of Europe, 'Media Diversity in Europe', n. 184, 4.

Paragraph 2 allows Member States to introduce restrictions of freedom of expression, but only provided they are "prescribed by law", "are necessary in a democratic society" and "pursue a legitimate aim".[399] For example, national security, territorial integrity or public safety, protection of health or morals, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

It is clear from the wording of Article 10 that there is no express mention of media pluralism or diversity as individual rights. Therefore, at first sight, one could question the Council of Europe's belief that Article 10 forms 'the basic framework for media pluralism on the European scale'.

However, the ECHR has not only laid down a sacrosanct catalogue of civil and political rights and freedoms, but has also set up a mechanism for their interpretation and enforcement. The European Court of Human Rights, established in 1959, is the permanent body of the Council of Europe which interprets and enforces the individual rights and freedoms codified in the ECHR, as well as the deriving obligations of the Council of Europe's Member States. Initially, the Court was accompanied by the European Commission for Human Rights which decided on the admissibility of cases. Protocol 11 added to the ECHR in 1998, abolished the Commission and established a single, full-time European Court of Human Rights ("**ECtHR**", or "**the Court**"). The agreement of sovereign states to allow a supra-national court to review a judgment of the domestic judiciary, and be bound by its findings, which may implicate the State in changing laws and paying compensation, represented an historic and unprecedented step in international law.[400]

Indeed, it was the ECtHR's case-law that played a pivotal role in widening the interpretation of Article 10, so that it would recognise the need to safeguard media pluralism in Europe. With regard to what this means in terms of Member States' obligations, the Court's stance seems to have toughened over time so that it could be argued that it refers as to Member

---

[399] Randall, H., 'Commercial speech under the European Convention on Human Rights: Subordinate or Equal?', (2006) 6 Human Rights Law Review 53.

[400] Council of Europe, Directorate General of Human Rights and Legal Affairs, Explanatory document on the European Convention on Human Rights, available at: http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM (accessed 28 April 2008).

States' duties with regard to excessive media concentration. The Court's judgments have influenced legal systems in the Member States of the Council of Europe, as well as the Council's of Europe policy towards media concentration. The European Court of Human Rights has, therefore, been not only a legal institution of the Council of Europe rigidly applying the law to particular cases, but also a policy actor.

It is obvious that, as observed by Hunt, different stages of the policy making are closely linked. It is a dynamic process which involves interactions between various actors – both legal and political.[401] Therefore, in its judgments, the European Court of Human Rights presents its position alongside the other institutions of the Council of Europe, it both launches and receives ideas.[402] As will be explained below, over the years it has had a significant influence on the Council's of Europe policy towards media concentration.[403] Following Hunt's observations with regard to the European Court of Justice, one may say that the role of the European Court of Human Rights in the Council's of Europe policy making process has been one of "provoking political responses" and "launching ideas".[404]

Turning now to the concrete account of the Court's influence on the media concentration policy, it must be observed at the outset, that overall, the ECtHR has been successful in safeguarding internal media pluralism. Cases in the 'internal pluralism' category may be referred to as, pure freedom of expression cases. This is where an individual wishes to or has expressed himself in the media and is prevented from doing so by a Member State. Article 10 protects exactly this type of situation and the Court's use of the word 'pluralism' is not necessarily limited to media only – it applies to the need for a pluralistic society as a prerequisite of democracy. Pluralism of ideas presented by media is just a part of this ideal.

It is the case-law involving the protection of structural media pluralism that breaches the boundaries of 'pure' freedom of expression cases. These cases are somewhat paradoxical. On the one hand, structural pluralism is a *prerequisite* for freedom of expression as in there is a need for pluralistic media structures to allow multiplicity of ideas being presented. On the

---

[401] Hunt, J, 'The Court of Justice as a policy actor in the development of the EC labour law regime: the case of the Acquired Rights Directive', (1998) Legal Studies 18 (3), 337.
[402] *Ibid.*, 340.
[403] *Ibid.*, 336.
[404] Alter, K. and Meunier-Aitsahalia, S., 'Judicial Politics in the European Community: European Integration and the Path breaking Cassis de Dijon Decision', (1994) Comparative Politcal Studies 26, 535.

other hand, the need to safeguard the pluralism of media providers may sometimes require *restrictions* to freedom of expression for some individuals. Licensing systems and regulations on media concentration may be allowed by Article 10(2) because they serve the aim of pluralism, hence they serve "the rights of others", even if they restrict freedom of expression. Therefore, structural media pluralism is a prerequisite of freedom of expression and at the same time measures aimed at securing it are capable of restricting this freedom.

The protection of structural pluralism proved more difficult to achieve by means of the Court's case law and prompted the Council of Europe to step in with regulatory proposals.

Article 10 as a shield for internal media pluralism

Initially, the mere finding of the Court that Article 10 also entails the need to safeguard pluralism was somewhat revolutionary because, as mentioned earlier, the relationship between pluralism and the freedom of expression is somewhat ambiguous. They are similar only in that the effective realisation of both depends on the absence of content-specific censorship. Apart from this however, they differ in their central interest and the purposes they serve. They cannot even be claimed to form "two sides of a coin" as these two values may find themselves in contradicting one and another. The need to ensure media pluralism may result in refusing access to media and thus infringing the freedom of expression. As noted by Craufurd Smith:

> "The primary aim of freedom of expression is to protect the right of individuals to express themselves without sanction; a right which may, but need not, lead to the transmission of a variety of ideas and information. The objective underlying media pluralism is, on the other hand, the communication to the public of diverse ideas and information; an objective which is itself likely to benefit from an expansive, individual right to expression, but which may also lead to certain individuals being refused access to the media".[405]

An early 1970s ECtHR's judgment *Handyside v. The United Kingdom*[406] was one of the first cases in which the Court, in express terms, mentioned pluralism in relation to claims of the violation of Article 10 ECHR. The case concerned the prohibition by the United Kingdom of

[405] Craufurd Smith, R., *Broadcasting Law and Fundamental Rights* (Clarendon Press, Oxford 1997), 196.
[406] *Handyside v. The United Kingdom*, (App. no. 5493/72), (1976) 1 EHRR 737.

the publication of a book by Mr Handyside's publishing firm. The book entitled "The Little Red Schoolbook" was intended for school-children aged 12 or over. While it generally dealt with matters such as education and learning, one of the chapters contained information about sex. The UK government believed that some of this information would be harmful for children as young as twelve and on the basis of Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964, it ordered the seizure of the books that had been published and a prohibition of any further publication. Mr Handyside referred the case to the ECtHR claiming a violation of the freedom of expression, enshrined in Article 10 of the ECHR. The Court examined whether a seizure and prohibition of the publication could be a justifiable restriction on the freedom of expression. In paragraph 49 the Court stated:

> "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. *Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*".[407]

Therefore, the Court established that pluralism is an indispensable foundation of a democratic society. The need for a democratic society to be truly pluralistic means the need to ensure that all sorts of ideas may be expressed freely and through any medium. Without a variety of voices and opinions the media cannot fulfil their contributory role to democracy. Thus, to guarantee freedom of expression means to contribute to pluralism. However, this is only subject to justifiable restrictions under paragraph 2 of Article 10. In the case at hand the ECtHR decided there was no violation of Article 10 ECHR, as the principle of pluralism of ideas was legitimately overridden by the interest of the "protection of morals" mentioned in paragraph 2 of Article 10.

However, the Court in *Handyside,* and similar cases which followed established a general rule that for the sake of pluralist voices, all opinions and ideas, including those shocking and

[407] *Ibid. para.* 49, emphasis added.

unpopular, have a right to be presented in the media and the restriction on that right can only be exceptional. This has become an established line of ECtHR jurisprudence. Paragraph 49, from *Handyside* has since been quoted by the ECtHR as an introduction, for example, "as the Court has consistently held", "this is the Court's well-established case-law" or "the Court reiterates the relevant principles which emerge from its judgments".[408] Although in *Handyside* itself the ECtHR did not find pluralism of voices to be the uppermost value, the cited passage has since then, been frequently used by the Court to find a violation of Article 10.[409]

For instance in *Lingens v Austria*[410] the Court confirmed the role the press, and media general, play in maintaining political pluralism in a democratic society. In this case, the Court stepped in to protect an Austrian journalist who published articles criticising the behaviour of prominent Austrian politicians, at the time. He was subsequently sued and prosecuted by Austrian courts for defamation and sentenced to a fine. In addition, the confiscation of the issues of a magazine which published the articles was ordered. The ECtHR repeated word by word paragraph 49 from *Handyside,* and stressed that the principles of "pluralism, tolerance and broadmindedness" are particularly important for the press, who have an obligation to impart information and ideas on political issues, and furthermore the public has a right to receive them.[411] According to the court, freedom of political debate is at the very core of the concept of a democratic society. In addition, the freedom of the press, and I would add the media generally, "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders".[412] Therefore, any restrictions on media dissemination of political views have proven very difficult to justify under Article 10(2).[413]

---

[408] *Raichinov v Bulgaria,* (App. no. 47579/99, Judgment of 10 April 2006; *Malisiewicz-Gąsior v Poland,* (App. no. 43797/98), Judgment of 6 April 2006.

[409] For instance *Castells v Spain,* (App. no 11798/85), (1992) 14 EHRR 445, at *para.* 42; *Piermont v France,* (App. no. 15773/89 and15774/89), (1995) 20 EHRR 301, at *para.* 76; *Oberschlick v Austria,* (App. no. 20834/92), (1995) 19 EHRR 389, at *para.* 29, and more recently: *Ukrainian Media Group v Ukraine,* (App. no. 72713/01), Judgment of 29 March 2005, at *para.* 40; *Sokolowski v Poland,* (App. no. 75955/01), Judgment of 29 March 2005, at *para.* 41; *Albert-Engelmann-Gesellschaft Mbh v Austria,* (App. no. 46389/00), Judgment of 19 January 2006, at *para.* 25.

[410] *Lingens v Austria,* (App. no. 9815/82), (1986) 8 EHRR 407.

[411] *Ibid, para.* 41.

[412] *Lingens v* Austria, n. 371, *para.* 42; more recent cases of violation of the freedom of political speech citing *Lingens* include *Malisiewicz-Gąsior v Poland,* (App. no. 43797/98), Judgment of 6 April 2006; Wirtschafts-Trend Zeitschriften-Verlags GmbhH *v* Austria, (App. no. 58547/00, Judgment of 27 April 2005 or *Sokolowski v Poland,* (App. no. 75955/01), Judgment of 29 March 2005.

[413] Janis, M.W., Kay, R.S., Bradley, A.W., *European Human Rights Law. Text and Materials,* 2nd ed (Oxford University Press, 2000), 170.

The *Jersild*[414] judgment praises the role the media play in reflecting the pluralism of voices, opinions and beliefs not only of politicians but of every member of a given society. The Court reiterated that "freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to [media] are of particular importance". And while the media must not overstep the boundaries, *inter alia*, in the interest of "the protection of the reputation or rights of others", it is nevertheless *incumbent* on them to impart information and ideas of public interest. Moreover, not only do the audiovisual media have the task of imparting such information and ideas: the public also has a right to *receive* them.[415] The conclusion from *Jersild* is that, for the sake of safeguarding internal media pluralism, Member States cannot convict journalists for assisting in making known the beliefs of another person, however unpleasant and disturbing these beliefs may be. This would seriously hamper the contribution of the media to discussions on matters of public interest and hence, pluralism of ideas.[416]

Jersild is significant also for other reasons. It was in this case that the Court for the first time emphasised the importance of audiovisual media for functioning, democratic society. The Court ruled that the findings of an earlier case, *Observer and Guardian,*[417] with regard to the press sector must without doubt be extended to audiovisual media.[418] Therefore, by paraphrasing the Court's findings in *Observer and Guardian* and replacing the word "press" with "audiovisual media", one can extract the Court's position with regard to the latter: "since freedom of expression constitutes one of the essential foundations of a democratic society, the safeguards to be afforded to audiovisual media are of particular importance".[419] The Court then sanctioned the Commission's finding in an admissibility decision in an earlier case[420] that "audiovisual media have often a much more immediate and powerful effect than the print media... [They] have means of conveying through images meanings which the print media are not able to impart".[421]

---

[414] *Jersild v Denmark,* (App. no. 15890/89), (1995) 19 EHRR 1.
[415] *Ibid., para.* 31.
[416] Bearing in mind that States, have a generally broader margin of appreciation in cases like *Jersild* than regulating political speech or debate of questions of public interest; see below for discussion on the *Tierfabriken* judgment.
[417] *Observer and Guardian v. United Kingdom* (App. No 13585/88) (1991) 14 EHRR 153.
[418] *Jersild v. Denmark,* n. 375, *para.* 31.
[419] *Observer and Guardian v. United Kingdom,* n. , para.59.
[420] *Purcell and Others v. Ireland,* Commission's admissibility decision (App. no. 15404/89), [1991] Decisions and Reports 70.
[421] *Jersild v. Denmark,* n. 375, *para.* 31.

It is worth stressing that while the Court has actively protected the pluralism of voices and beliefs presented in the media, it has never recognised the right of an individual, be it a politician or a private person, of *access* to media, in particular to broadcasting.[422] Deciding on the admissibility of the case brought by Jörg Haider against Austria, the Commission held that, "Article 10 of the Convention cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion".[423]

Therefore, Article 10 protects the pluralism of voices once they reach the media, but not before then. However, once ideas have been disseminated by the media, Article 10 makes sure that only exceptional circumstances allow for those ideas to be silenced.

In summary, all the above *Handyside*-type cases, where the ECtHR used the trinity 'pluralism, tolerance and broadmindedness' in relation to media, the Court understood the term pluralism in its internal incarnation. This line of case-law has established that even though there is no general right of access to the media, in principle the media should themselves strive to reflect plurality and diversity of ideas, views and opinions without the interference by a national authority. However, in none of these cases did the Court mention the need to provide for plurality of media operators, in order that this would be achieved.

Protection of structural pluralism as a legitimate restriction to broadcasters' freedom of expression

The need to maintain structural media pluralism can be implied from the Court's case-law on the licensing of broadcasting. The *Handyside* passage from paragraph 49 of the case, has been used by the Court to justify national broadcasting licensing systems and regulations that are aimed at protecting external pluralism. The Court seemed to believe that precisely because Article 10 does not guarantee an unfettered right of access to broadcast media, there is a need to ensure a number of media providers; the more media operators the more possible access

[422] Nicol, A., Millar, G., Sharland, A., *Media Law and Human Rights* (Blackstone Press Limited, 2001), 155.
[423] *Haider v Austria,* Commission's admissibility decision (App. No. 25060/94), [1995] Decisions and Reports 86.

points. Admittedly, an abundance of media providers does not automatically mean that *everybody* will get a chance to express themselves in the media. However, the chances are that at least the majority of voices and ideas in the society will be represented.

Article 10(1) allows states to license broadcasting, cinema, and television enterprises. Therefore, this subjects broadcasting material to greater regulation than the written publications.[424] There are obvious reasons for allowing more regulation of radio and broadcast television than of print media. The historical justification was scarcity of frequencies[425] – a state decided who could obtain a licence and what conditions, including content requirements, would be attached to it. Currently, with the ongoing digital evolution allowing for a multitude of channels, the arguments for broadcasting regulation shifted from limiting the number of broadcasters to ensuring pluralism, both external and internal. The opinion forming power of broadcasting is much greater than that of the press. Broadcasting is ubiquitous[426] and as a well known adage goes, "one picture is worth a thousand words". Moreover, media consumers expect different standards from broadcasting than from the press. As Barendt observes, "while [the public] expects the print media to be biased or to have selective coverage, it has relied on radio and television to provide objective news and a comprehensive range of programmes to inform as well as to entertain".[427]

The fact that the possibility of a broadcasting regulation is expressly mentioned in Article 10(1) could imply that any form of broadcasting licensing or regulation system is automatically exempt from any accusations of an infringement of the right to expression.[428] The Court has however decided differently, holding that values protected by a licensing system may only be the 'legitimate aim' for the restriction of freedom of expression.[429] Therefore, every licensing system has to fulfil the conditions of Article 10(2): "the object and purpose of the third sentence of Article 10(1) and the scope of its application must ... be

---

[424] Ovey, C., White, R.C.A., *Jacobs and White: The European Convention on Human Rights*, 3rd ed (Oxford University Press, 2002), 284.
[425] Barendt, E., *Freedom of Speech* , n. 83, 445.
[426] Trager, R., Dickerson, D.L, *Freedom of Expression in the 21st Century*, n. 22,, 154; McGonagle, M., *Media law*, n. 45, 386.
[427] Barendt, E., *Freedom of Speech* , n. 83, 448.
[428] Janis, M.W., Kay, R.S., Bradley, A.W., *European Human Rights Law. Text and Materials*, n. 414, 79.
[429] Nicol, A., Millar, G., Sharland, A., *Media Law and Human Rights*, n. 423, 153.

considered in the context of the Article as a whole and in particular in relation to the requirements of paragraph 2".[430]

This interpretation by the Court makes it clear that "states cannot simply justify their interference with broadcasters by reference to the licensing power under Article 10(1), they must also show that the particular interference was lawful under Article 10(2)".[431] Thus, the licensing systems which led to limiting the freedom of expression of some individuals, but are aimed at securing structural media pluralism, have often been justified by the Court as necessary for the "protection of the rights of others" mentioned in Article 10(2).

In *Groppera,*[432] the ECtHR established that the need to safeguard pluralism by means of a licensing system in a Member State can be an acceptable justification for the limitation on the freedom of expression in the name of the protection of the "rights of others". Although the case is somewhat outdated, as it was decided in the era of frequency scarcity,[433] it is nevertheless worthwhile recalling some of the Court's statements which continue to apply in the current era of channel abundance. The Court accepted the Swiss government's submission that restrictions of the right to freedom of expression designed to ensure pluralism can be justified under Article 10(2) ECHR. The case concerned the Swiss licensing system which resulted in a ban on the retransmission of programmes of Groppera Radio by a cable company, which did not obtain a licence for receiving installations. Groppera Radio claimed violation of Article 10 before the ECtHR. The Swiss government responded by saying that even if there was a violation, it was justified under Article 10(2) because its aim was the "protection of the rights of others". It was designed "to ensure pluralism, in particular of information, by allowing a fair allocation of frequencies internationally and nationally".[434] The Court agreed and stressed that the absence of a licensing system could result in limiting the range of programmes made available to the public in Switzerland, and thus in limiting pluralism in the Swiss media market.[435]

---

[430] *Groppera Radio AG v Switzerland*, (App. no. 10890/84), [1990] 12 EHRR 321, *para.* 61.
[431] Mowbray, A., *Cases and materials on the European Convention on Human Rights*, (Butterworths, 2001), 505.
[432] *Groppera Radio AG v Switzerland,* n. 389.
[433] Mowbray, A., *Cases and materials on the European Convention on Human Rights*, n. 432, 505.
[434] *Groppera Radio AG v Switzerland*, n. 389, 69.
[435] Craufurd Smith, R., *Broadcasting Law and Fundamental Rights*, n. 406, 196.

In the ever changing media environment, characterised by progressing digitisation which renders a scarcity of frequencies a problem of the past, some argue that the need for rigid control of the number of broadcasters in order to protect pluralism will be less relevant. Nevertheless, *Groppera* is a significant judgement in that the Court accepted that a national licensing system aimed at protecting structural media pluralism can be a legitimate aim of a restriction of freedom of expression. For instance, the recent document from the Irish Broadcasting Commission on the Ownership and Control Policy[436] specified that in order to counteract excessive concentration in the media sector, no licence will be given to a company which holds 25% of the total number of broadcasting services licensed in Ireland. Therefore, if hypothetically, a broadcaster who holds over 25% of broadcasting services in Ireland, applied for a further broadcasting licence, he would not be granted one. This would, in principle, amount to a restriction of the freedom of expression of this broadcaster. However, it would most certainly be justified under Article 10(2) as such a provision of a broadcasting licensing system is aimed at safeguarding external media pluralism, and thus the "rights of others", both viewers/listeners and other broadcasters which may wish to enter or expand in the market.

On the other hand, a licensing system which will not be legitimised under Article 10(2) is, for instance, the one that curbs the freedom of media companies to receive and impart information. In *Autronic*,[437] a company selling satellite dish aerials for home use, applied to the Swiss government for permission to broadcast at a trade fair a public television programme (in Russian) that it received from the Soviet satellite G-Horizont. At that time, (in 1982) the only television broadcasts by satellite, that could be received in Switzerland by means of a satellite dish aerial were those from G-Horizont. Permission was refused on the grounds that the Soviet government did not expressly consent to such a showing of the television programme. Autronic complained to the ECtHR, claiming violation of Article 10 ECHR. The Swiss government responded saying that Autronic's freedom of expression had not been restricted since it was not concerned with the content of the programme it wanted to show. Indeed, nobody in Switzerland would be interested in watching a programme in Russian that originated from the Soviet Union. What Autronic in fact was interested in, was to merely demonstrate the capabilities of the transmission equipment which it was selling.

---

[436] Broadcasting Commission of Ireland 'Ownership and Control Policy', 2005, http://www.bci.ie/documents/o&c_policy_05.pdf (accessed 8 September 2007).
[437] *Autronic AG v Switzerland*, (App. no. 12726/87), [1990] 12 EHRR 485.

The ECtHR rejected the Swiss government's defence and ruled that the ban on showing the programme by Autronic constituted a violation of the right to freedom of expression. In the Court's view, it was irrelevant for this finding that the programme's content was of secondary value to Autronic and that in fact few people would be interested in the content, because in the Court's words: "Article 10 applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information".[438]

This passage has been repeated in numerous subsequent judgments of the Court[439] and as a result, it is now firmly established that Article 10 protects not only the substance of the communication of ideas and information expressed, but also the process of this communication. A licensing system, even the one which is aimed at protecting pluralism, cannot, therefore, unduly interfere with a media company's right to receive and impart information.

Media monopolies as the worst possible scenario

In *Groppera* the ECtHR merely *accepted* already existing national measures aimed at safeguarding pluralism in media as justifiable *restrictions* to the primary right to freedom of expression. In subsequent judgments the ECtHR seems to have taken a step further and established that Member States' actually have an obligation to *guarantee* media pluralism in the national media market. This applied in particular to the TV broadcasting sector, given its importance and potential recognised in *Jersild.*

In this regard, the judgment in *Lentia*[440] may be viewed as the most prominent one. It involved several applicants questioning the Austrian broadcasting monopoly which, as they argued, by its very nature violated Article 10 ECHR. Austria claimed first and foremost that the third sentence of Article 10(1) allows the States to require the licensing of broadcasting or

---

[438] *Autronic AG v Switzerland*, n. 396, *para.* 47.
[439] See for instance *Oberschlick v Austria*, n. 370, *para.*. 57, *Jersild v Denmark*, n. 375, *para.*. 31 and, most recently, *Sokolowski v Poland*, n. 370, *para.*. 44.
[440] *Informationsverein Lentia and Others v Austria*, (App. no. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90), [1993] 17 EHRR 93.

television companies and this means that States are free to establish whatever broadcasting system they see fit, even one that introduces a broadcasting monopoly. The ECtHR agreed, but ruled that it still must be determined whether such a system also satisfies the relevant conditions of paragraph 2 of Article 10. The Austrian government submitted that the maintenance of a broadcasting monopoly in the hands of the Austrian Broadcasting Corporation (ORF) served the purpose of ensuring objectivity and impartiality of reporting, diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes. As such, it formed a justified restriction on the freedom of expression. The Court could not agree with such a preposition. It reiterated that the preservation of a plural, culturally diverse broadcasting offer was an aim that could justify restrictions to broadcaster's freedoms. The Court specified that the public's *entitlement to receive* diverse information and ideas "cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the *ultimate guarantor*".[441] The Court added that "this observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely".[442]

In this case the Court understood pluralism in its structural incarnation as it may be gleaned from the Court's agreement with the applicants that to protect public opinion from manipulation, it is by no means necessary to have a public monopoly in the audio-visual industry. Indeed, on the contrary, true progress towards attaining diversity and objectivity can be achieved only by providing *a variety of stations and programmes.*[443] The Court stated that of all the means to ensuring that the values are respected, a public monopoly is the most restrictive one.

Finally, and most importantly, the Court rejected the Austrian government's economic argument that the Austrian market is too small to sustain more than one television company and if liberalised 'private monopolies' would be created anyway. Invoking examples of other European countries of a comparable size to Austria, the Court stated that "the coexistence of

[441] *Ibid., para.* 38, emphasis added.
[442] *Ibid., para.* 38.
[443] *Ibid, para.* 37.

private and public stations ... accompanied by measures preventing the development of private monopolies, renders such fears groundless".[444]

The judgment in *Lentia* is thus of great significance, for several reasons. First, the ECtHR confirmed that the public is entitled to receive diverse information and ideas. Secondly, the State is the ultimate *guarantor* of the principle of media pluralism. Furthermore, a monopoly in the broadcasting market, be it public or private, is in its nature harmful to pluralism which, to be accomplished, requires the presence of several actors on the media scene, notwithstanding the fact that they may be regulated by a state by means of licensing. And finally, the Court seemed to point to national anti-concentration rules as an effective means to ensure that private monopolies do not appear in liberalised national media markets.

All the above read together allow for one to conclude that the ECtHR in *Lentia* found a pluralistic media sector, and broadcasting in particular, to be of great value to democracy and imposed an obligation on Member States to guarantee that several media operators are present in any given national market. The adoption of anti-concentration laws seems to be viewed by the Court as an appropriate means to achieving the above goal.

Some argue that in *Lentia* the Court did not establish such an obligation and that Member States are under no duty to adopt, or indeed maintain, such regulations once in force.[445] They claim that *Lentia* does not differ much from *Groppera* in that it continues to construe media pluralism only, as a possible justification to restrictions on freedom of expression, and not an essential requirement for its realisation. I dare to disagree. Even if media pluralism continues to be construed by the ECtHR only as an acceptable restraint to freedom of expression, the way in which the Court treated this principle is different in both cases. While in *Groppera* it merely accepted the existing laws designed to safeguard pluralism, in *Lentia* it indicated the need to establish such laws that were not present in the country in question at that time. It actually required the *introduction of safeguards of structural pluralism* to the national market. This, in my opinion makes *Lentia* a lot more powerful than *Groppera.*

---

[444] *Informationsverein Lentia and Others v Austria*, n. 399, *para.* 42.
[445] Craufurd Smith, R., *Broadcasting Law and Fundamental Rights*, n. 406, 180.

The liberalisation of Austrian broadcasting regulation, which followed the *Lentia* judgment, happened under the watchful eye of the Court and any attempts of the Austrian government to circumvent the findings in *Lentia* were scrupulously punished.[446] Finally, in *Tele I*[447] the Court "noted with satisfaction"[448] that the new Austrian legislation provides for structural pluralism. The Court found that Austria's solution to give private broadcasters access to cable broadcasting while reserving terrestrial television broadcasting to the ORF was compatible with Article 10 as it provided a solution less restrictive than the former complete broadcasting monopoly of the ORF and in fact introduced pluralism of operators in the media market.[449]

This is what makes the *Lentia* judgment so significant. Not only did the Court say that a monopoly in the media sector is the worst possible scenario, it also influenced a change of law in a member state so as to allow for multiplicity of media providers.

Member States' obligation to counteract excessive media concentrations?

Despite the disappearance of public broadcasting monopolies in Member States of the Council of Europe, there is a growing concern about the current trend of progressing media concentration. The phenomenon which may "undermine the right of the public to obtain information from different sources"[450] constitutes a potential threat to the freedom of expression.[451]

In this regard, the next step from *Lentia* could only be that the Council's Member States not only cannot justify maintaining public media monopolies, but they also have an obligation to actively counteract excessive concentration in the media sector, for instance by introducing and maintaining national anti-concentration laws. Regrettably, this obligation has only been stated in express terms by the European Commission for Human Rights. The Commission was initially anticipated to have a rather "instrumental" role in deciding on the admissibility of cases to be judged by the Court. However, throughout its existence right up until 1999, the

[446] See, for instance, *Radio ABC v. Austria,* (App. no. 19736/92), [1988] 25 EHRR 185.
[447] *Tele I Privatfernsehgesellschaft MBH v Austria* ,(App. no. 32240/96), [2002] 34 EHRR 181.
[448] Mowbray, A., *Cases and materials on the European Convention on Human Rights*, n. 432, 506.
[449] *Tele I Privatfernsehgesellschaft MBH v Austria,* n. 406, *para.* 40.
[450] Council of Europe, 'Freedom of expression and information', http://www.coe.int/t/e/human_rights/en_freedomofexpression.pdf (accessed 8 September 2007).
[451] Council of Europe, 'Media pluralism to safeguard freedom of expression', http://www.coe.int/T/E/Com/Files/Themes/media-freedom/pluralisme.asp (accessed 8 September 2007).

Commission developed into, what may be called, a "first instance" Court of Human Rights, which very often issued preliminary decisions on cases.

In two such "preliminary judgments" the Commission expressed firm support for the proposition that under Article 10, Member States have a positive, enforceable obligation to avoid excessive media concentration. The first case, *De Geillustreerde Pers NV*,[452] concerned the refusal by a Dutch national corporation, responsible for co-operation of the broadcasting organisations, to provide complete programme data to the applicant who was a publisher of a general interest magazine. Such complete programme data could only be published by broadcasting organisations to which broadcasting time had been allocated. The applicant complained to the Commission, claiming that such a legally sanctioned absolute monopoly on the part of the broadcasting organisations to publish complete programme data infringes Article 10 ECHR. The claimant alleged that it violated the applicant's right to freely receive and impart information, as well as the right of the public to be advised about oncoming programmes by impartial publications. Having initially declared the case admissible, the Commission subsequently published a report on the case in which it indicated that there was no violation of Article 10. However, despite that finding, 'between-the lines' the Commission made a potentially groundbreaking suggestion that States have a duty under Article 10 to protect against excessive press concentrations. The Commission noted:

> "The protection of the commercial interests of particular newspapers or groups of newspapers is not as such contemplated by the terms of Article 10 of the Convention. These matters might perhaps raise an issue under this provision where a state fails in its *duty* to protect against excessive press concentrations".[453]

From the above passage, one may deduce that the Commission's belief was that Article 10 is not there to protect commercial interests of individual newspapers such as the applicant in the *Geillustreerde Pers* case. However, protection of commercial interests of newspapers by a State by virtue of allowing excessive press concentration may result in Article 10 being applicable so as to defend those companies who cannot enter the thus concentrated market and hence their right to impart information would be hampered.

---

[452] *De Geillustreerde Pers NV v Netherlands,* (App. no. 5178/71), [1976] 8 DR 5.
[453] *Ibid., para.* 88, emphasis added.

The second case, *Verein Alternatives Lokalradio Bern*,[454] concerned the allegation by two broadcasting companies that the Swiss government's refusal to grant them a concession for local broadcasting violated Article 10 ECHR. The companies fulfilled all of their formal conditions for the concession and it was clear that the additional selection criteria had clear political overtones. So the refusal was as much a political as an administrative act. The Commission held, crucially, that "a licensing system not respecting the requirements of 'pluralism, tolerance and broadmindedness, without which there is no democratic society' would infringe Article 10".[455] However, in this particular situation the Commission did not find the application admissible because the additional "political criteria" were actually there to ensure cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federalist policy. Therefore, the licensing system respected the requirements of pluralism, even if as a result some entities were refused access to the media. Pluralism came before freedom of expression, again.

The ECtHR has never had a chance to comment on any of the cases so it has never expressly confirmed these opinions. This has led some authors to argue that the individual right to media pluralism might not at all exist or might not even be enforceable. The ECtHR has never gone as far as to say that the public have an individual right to pluralism of the media on the basis of Article 10 ECHR. Consequently, the Court's case-law cannot be interpreted so as to impose a positive duty on the Member States to bring about media pluralism and counteract excessive concentrations of power in the media sector.[456] However, other authors have pointed out that the ECtHR did recognise such a positive duty on the part of Member States, albeit only indirectly.[457]

In a relatively recent judgment in *Tierfabriken*[458] the Court was asked to consider whether a refusal to air a controversial television commercial constituted a violation of Article 10 ECHR. The applicant organisation, an animal protection group, reacted to numerous television commercials from the meat industry, by producing its own commercial which concluded with

---

[454] *Verein Alternatives Lokalradio Bern v Switzerland,* (App. no. 10746/84), [1986] 49 DR 126.
[455] *Ibid., para.* 140.
[456] See, for instance, Craufurd Smith, R., *Broadcasting Law and Fundamental Rights*, n. 406, 179-180 and 196.
[457] See, for instance, Jones, C.A., 'Television Without Frontiers', in: Eeckhout, P., Tridimas, T. (Eds.), *Yearbook of European Law 1999-2000* (Oxford Clarendon Press, 2000), 306-307.
[458] *Verein Gegen Tierfabriken v Switzerland*, (App. no. 24699/94), [2002] 34 EHRR 159.

the statement: "Eat less meat, for the sake of your health, the animals and the environment!". Wishing the ad to be broadcast on Swiss Radio and Television, the applicant sent a tape to the Commercial Television Company responsible for television broadcasting in Switzerland. Airing the commercial was refused on the grounds of its "clear political character". Having reached the Supreme Court in its appeal process, the applicant learned that it had other means of disseminating its political ideals. For example, in foreign programmes which were broadcast in Switzerland, or in the cinema and press (for which political advertising was in fact reserved under Swiss law). The applicant considered this insufficient and complained to the ECtHR claiming a violation of Article 10 ECHR.

The Swiss government submitted that the prohibition of political advertising in television was designed to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity among the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors and, to support the press. The Court found this line of reasoning generally acceptable, but not capable in the present case to justify the restriction of the applicant's freedom of expression. The Court emphasised that the applicant was not a powerful financial group and the airing of the commercial was the only way in which the applicant wished to participate in an ongoing political debate on animal protection.

The Court's well known view was stressed again, this time with regard to advertising. The Court ruled that states have a narrower margin of appreciation in regulating political speech or debate of questions of public interest.[459] Nevertheless, for the purposes of analysing the ECtHR's contribution to media pluralism debate, the Court's general opinion expressed in *Tierfabriken* cannot be overlooked:

[459] In *Murphy v. Ireland*, (App. no. *44179/98*), [2004] 38 EHRR 13, the Court decided that the ban on religious advertising was a justified restriction on freedom of expression in Ireland. The Court distinguished the case from *Tierfabriken* by stating in paragraph 67 that 'a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or, especially, religion'; see also Randall, H., 'Commercial speech under the European Convention on Human Rights: Subordinate or Equal?', n. 400, 64; Barendt, E., *Freedom of Speech*, n. 83, 445.

> "It is true that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of expression of [broadcasters]. Such situations undermine the fundamental role of freedom of expression in a democratic society ..., in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the *ultimate guarantor*. This observation is especially valid in relation to audiovisual media, whose programmes are often broadcast very widely".[460]

Thus, it may be gleaned from the above opinion that the Court believes that one of the ways to safeguard media pluralism is to prevent financial groups that are too large from controlling the advertising sector.[461] And as national governments are the guarantors of media pluralism, they are under obligation to take appropriate measures to make such a prevention effective. Even broader interpretation of this judgment allows suspicion that the Court could possibly also view the competitive advantage obtained by powerful commercial broadcasters themselves as dangerous for media pluralism, and, thus, freedom of expression. This has, however, never been stated expressly in any of the judgments. However, the growing concern of the Council of Europe with mounting media concentration in Europe may result in the Courts formulating such a view in express terms on the first convenient occasion.

To summarise, the ECtHR's judgments, in particular *Lentia* and *Tierfabriken,* seem to suggest that the Court has *required* affirmative action on the part of signatory states to promote pluralism in the media. This arguably includes the obligation to prevent the formation of excessively large financial groups which may exercise undue pressure on the independence of broadcasters. The Court's approach is that "rights of broadcasters are limited to the interests of pluralism and it is the *duty* of the legislature to take appropriate steps to secure this end".[462]

---

[460] *Verein Gegen Tierfabriken v Switzerland*, n. 417, *para.* 67, emphasis added.
[461] Jones, C.A., 'Television Without Frontiers', n. 458, 306-307.
[462] *Ibid.*, 306-307.

Moreover, this view seems to be confirmed by the Council of Europe itself. In the previously mentioned 2002 report "Media Diversity in Europe"[463] having analysed the Court's case-law on media pluralism, the Council's Advisory Panel on media diversity concluded that the Court believes that Article 10:

> "not only enshrines an individual right to media freedom, but also entails a *duty to guarantee pluralism* of opinion and cultural diversity of the media in the interest of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy".[464]

The Council of Europe, a body which initiated the life of the ECtHR , may arguably be viewed as a legitimate and, one may say, "primary" interpreter of the Court's judgments. Therefore, I accept its understanding of the Court's view on the matter as binding.

3.2 Why is the European Court of Human Rights not enough?

Notwithstanding the unquestionable contribution the ECtHR has made over the years to the debate on the need to safeguard pluralism in the media, the individual *ex post* and case-by-case protection offered by the Court is by no means sufficient to counteract media concentrations at European level. Neither is it sufficient, therefore, to guarantee pluralism in European media.

Although the ECtHR has been braver than any of the EU institutions in formulating the view that the Council of Europe's Member States are under *obligation* to safeguard media pluralism,[465] it is still uncertain whether the ECtHR construes the principle of pluralism as a *restriction* upon freedom of expression or an inherent *aspect* of that freedom. Moreover, the Court will only decide on clear cut cases and in particular, judgments made against Member

---

[463] Council of Europe, 'Media Diversity in Europe', n. 184, 7.
[464] *Ibid.*, 7.
[465] The European Court of Justice followed the ECtHR's case-law to a certain extent and in several judgments considered, that in the light of Article 10(2) of the ECHR, there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms, such as freedom of establishment or freedom to provide services; see for instance C-353/89, *Commission v Netherlands* [1991] ECR I-04069, *para.* 29; C-288/89, *Gouda* [1991- ECR I-04007, *para.* 23; C-148/91, *Veronica Omroep* [1993] ECR I-00487, *paras.* 9,10, C-368/95, *Familiapress* [1997] ECR I-3689, *para.* 18. However, the European Court of Justice only confirmed the *right* of the Member States to regulate for media pluralism; it has never stated that an *obligation* exists.

States are only binding on the member state in question. The Court will only deal with three types of *individual* cases – first involving restrictions of freedom of expression which at the same time have a negative impact on internal media pluralism (*Handyside*, *Jersild*). Secondly, cases where the lack of structural media pluralism constitutes, in itself an impediment to freedom of expression (*Lentia)*. Finally, cases where national measures aimed at the protection of structural pluralism are a justified (*Groppera*) or unjustified (*Autronic*) restriction to freedom of expression.

Furthermore, the Court has to wait for a complaint to deal with a problem – even if it is aware of this particular problem. It does not pose a concern in instances where there is a lack of internal media pluralism. A person who is prosecuted by a State for expressing his views in the media may complain to the ECtHR. However, in cases of the lack of structural media pluralism, individual viewers and listeners do not seem eligible to bring complaints before the Court. For instance, the Commission has considered that they do not have sufficient standing to call for the correction of misleading information which does not affect them directly. In the case *X v. Sweden*,[466] the complainant alleged that Swedish television had given a misleading impression of a company in Liberia. The Commission held that the claimant was not a victim because he was not affected *personally* by the report. This suggests that individuals concerned with not being sufficiently and impartially informed as a result of excessive media concentration are not entitled to seek protection by the Court of their right to *receive* diverse information, unless they can prove a *direct concern*. Therefore, only broadcasters affected by excessive media concentration which in turn restricts their right to freedom of expression may bring an individual case to the Court. If the Court then recognises such a plea, the pluralist structure of the market may, as a result, be restored with a positive effect for viewers or listeners.

Finally, the ECtHR will only reprimand a *state-induced* lack of media pluralism – either content or structural. Notwithstanding *Tierfabriken,* it remains unclear if the ECtHR would indeed punish a member state which did not prevent excessive concentration, which in turn led to the impediment of freedom of expression, in the commercial media sector. The

[466] *X v Sweden* , Commission's admissibility decision (App. no. 3071/67), [1968] Decisions and Reports 71.

circumstances of the case would have to be just right and very specific for such a conclusion to be reached.

In summary, the protection of media pluralism offered by the Court is individual and incidental. This is far from sufficient given the mounting concerns about the dangers posed to pluralism and diversity by growing concentration in the media sector in Europe. There is a need for organised and structured *ex ante* action on media concentration at the European level. As noted by the European Broadcasting Union:

> "Freedom of expression and information as a right for individuals cannot offer its full benefits for a democratic society unless there is a *framework* which ensures that the media system functions properly, and unless there are safeguards for media pluralism (and media conglomerates are prevented from becoming dominant and controlling public opinion), as well as safeguards for cultural identity and diversity (so that they are not brushed aside by market forces and globalisation)".[467]

This is why the Council of Europe has stepped in to fill in the gap left by the individual, incidental and *ex post* protection of media pluralism offered by the Court. This is where the Court's role as a policy actor came into play. The work of the Council of Europe in the area of media pluralism has already been discussed in Chapter 2.1 above.

[467] European Broadcasting Union, 'EBU comments on the Charter of Fundamental Rights', n. 100.

4. European tools II: European competition law – policy evolution

Article 2 of the EC Treaty explains that one of the tasks of the European Community is to promote a harmonious and balanced development of economic activities. This is to be achieved by establishing a common market and an economic and monetary union and by implementing the common policies referred to in Article 3. Article 3(1)(g) calls for the European Community to implement a system whereby "competition in the internal market is not distorted". The "system" established by the EC Treaty consists of rules prohibiting anti-competitive agreements between undertakings (Article 81), rules prohibiting abuse of a dominant position (Article 82) and rules regulating state involvement is business practices Articles 86 and 87). Since 1990, the EC has also had the power to regulate mergers (EC Merger Regulation[468]). Consumer welfare is the main objective of the EC competition law, accompanied by other objectives such as market integration and development of healthy European industry.[469] Therefore, the EC competition policy contributes to the main task of the European Community in that it complements the internal market rules "by preventing businesses from partitioning the internal market and by encouraging competition across borders".[470]

Competition law is currently the only tool for active and direct EU action and regulation in the field of media concentration. Therefore, not surprisingly, the contribution of competition law, both its merger control and antitrust branches, to the maintenance of pluralism has been recurrently and frequently discussed in academic literature.[471] There have been many different approaches accepted. One of the most interesting approaches was offered by Arino, who analysed the impact of both EU competition law and legislation on pluralism across the value

---

[468] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings amended in 1997 and recently replaced by Council Regulation (EEC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[469] *Ibid.*, 939.

[470] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* (Cambridge University Press, 2006), 928.

[471] See, for instance, Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', in Preissl, B., Muller, J. (Eds.), *Governance of Communications Networks. Connecting Societies and Markets with IT*, (Physica-Verlag, 2006); Arino, M. 'Competition law and pluralism in European digital broadcasting: addressing the gaps', n. 170; Doyle, G., *Media Ownership*, n. 69; Harcourt, A., *The European Union and the regulation of media markets*, n. 89; Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, (T.M.C. Asser Press, The Hague, 2001).

chain (content-network-platform).[472] I, however, propose yet another angle. In the analysis of salient mergers and antitrust decisions in the broadcasting sector, I consider their impact on structural and internal pluralism alongside examining the policy developments in DG Competition – from the austere Van Miert, through to the more lenient Monti and through to, arguably the most lenient of them all, Kroes. This policy development has mirrored the changing approach in the European Union as a whole, to the issue of media concentration. This shows that competition law can be stretched if necessary and if there is a political will.

4.1 "Smuggling" public interest to merger analysis under Van Miert

The European Commission has had specific merger control powers since 1989 when the Merger Regulation was adopted. The Commission becomes solely responsible for the assessment of a concentration (a merger, an acquisition or a joint-venture) if the latter has a "Community dimension". That is where certain, high turnover thresholds are exceeded.[473] The Commissions merger decisions are subject to review by the Court of First Instance ("**CFI**") and then by the European Court of Justice ("**ECJ**"). Neither the Council of Ministers nor the European Parliament's consent is necessary.

The test applied by the Commission when deciding whether to allow or prohibit a merger is the "substantial impediment of effective competition" (SIEC) test introduced by the new merger regulation 139/2004 in place of the dominance test applied before the 2004 amendment. Thus, Article 3 of the current Merger Regulation, provides that the Commission will prohibit, that is declare incompatible with the common market, a concentration "which would significantly impede effective competition, in the common market or in a substantial part of it, *in particular* as a result of the creation or strengthening of a dominant position".[474] The change from a narrower dominance test to a wider SIEC test was motivated by the

---

[472] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', n. 472.

[473] Article 1 of the Merger Regulation states that in general a concentration has a Community dimension where (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 billion Euro; and (ii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more that 250 million Euro, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. There are more detailed rules for establishing a Community dimension even if a concentration does not meet the two general thresholds.

[474] Article 3 of the Council Regulation (EEC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Commission's realisation that mergers may have anti-competitive effects even when they don't lead to creation of a dominant position.[475]

There are generally speaking three types of mergers that the Commission deals with: horizontal, vertical and conglomerate. Accordingly, the Commission published Horizontal and Non-horizontal Merger Guidelines explaining the differing treatment of the three types of mergers.[476] The vast majority of cases before the European Commission have concerned horizontal concentrations, that is concentrations between undertakings on the same level of trade (for instance two providers of the same type of goods).[477] The Horizontal Merger Guidelines explain that in analysis of this type of cases the Commission will first establish relevant markets in which the merging undertakings operate. Then, the parties' market shares are calculated, the power of customers and suppliers checked and entry barriers reviewed, in order to establish whether the merger would lead to substantial impediment of effective competition in the relevant markets identified.[478] Vertical mergers take place between companies operating on different levels of trade, for instance a merger between a raw material manufacturer (e.g. fabric) and an undertaking using this raw material to produce a finished product (e.g. clothes). In deciding whether to allow a merger of this type the Commission is looking to prevent a foreclosure effect, that is elimination or weakening of competitors in downstream or upstream markets due to the merged entity dominance. Finally, conglomerate mergers, that is mergers between undertakings present on different markets, may be anti-competitive if they lead to portfolio effects or leveraging.[479] Portfolio effects arise when a merged entity gains competitive advantage by being able to offer a wide portfolio of

---

[475] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* n. 471, 1090.

[476] For the European Commission's position on the assessment of horizontal mergers see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ (2004) C-31/5; For the European Commission's position on the assessment of vertical mergers see Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at: http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf; For the European Commission's position on the assessment of conglomerate mergers see Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf, paras. 91-121.

[477] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* n. 471, 1090.

[478] *Ibid.* 1090.

[479] *Ibid.*, 1104.

products.[480] Leveraging occurs when the merged entity sells bundles of products cheaper than competitors who sell the products separately, in order to bind the customers, eliminate competitors and then raise prices. The European Courts provided further guidance in its seminal judgments on conglomerate mergers.[481] The Court emphasised that proving anti-competitive risks of portfolio effects and leveraging must be done with great care[482] and even if those risks are indeed proven, the Commission is obliged to consider any behavioural commitments offered by the parties.[483] There have been fears expressed that after *Tetra Laval/Sidel* and *GE/Honeywell* judgments, the standard of proof imposed by the Courts on the Commission is now so high that it is doubtful whether the Commission will attempt to prohibit a merger on grounds of conglomerate effects in the near future.[484] This may have wide ranging implications for media mergers which very often involve companies operating in different but related markets (e.g. broadcasting and newspaper publishing or pay-TV and free-TV operation).

There is no media-specific merger review at the EU level. However, the Merger Regulation contains one specific provision – Article 21(4) – which is known as the 'legitimate interest' exception.[485] It allows Member States to take 'appropriate measures' to protect legitimate interests other than those taken into consideration by the Merger Regulation. Public security, plurality of the media and prudential rules are expressly mentioned as such legitimate interests. This means that for the sake of protecting the legitimate interest of media pluralism, Member States may *prevent or attach additional conditions* to media mergers that may be detrimental to media pluralism, even if they were approved by the Commission on competition grounds.[486] However, the Commission has explained that Article 21(4) does not give the

---

[480] See for instance Case IV/M.938 *Guiness/Grand Metropolitan*, OJ 1998 L228/24; Case IV/M.794 *Coca-Cola Enterprises/Amalgamated beverages*, OJ 1997 L218/15.

[481] Case C-12/03 P *Commission v. Tetra Laval* [2005] 4 CMLR 8; T-210/01 *General Electric v. Commission* [2005] ECR II-5527

[482] There is now a presumption of legality of conglomerate mergers, unless the Commission can prove that they are ancti-competitive

[483] Case C-12/03 P *Commission v. Tetra Laval* [2005] 4 CMLR 8, para. 85

[484] Practical Law Company, 'Tetra Laval decision: good news for business?', 31 March 2005, available at: http://crossborder.practicallaw.com/2-200-5556 (accessed 28 April 2008).

[485] Ritter, L., Braun, W.D., Rawlinson, F., *European Competition Law: A Practitioner's Guide,* (Kluwer Law International, 2000), 435.

[486] See European Commission, *Notes on Council Regulation (EEC) 4064/89,* published in "Merger control law in the European Union", European Commission, Brussels-Luxembourg, 1998, available at: http://ec.europa.eu/comm/competition/mergers/legislation/regulation/notes.html (accessed 28 April 2008).

Member States any power to *authorise* concentrations which the Commission may have prohibited under this regulation.[487]

The Commission cooperates with the Member State concerned when examining concentrations which may involve any of the legitimate interests mentioned in Article 21(4). In fact, it has been argued that the Commission has itself carefully considered the legitimate interest of maintaining media pluralism when prohibiting mergers in the media sector.[488]

Other public interests must be communicated to the Commission by the Member State concerned and may only be relied on after they have been accepted by the Commission as compatible with the general principles and other provisions of Community law. Most recently, the Commission and the European Court of Justice have clarified the scope of the application of this exception in a case involving the Portuguese government.[489] The case involved a takeover bid for cement company Cimpor Cimentos de Portugal SGPS (which was in the process of privatisation) by the Portuguese company Secil and the Swiss company Holderbank. Portugal blocked the transaction explaining its decision by the need to protect the development of shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus. The Commission was not informed about this potential legitimate interest, and thus it has not accepted it on the basis of Article 21(4) (then Article 21(3)). The Commission decided that even if it was informed, its conclusion would have been that the reasons for blocking the merger could not have been accepted as a legitimate interest under Article 21(4).[490] The Commission also emphasised that Member States are obliged to notify to the Commission any measures that they intend to adopt on the basis of the "legitimate interests" exception, if those interests are not expressly mentioned by Article 21(4) ECMR or even if they are mentioned, but there is some doubt as to whether the interests pursued are really covered by one of the exceptions listed in that article. This basically means the requirement to inform the Commission of any intended national action with regard to a merger allowed by the

[487] See European Commission, *Notes on Council Regulation (EEC) 4064/89,* published in "Merger control law in the European Union", European Commission, Brussels-Luxembourg, 1998, available at: http://ec.europa.eu/comm/competition/mergers/legislation/regulation/notes.html (accessed 28 April 2008).

[488] For instance, Case M.469 *MSG Media Service,* OJ (1994) L 364/1 or Case M.993 *Bertelsmann/Kirch/Premiere,* OJ (1999) L 53/1; see discussion below.

[489] CASE COMP/M.2054, *Secil/Holderbank/Cimpor*, Commission decision of November 22, 2000, upheld by the European Court of Justice in Case C-42/01, *Portugal v.* Commission [2004] ECR I-6079.

[490] Case C-42/01, *Portugal v.* Commission [2004] ECR I-6079, paras 26-40.

Commission. This may have a significant impact on the Member States' willingness to intervene in media mergers on the grounds of media pluralism. In fact, there has been only one such intervention to date, and it was in fact to a large extent "suggested" by the European Commission in its decision approving the merger.

Besides the 'legitimate interests' exception, competition law in general and merger control rules in particular apply to the television as they do to any other sector of the economy. However, this was only made clear in the 1970s by the ECJ in the *Sacchi*[491] judgment, in which the Court expressed its seminal view that:

> "in the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded a provision of services"[492] and "trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods". [493]

This and a later judgment in *Debauve*,[494] paved the way for the adoption of the Television Without Frontiers Directive in 1989. In its interpretation of the Directive the ECJ adopted a very liberal line, defending vigorously the liberalisation of European market as the "basic aim" of the Directive and, consequently, often sacrificing the public interests (such as protection of minors) which the Directive tries to protect.[495] One would expect that DG Competition, realising the limitations of its competence, would be more than happy to follow this track and advocate liberalisation of the markets while ignoring public interest considerations. This is why, the hardline attitude of DG Competition towards media mergers in the early 1990s came as a bit of a surprise.

---

[491] Case C-155/73, *Sacchi*, [1974] ECR 409.
[492] *Ibid.*, *para.* 6.
[493] *Ibid.*, *para.* 7.
[494] Case C-52/79 *Procureur du Roi v, Debauve*, [1980] ECR 833.
[495] See for instance Case C-56/96 *VT4 Ltd v. Vlaamse Gemeenschap,* [1997] ECR I- 3143; Case C-14/96 *Criminal proceedings against Denuit*, [1997] ECR I-2785; Case C-34/95 *Konsumentombudsmannen v. De Agostini and TV-Shop*, [1997] ECR I-3843.

Following the adoption of the *Television Without Frontiers* directive in 1989, there had been a significant increase in European-wide media mergers.[496] Anticipating the growth in media-related competition decisions, the European Commission's Directorate General for Competition decided to clarify its policy towards the sector. In the Communication to the Council and European Parliament on audio-visual policy,[497] adopted in February 1990, the Commission emphasised that the media industry differs significantly from other sectors due to a number of "specific economic and cultural considerations". In this respect, the Communication clarified that although competition law will continue to apply to the media sector, specific features of the industry will be taken into account when taking media-specific competition decisions. In addition, in 1990, a special unit specifically devoted to media sector was created within DG Competition (Unit C-2 - Media).

This official position determined the way media mergers, in particular those in the broadcasting sector, were treated by the European Commission under the rule of the then Competition Commissioner Karel Van Miert (1993-1999). Under Van Miert's leadership in DG Competition, there were many compromises made between the economic and non-economic objectives in media mergers.[498] In fact, the policy can be described as nothing less than "smuggling" public interest considerations through the backdoor of competition analysis. Out of the total number of 19 transactions prohibited to date, six, i.e. almost one third, have been media mergers concerning broadcasting markets. Furthermore, all six negative decisions were taken when Van Miert was in charge of the Competition portfolio. The burning need for the EU level regulation of media concentration made DG Comp under Van Miert's rule the guardian of pluralism with the sword of competition law.[499] As noted by a C-2 Unit official during Van Miert's term in office:

> "While the competition rules are of general application, they must take account of each sector's special characteristics. In the case of television, there are many such

---

[496] Lang, M., 'Entering the Digital Age. The Promise of Pluralism and the Danger of Monopoly Control', article presented at the ECPR-Workshop on *New Media and Political Communication* in Bern, 27 February 1997; Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 41

[497] European Commission, 'Communication to the Council and European Parliament on audio-visual policy', COM(90)78, Brussels, 21 February 1990.

[498] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* n. 471, 937.

[499] Whiddington, C., 'European Union', in De Avillez Pereira, M.(Ed), *Antitrust and New Media*, (Kluwer Law International, London 2000), 199.

characteristics ... One quite specific ... should be stressed here, namely the dangers inherent in the creation or strengthening of dominant positions for media plurality. The goal of media plurality must, therefore, *always* be kept in mind".[500]

This policy continued in a similar way under Van Miert's successor, Mario Monti (1999-2004) when important decisions with "conditions and obligations" were made. However, current Commissioner Neelie Kroes will most certainly apply a more liberal approach to media mergers, consistent with the current Commission's policy line towards the media industry. In fact, one can observe the development of policy and attitude of the DG Competition towards media concentration from "smuggling" public interest considerations into competition analysis under van Miert, to regulated monopolies and a liberal approach under Monti and Kroes.

Under Van Miert's rule and according to his own words "strict application of the competition rules [was also able to] contribute to maintaining plurality in this sensitive sector".[501] He has six negative media merger decisions under his belt to prove that and, remarkably, all six involved the television sector. This goes to show the importance attached to this medium and proves the point that excessive concentration in the television sector is seen as far more dangerous than in any other area of the media.[502]

The first of the negative decisions was the *Media Service GmbH (MSG)*[503] decision taken in 1994 which concerned a proposed digital pay-TV joint venture on the German market between Bertelsmann, Kirch and Deutsche Telekom. Bertelsmann is a parent company of a leading German (and now international) media group. Kirch was, at the time, the leading German supplier of feature films and television programming and was also active in commercial television. Deutsche Telekom was the public telecommunications operator, which at that time held a monopoly on the German telephone network and covering over 90% of the German cable television market.

---

[500] McCallum, L., 'EC Competition Law and Digital Pay Television', 1999 Competition Policy Newsletter 1, 6.
[501] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 51.
[502] Garzaniti, L., *Telecommunications, broadcasting and the internet*, (Thomson, Sweet&Maxwell, London 2003), 532.
[503] Case M.469 *MSG Media Service*, OJ (1994) L 364/1.

The proposed joint venture, called Media Service GmbH (MSG), intended to offer technical, business and administrative handling of pay-TV, as well as to provide the necessary technical infrastructure for the supply of such services and all related business. MSG would offer decoder, conditional access and subscriber management from a single body.

At the time of the decision, the only supplier of pay-TV in Germany was Premiere, jointly controlled by Bertelsmann, Kirch and Canal Plus. Premiere itself provided the necessary technical services and the subscription management. Similar services as MSG's were offered only by Selco, a JV between Pro 7, a German private television company, and News Corporation. German Telecom operated a cable network that was predominant on the German market.

After discussions between the Commission and more than 100 companies and industrial bodies, the Commission concluded that the JV would adversely affect competition on all four identified relevant product markets. First of all, on the market for administrative and technical services for pay-TV (defined for the first time in this case), the Commission observed that MSG would to begin with hold a monopoly given that it would be the first supplier of such technical and administrative services and as such, it would enjoy a first-mover advantage.[504]

The Commission stated that normally a monopoly on the "future markets" is not questionable if it is temporary. However, in this case the Commission believed that the market had already been sealed off in the development phase.[505] This was due to the fact that the creation of MSG would, from the start, exclude all likely competition for these services in the form of Premiere (with a strong subscriber base and preferential access to programme software) on the one hand, and Deutsche Telekom with its cable network covering over 90% cabled households in Germany, on the other.[506] The Commission saw new entry to such a market virtually impossible given the fact that an alternative supply of services would have to impose itself against such combined competitive advantages of Deutsche Telekom and Premiere, owned by Bertelsmann and Kirsch respectively.[507]

---

[504] Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, n. 472, 116.
[505] Case M.469 *MSG Media Service*, n. 441, *para.* 55
[506] *Ibid.*, *para.* 56.
[507] *Ibid.*, *para.* 60; see also Whiddington, C., 'European Union', n. 500, 188.

As to actual competition, the Commission noted that the only company at the time of the decision which offered, in Germany, similar services to those to be offered by MSG was Selco – a joint venture between the private television broadcaster Pro 7 and News Corporation, which belonged to the Murdoch group. However, the Commission established that, first of all, Selco operated a niche market with a limited subscriber base, as its business object is confined to the marketing of foreign-language programmes in Germany. Secondly, and more importantly, the Commission observed that 47.7% of the shares in Pro 7 were held by Thomas Kirch, the son of the owner of the Kirch group. It appeared furthermore that Pro 7 to a large extent purchased Kirch-group programme software for use in its programmes. In the Commission's opinion "Pro 7 therefore should probably be included *at least in the sphere of influence* of Kirch group".[508] Against this background, the Commission concluded that it is hardly to be expected that Selco would enter into active competition against MSG.

The second relevant market was the one for pay-TV, which is downstream of the first defined market for technical and administrative services for pay-TV on which MSG would have been active. The Commission found that the fact that MSG would be dominant on the upstream market would considerably strengthen the position of Bertelsmann/Kirch.[509] Given that Bertelsmann and Kirch enjoyed preferential access to the software that is attractive for pay-TV, had widespread activities in free-access commercial television as well as in print media, they already had an extraordinarily strong position on the pay-TV market.[510] The creation of MSG would do nothing else but solidify this position as all potential other pay-TV suppliers would be forced to procure the technical services underlying pay-TV from a company which would not only on a lasting basis hold a monopoly position as an operator of a digital infrastructure for pay-TV, but would also be controlled by the pay-TV suppliers that were already in a leading position.[511]

In such a situation, Bertelsmann and Kirch via MSG could significantly influence competition from future pay-TV suppliers and to a large extent shape it as they wished.[512] Firstly, they

---

[508] Case M.469 *MSG Media Service*, n. 441, *para.* 65, emphasis added.
[509] *Ibid.*, *para.* 74.
[510] *Ibid.*, *para.* 81.
[511] *Ibid.*, *para.* 82.
[512] *Ibid.*, *para.* 84.

could ensure that MSG's terms and conditions, and in particular the price structure, were arranged in such a way that it was advantageous to their own programmes and disadvantageous to those of their competitors.[513] Secondly, through MSG, Bertelsmann and Kirch would have control over the electronic programme guide ("**EPG**") necessary to find one's way in the "programme jungle". The EPG is contained in the decoder box and hence operated by whoever installs the decoder, in this case MSG. Such control would give Bertelsmann and Kirch the possibility to influence the location of their potential competitors' programmes. This would place them at positions in the programme menu which would make them less attractive.[514] MSG would also allow Bertelsmann and Kirch to acquire substantial informational advantages over their competitors, in relation to the customer structure and viewer behaviour of the subscribers handled by its subscriber management system. For example, information on the age structure of the viewers of particular programmes.[515]

In the third identified relevant market for cable networks, Deutsche Telekom had a monopoly at the time of the decision. However, as observed by the Commission this could soon come to an end following the deregulation of the market which would open the market up to competition. Therefore, the Commission concluded that in the same way as Bertelsmann/Kirch removed Deutsche Telekom as a potential competitor in the market for technical and administrative pay-TV services, Deutsche Telekom, through the proposed joint venture, prevents Bertelsmann and Kirch from being available as potential partners for other future cable operators.[516]

In conclusion, the Commission prohibited the proposed concentration after first rejecting the undertakings offered by the parties as insufficient to remedy the danger of creating or strengthening dominant positions.

The *MSG* decision is a fine example of DG Competition, under Commissioner Van Miert's direction, smuggling public interest considerations into what should be a pure market efficiency analysis. Particularly interesting here is the Commission's assessment of the market for technical and administrative services for pay-TV and the potential competition in the form

---

[513] *Ibid.*, *para.* 84.
[514] Case M.469 *MSG Media Service*, n. 441, *para.* 87.
[515] *Ibid.*, *para.* 89; see also Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 454.
[516] *Ibid.*, *para.* 92.

of Selco. As explained above, the Commission found that one of the parents of Selco, Pro 7, should be included *at least in the sphere of influence* of the Kirch group, given the fact that Thomas Kirch, the son of the owner of the Kirch group, held almost 50% of the shares in Pro 7. In terms of competition, such an argument is quite weak as family bonds are not something that pure economic analysis of market efficiency takes into account. Indeed, the vague notion of "sphere of influence" is not frequently used by competition authorities. Moreover, some authors[517] argue that this finding of the Commission is contestable in the light of the definition of control in the Merger Regulation, which requires the "possibility of exercising decisive influence" (Article 3(1)(b)). Therefore, Thomas Kirch did not *control* Pro 7 and hence did not influence the actions of Selco, which means that Selco could be taken into account as a potential competitor. However, this just proves the point that in *MSG* the Commission's reasoning went well beyond pure competition law principles and exclusively economic arguments. First of all, it seems that the Commission deliberately said nothing about control. It just mentioned the relatively high percentage of shares held by Thomas Kirch in Pro 7. The Commission intentionally and very clearly invoked a careful notion of "at least in the sphere of influence" just because there was a family bond between Kirch Group and Pro 7, regardless of how big a portion of shares Thomas Kirch held in Pro 7. The Commission, in my opinion correctly, assumed that holding almost 50% of shares allowed Thomas Kirch to have quite a significant influence over Pro 7. Therefore, what mattered for the Commission here was that due to this family connection, Thomas Kirch would be trying to steer Selco's activities away from competition with MSG. Eventually, the approach of the Commission proved to be justified given the subsequent integration of Pro 7 into the Kirch group.[518]

Therefore, the Commission excluded the possibility of competition between MSG and Selco on the market for technical and administrative services for pay-TV, not only on the purely economic grounds but also because it decided that father and son will not want to compete with each other. The latter is an assumption based on life experience and psychological, rather than economic arguments.

---

[517] Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, n. 472, 117.
[518] *Ibid.*, 117.

Moreover, the Commission's assessment of the market for pay-TV also allows one to draw a conclusion that there was something more than pure economic reasoning behind the prohibition of the joint venture. In this market the Commission concluded that the fact that MSG would have had a fairly permanent monopoly on the upstream market for services would have solidified the dominant positions of Kirch and Bertelsmann on the downstream market for pay-TV. Via MSG, the two media giants could shape the competition by influencing prices, the position of competitors' programmes on the electronic programme guide and obtaining informational advantages. As observed by Harcourt, "even though these were economic rationales for preventing the joint venture, it is plain to see that such a JV could have presented serious implications for cultural (and political) pluralism in Germany".[519]

Clearly, this would have happened with Bertelsmann and Kirch's ability to control the pay-TV content not only by having preferential access to attractive software but also by influencing the positions on which their competitors' programmes appeared in the electronic programme guide. The result would inevitably be an overwhelming majority of Bertelsmann/Kirch content on pay-TV with both companies able to popularise whatever political or cultural messages they saw fit and silence those they regarded as useless, harmful or otherwise not worthy of being shown. This makes the *MSG* decision an exemplary case of DG Competition applying competition law reasoning to achieve aims that proved politically impossible to achieve by the means of legislation.

The negative decision in the *MSG* case also had wider implications in that it indirectly prompted the Commission to adopt the Television Standards Directive[520] in 1995. Following the prohibition of the MSG joint venture, Kirch and Bertelsmann set up two separate digital platforms using different technologies for set-top boxes. Failed attempts of the Commission to convince Bertelsmann to use Kirch's technology and the accompanying debate on standards in the transmission of television signals provided momentum for suggesting the adoption of a Directive.[521] However, the Directive did not go as far as imposing standards. It only made suggestions which would preferably be taken on board by the television companies. This

[519] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 50.
[520] Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, OJ (1995) L 281/51, now revoked and replaced by the Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic telecommunications networks and associated facilities ('Access Directive'), OJ (2002) L 108/7.
[521] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 51.

liberal approach of the Directive was to have a serious impact on the result of a later case *Cablevision/Telefonica/Sogecable* in Spain (see below).

The second prohibition decision in the media merger case taken under Van Miert's rule as a Competition Commissioner was *Nordic Satellite Distribution*[522] in 1995. The case concerned the creation of a joint venture under the name Nordic Satellite Distribution (NSD) by Norsk Telekom, Tele Danmark and Kinnevik. Norsk Telekom was a Norwegian company controlled by Telenor which provided telephone services in Norway and owned or leased transponder capacity[523] from the satellites Thor, Intelsat and TV-Sat, situated at 1 degree West. It also owned a large cable network in Norway. Tele Danmark is the Danish telecom operator which provided voice-telephony services, broadband and cable networks. Swedish company Kinnevik's media activities included satellite television broadcasting of commercial (TV3) and pay-TV (TV 1000) channels, the distribution of satellite television (via Viasat), managing conditional access systems and radio broadcasting.

The joint venture's aim was to provide transponder capacity and the transmission and distribution of satellite TV channels in the Nordic market.[524] In this regard, NSD was to establish an attractive or even leading satellite position for the transmission of TV signals to the Nordic countries, named by the parties as the Nordic "Hot Bird" (orbital positions 1 degree West or 5 degrees East).[525] The transponder capacity and satellite network service provided by NSD would be subleased from *inter alia* Telenor. In addition, NSD was to provide satellite TV channels to cable TV operators and direct-to-home households.[526] The distribution of the channels would take place via the parents' distribution companies Viasat (Kinnevik) and Telenor CTV (Norsk Telekom) and through the parents' (Norsk Telekom and Tele Danmark) cable TV operators. NSD would use open encryption system in which smart-cards of Viasat, Telenor or others could be interchanged by consumers in one and the same decoder.

---

[522] Case M.490 *Nordic Satellite Distribution*, OJ (1996) L 53/20.
[523] Transponder is an element of a satellite used to receive and transmit TV signals. Each satellite contains several transponders.
[524] Case M.490 *Nordic Satellite Distribution,* n. 460, *para.* 8.
[525] *Ibid., para.* 31.
[526] TV signal from a satellite may be received by a privately owned small satellite dishes (direct-to-home system) or by one or two larger dishes owned by cable TV operators and then distributed to homes (cable TV system).

The Commission identified three relevant markets affected by the concentration[527] and concluded that each of them would be, in one way or another, threatened by the proposed transaction.

To begin with, as a result of the links with Kinnevik, NSD would acquire a dominant position on the market in the provision of satellite TV transponder capacity suitable for Nordic viewers.[528] As a result of the transaction Astra and Eutelsat satellites would cease to play any role in the Nordic region and hence, contrary to the parties' arguments, would not constitute even a shadow of competition to NSD. At the time of the decision, approximately 70% of the Nordic direct-to-home households, as well as almost all Nordic cable networks, had dishes directed to Astra and Eutelsat.[529] However, the Commission concluded that after the creation of NSD, most dishes in the region would be turned towards satellites controlled by NSD. There would be three main reasons for this. First of all, NSD would offer the most popular Nordic TV channels, Kinnevik's TV3 channels, on an exclusive basis.[530] Secondly, as opposed to Astra and Eutelsat, NSD's satellites have footprints aimed at the Nordic regions hence NSD would be able to reach *all* Nordic viewers.[531] Thirdly, notwithstanding the parties' statements to the contrary, customers would not be willing to invest in additional equipment, be it additional dishes or motorized dishes, just to be able to continue receiving signals from Astra and Eutelsat. Not only would there have been aesthetic, planning and financial constraints, but also the customers would just have no interest in the channels offered by Astra and Eutelsat.[532] They would get everything they want, in terms of television, from NSD.

On the second relevant market for the operation of cable TV networks, it was Tele Danmark's dominant position in Denmark which would have been strengthened by the creation of NSD.[533] As NSD's package of programmes would be *a must* for cable operators, several cable operators would compete to obtain exclusivity arrangements. This would put NSD in a position to price-discriminate or impose unfavourable terms on cable TV operators other than one of its parents – Tele Danmark, which even without that advantage already had an

---

[527] Case M.490 *Nordic Satellite Distribution*, n. 460, *para.* 74.
[528] Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 456.
[529] Case M.490 *Nordic Satellite Distribution*, n. 460 , *para.* 78.
[530] *Ibid., para.* 79.
[531] *Ibid., para.* 79.
[532] *Ibid., para.* 90.
[533] *Ibid., para.* 132.

exceptionally strong position in the Danish market.[534] Moreover, those independent cable operators wishing to carry NSD channels on an exclusive basis would have to negotiate with, Tele Danmark, as one of the parents of NSD![535] This clearly would have made the situation even more distorted.

On the final relevant market for distribution of satellite pay-TV channels to direct-to-home households, the operation would create a dominant position for Kinnevik's Viasat.[536]

The Commission rejected as insufficient the undertakings proposed by the parties describing them as having only a minor short term effect, too limited in scope, too vague, ambiguous and difficult to enforce.[537] Therefore, the inability to remedy the situation in which the vertical integration of NSD would cause the positions of the joint venture and its parents to reinforce each-other on various markets,[538] led the Commission to prohibit the transaction.

The *NSD* decision stimulates two important observations. Firstly, it indicated the Commission's attitude to similar cases: (i) the coming together of ex-monopolists (like Tele Danmark, Norsk Telekom) in the telecommunications sector and a strong broadcasting content provider (like Kinnevik) will not meet with a favourable assessment; and (ii) the Commission will prevent any attempt to replace dominant positions enjoyed by former "legal monopolists" with dominant positions held by private companies.[539]

The second observation is that like in *MSG*, the Commission in *NSD* seemed to have in mind more than just economic concerns relating to market foreclosure. This time, however, it even expressly talked about public interest considerations in the decision. Analysing the possible economic and technical progress resulting from the transaction, the Commission observed: "it is likely that the operation will lead to less variety in the offer to Nordic TV households in the future".[540] Therefore, hidden in the array of purely economic considerations was the vital concern about the decrease in diversity and plurality of television offerings in the Nordic

[534] *Ibid., para.* 128.
[535] *Ibid., para.* 132.
[536] *Ibid., para.* 136.
[537] Case M.490 *Nordic Satellite Distribution,* n. 460, *para.* 154-158.
[538] *Ibid., para.* 164.
[539] Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, n. 472, 114.
[540] Case M.490 *Nordic Satellite Distribution,* n. 460, *para.* 151.

countries. This renders the *NSD* decision another interesting example of DG Competition chaired by Karel Van Miert, subtly smuggling public interest considerations to competition analysis.

The precedents established by the *MSG* and *NSD* decisions meant that when two years later Bertelsmann and Kirch submitted to the Commission their "second-try MSG"[541] proposal, the fate of the transaction was decided almost from the start. Indeed, in 1998 the Commission prohibited the proposal to change shareholdings in the German pay-TV operator Premiere, which would involve Canal Plus relinquishing its share and Kirch and CLT-UFA – Bertelsmann's joint venture with Audiofina – raising theirs.[542] The outcome of this shift would be Bertelsmann (via CLT-UFA) and Kirch holding 50% each in Premiere and Kirch closing down its pay-TV channel DF1.[543]

The Commission again established that the transaction would impede effective competition on both identified relevant markets: for pay-TV and for technical services for pay-TV. On the market for pay-TV the Commission concluded that Premiere would achieve a permanent dominant position which, despite the parties' arguments, would not be off-set by the position of public television suppliers. This long-term dominant position of Premiere would arise out of a combination of factors. First of all, following the closing down of DF1 Premiere would be the only provider of pay-TV in Germany, having indeed a monopoly position. Secondly, Premiere would have access to programme resources unparalleled in Germany, thanks to its parents' – Bertelsmann's and Kirch's – extremely strong positions on the upstream market for the acquisition of programme rights.[544] Although the output deals for premium films and sports held by Kirch and Bertelsmann were not unlimited, they ran for different terms and thus potential competitors would have to embark on a several-year long quest for taking these rights away from Premiere, before they could offer an equally attractive pay-TV bouquet.[545] However, even after termination of the output deals Bertelsmann and Kirch, given their financial strength, would probably still be most likely to acquire those rights for another term. Furthermore, given the fact that the Premiere's d-box decoder worked with a proprietary

[541] Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, n. 472, 118.
[542] Case M.993 *Bertelsmann/Kirch/Premiere*, OJ (1999) L 53/1.
[543] *Ibid., para.* 8.
[544] *Ibid., para.* 35.
[545] *Ibid., para.* 50.

conditional access system (Beta system) potential new entrant to the pay-TV market would either have to establish its own decoder infrastructure, alternative to the d-box, or obtain a licence to use Beta access technology. Since households are not usually prepared to procure another decoder,[546] establishing a new decoder infrastructure would not be an option for potential competitors of Premiere. Therefore, by way of licensing the Beta access technology Bertelsmann and Kirch would gain absolute control over decoder infrastructure in Germany. This would give them, just as the Commission already pointed out in *MSG,* considerable information advantages, the opportunity to shape terms for the use of a Beta system which would be advantageous to Premiere and disadvantageous to its competitors, as well as the ability to influence the positioning of their competitors' programmes on the electronic programming guide.

The parties tried to argue that even if Premiere did in fact have a long-term monopoly for the provision of pay-TV in Germany, this would not be so detrimental overall as in fact pay-TV subscribers devote only 10% of their viewing time to pay-TV, with 90% going to free TV. The Commission was, however, not convinced and stated, very importantly, that

> "if pay-TV subscribers are prepared, in addition to the existing broadcasting fees ..., to pay an extra [fee] for a pay-TV subscription, although they use this for only 10% of their viewing consumption, this shows that the economic success of pay-TV is not exactly dependent on the audience share".[547]

The parties also failed to convince the Commission about their "failing company defence"[548] argument. They claimed that DF1's limited success thus far meant that if it was not acquired by Premiere it would close down. The Commission responded that first of all, the withdrawal of DF1 from the market would not automatically follow Kirch's decision to close it down. Furthermore, even if it was finally withdrawn, Kirch could easily develop a new marketing platform and operate pay-TV given its extensive programme resources.

---

[546] *Ibid., para.* 56.
[547] Case M.993 *Bertelsmann/Kirch/Premiere*,n. 480, *para.* 44.
[548] Developed by the European Commission in Case M.308 *Kali and Salz/MdK/Treuhand*, OJ (1994) L 186/38.

On the market for technical services for pay-TV, the dominant position of Premiere on the market for pay-TV would result in creating a dominant position for BetaDigital (which would be 50/50 owned by Bertelsmann and Kirch) in technical services for satellites.

The fact that by establishing a digital infrastructure and jointly offering an attractive programme, the parties could be successful in securing the general acceptance of digital television, did not convince the Commission that the transaction led to promoting technical and economic progress. Finally, the undertakings proposed by the parties were rejected as insufficient to remedy such an extensive monopoly situation. Therefore, the Commission prohibited the merger. In fact, considering its previous negative decisions, and in particular the *NSD*, which had been blocked despite the fact that the parties planned to use open conditional access technology, the Commission had no other choice but to block the merger between Bertelsmann and Kirch.

In parallel to the Bertelsmann/Kirch/Premiere joint venture the Commission investigated a closely linked case involving joint control by Bertelsmann, Kirch and Deutsche Telekom over BetaResearch.[549] Before the transaction this was Kirch's wholly owned subsidiary holding licences for Beta technology used for the encryption of programmes on the basis of the d-box decoder. The Commission prohibited both joint ventures on the same day and on similar grounds. It concluded that, just like BetaDigital would have dominant position in technical services for satellites, Deutsche Telekom would have a monopoly of the provision of such services for the transmission of pay-TV over cable networks.

These two parallel investigations of the European Commission into concentration on the German pay-TV market are significant also because they caused a major political stir. The Commission upheld its stance against the highest level of lobbying from Germany – one of the most powerful EU Member States. The Commission initially put informal pressure upon Germany to investigate the joint ventures at national level.[550] Only when the German government decided to approve them, did the DG Competition open the investigation. It was instantly faced with aggressive lobbying by the German government which claimed that despite the fact that the joint ventures were approved in Germany on competition grounds,

---

[549] Case M.1027, *Deutsche Telekom/BetaResearch*, OJ (1999) L 53/31.
[550] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 52.

German national rules against media concentration were adequate to counteract any negative non-competition related consequences.[551] Interestingly, Commissioner Van Miert had not only Kohl's administration against him. Indeed, within the Commission itself, Commissioners for Culture, Education and Information Society supported German demands for approving the concentration.[552] German industry and government, as well as the three Commissioners were "infuriated" by the situation in which the Commission's investigation temporarily suspended the expansion of digital TV in Germany, which meant that American, and not European, companies were "stealing a lead" in this area.[553] Nevertheless, DG Competition held out its stance against the strong political pressures. This showed that it "had acquired a considerable degree of legitimacy in arbitrating media markets".[554]

Following the prohibition by DG Competition of any of their attempts to join forces, Bertelsmann, Kirch and Deutsche Telekom lamented that the inevitable consequence would be the abandonment of digital television in Germany.[555] This has not materialised despite the whirlwinds on the market that followed the prohibition decision. In 1999 Bertelsmann sold its share in Premiere to Kirch which resulted in the merger of Kirch's pay-TV activities in DF1 and Premiere into KirchPayTV. Bertelsmann's CLT-UFA became RTL Group which is still a strong pan-European broadcasting and production company while in 2002 the Kirch group collapsed. Nevertheless, digital TV in Germany very much does exist, even if it lags behind its UK or French counterparts. Public broadcasters, ARD and ZDF, as well as Bertelsmann's RTL Group offer digital television packages in free TV and pay-TV respectively. In 2003 Premiere was bought and revitalised by the German private equity house Permira, and it also provides digital TV. Therefore, even if digital television in Germany developed slower than it would had the merger between Kirch and Bertelsmann been allowed, it surely developed in a more competitive, and also a more pluralist environment.

The Commission's two remaining negative decisions in the broadcasting sector, *HMG* and *Telefonica/Sogecable/Cablevision*, concerned Dutch and Spanish television markets respectively.

---

[551] 'Brussels risks war with Kohl', *The Guardian*, 2 February 1998.
[552] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 52.
[553] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.
[554] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 52.
[555] McCallum, L., 'EC Competition Law and Digital Pay Television', n. 501, 5.

In *RTL/Veronica/Endemol (Holland Media Groep – **HMG**)*,[556] following the request from the Dutch government,[557] the Commission analysed a proposed joint venture called Holland Media Groep (HMG) between two commercial television companies operating in the Netherlands (RTL 4 and Veronica) and a producer of Dutch-language television programmes, Endemol. Because there is no suspension effect for concentrations without a Community dimension analysed by the Commission at the request of a Member State concerned, the joint venture had already been implemented and was operative by the time the Commission started the investigation. This has probably to a large extent influenced the final outcome of the case.

The Commission identified three relevant markets: for TV broadcasting, for TV advertising and for independently produced Dutch TV programmes, i.e. TV productions excluding in-house productions of the broadcasters.

Delineating the first relevant market, the Commission argued that all TV broadcasters compete against each other for audience shares and therefore, the impact on the transaction has to be analysed against the market for TV broadcasting.[558] Moreover, the Commission decided to conduct its analysis on the broadcasting market even though, as the Commission itself admitted, was not so much a market in a strict economic sense of the notion,[559] but rather a term "in common use by all concerned".[560] This can be seen as a hint that the *HMG* decision provides something much more than just a purely economic analysis of the effects of the proposed joint venture.

On such a defined broadcasting market the Commission found HMG to have a very strong position due to a combination of the three popular channels (RTL 4, RTL 5 and Veronica) strengthened by the structural link with Endemol, which was the largest Dutch independent producer of television programmes.[561] RTL was, at that time, the only commercial broadcaster offering full programme service and Veronica was generally acknowledged as the most popular public broadcaster. In 1995, Veronica was to become a fully-fledged commercial

---

[556] Case M.553, *RTL/Veronica/Endemol*, OJ (1996) L 134/32.
[557] Pursuant to Article 22 of Council Regulation (EC) No.4064/89 (Merger Regulation).
[558] Case M.553, *RTL/Veronica/Endemol,* n. 494, *para.* 17
[559] Since there is no direct trade relationship between free TV suppliers and their viewers.
[560] Case M.553, *RTL/Veronica/Endemol*, n. 494, *para.* 17
[561] *Ibid., paras.* 43, 45.

broadcaster and without HMG it would have been the strongest competitor to RTL. Instead, the programmes of the two companies had been coordinated and in place of fierce competition, HMG was peacefully enjoying the position of the strongest broadcaster in Netherlands. This position could by no means be equalled or off-set by public broadcasters which could not coordinate programming on their channels so as to provide complementary programme schedules. The Commission rejected the parties' arguments that income from licence fees places public broadcasters in an advantageous competitive position.

HMG's dominant position on the TV broadcasting market was reflected on the market for TV advertising. The Commission concluded that HMG would be the clear market leader which will allow it to counteract all existing competition and make new entry very difficult.[562] In fact, a number of advertisers expressed their concerns to the Commission about the creation of HMG. Finally, the Commission decided that the creation of HMG would strengthen the already dominant position of Endemol on the market for independent Dutch television production.[563]

Given the fact that HMG already operated on the Dutch television market, ordering its dissolution by the Commission's negative decision would have had profound financial consequences. Therefore, the Commission did not order the parties to immediately abandon cooperation within HMG, but offered them three months to come back with proposals to restore effective competition in the relevant markets. This resulted in the eventual approval of the joint venture a year later following the withdrawal of Endemol from the project. The final outcome was therefore the authorisation of HMG despite strong reservations. Had it been a normal case with a Community dimension the Commission would most probably have not allowed such a combination at all. On the other hand, had the Dutch government not referred the case to the Commission, HMG could be allowed by national authorities without any changes. The truth is that HMG was bad in itself, but with Endemol involved, it was unbearable. Therefore, the Commission's involvement at least resulted in choosing a "lesser evil".

---

[562] Case M.553, *RTL/Veronica/Endemol*, n. 494, *para.* 87.
[563] *Ibid.*, n. , *para.* 104; see also Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 457.

Moreover, as observed by Harcourt, "clearly, as this [was] a purely national case and a venture with a comparatively low turnover, the Commission's concern overstepped those of ensuring a competitive market".[564] The comment on the case by Commissioner Van Miert himself serves best as a confirmation of this statement:

> "Today's decision is a further example of the Commission's commitment to protect competitive market structures in media sector. It is also worth mentioning that the strict application of the competition rules can also contribute to maintaining plurality in this sensitive sector".[565]

DG Competition under Van Miert also intervened in the British television broadcasting market and prevented the creation of a dominant position in digital terrestrial pay-TV. In 1997 Carlton, Granada and BSkyB entered into a joint venture called British Digital Broadcasting (BDB). Carlton and Granada operated commercial television channels and also had interests in pay-TV. BSkyB is a satellite pay-TV operator and a major programming supplier. Granada had a share in BSkyB and both companies operated a pay-TV joint venture company.[566] The joint venture was approved by the UK Department of Trade and Industry. However, informal discussions between DG Competition and the UK regulators resulted in the UK Independent Television Commission (ITC) informing the parties that it would grant a broadcasting licence to BDB only if BSkyB withdrew from the joint venture while honouring the long-term programme supply agreement.[567] Without BSkyB as a shareholder, DG Competition granted a comfort letter for BDB in May 1998. The letter attached further conditions aimed at avoiding cooperation between BDB and BSkyB to the greatest possible extent. The conditions also included a reduction of the duration of the programme supply agreement, the deletion of clauses from the supply agreement which would have acted as a deterrent to BDB competing itself for premium programme content, and finally, changes to the joint venture agreement that

---

[564] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 51; see also Whiddington, C., 'European Union', n. 500, 189.
[565] *Ibid.*, 51.
[566] Pons, J.F., 'The application of competition and anti-trust policy in media and telecommunications in the European Union', speech at International Bar Association, 14 September 1998, Vancouver, Speech 1998/41, http://ec.europa.eu/comm/competition/speeches/text/sp1998_041_en.html (accessed 8 September 2007).
[567] Smith, P., 'The Politics of UK Television Policy: The Introduction of Digital Television', paper presented at Workshop 24, Regulating Communications in the 'Multimedia Age', European Consortium of Political Research, 27th Joint Sessions of workshops, University of Mannheim, Germany, 26 - 31 March 1999, http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w24/smith.pdf (accessed 8 September 2007).

were aimed at excluding the possibility of Granada becoming a shareholder in BSkyB which would have prevented competition between BDB and BSkyB.[568]

After the amendments and elimination of BSkyB, the Commission was satisfied that BDB would provide the necessary competition in the market for pay-TV, which was at that time dominated by BSkyB.[569] Indeed, at the beginning of October 1998 BSkyB launched its own digital satellite platform called Sky Digital and "the prospect of competition from [BDB] has led BSkyB not only to reduce its prices for digital pay television, but also to offer consumers a wider choice of services".[570] BDB started broadcasting in November 1998. It was later renamed ONdigital. Unfortunately, without BSkyB's technical expertise and customer-service infrastructure, BDB struggled[571] and ultimately generated substantial debt. Rebranding to ITV Digital did not help and in 2002, operations terminated. Currently BSkyB is a dominant pay-TV supplier in the UK. Other pay-TV suppliers are cable operators NTL and Telewest, which merged in 2005. However, as they produce only marginal amounts of their own programming content, they are more customers than competitors of BSkyB. This shows that although competition intervention is able to counteract the creation of a monopoly as a result of a merger, it cannot intervene in the situation of a broadcaster becoming dominant as a consequence of its competitors disappearing from the market. This is where additional media concentration laws should complement competition control. Notwithstanding the later developments, DG Competition's intervention in the BDB joint venture managed to secure competitive and pluralist pay-TV market in the UK, at least for four years.

Other interesting example of DG Competition, under Commissioner Van Miert, going beyond a purely economic analysis of the effects of media mergers, is the 1994 *Newspaper Publishing*[572] case. This was the only case, thus far, in which the Commission expressly mentioned the possibility of using Article 21(4) (then Article 21(3)) of the Merger Regulation. The case concerned the notification by PRISA, Espresso and Mirror Group Newspapers of a public bid for the acquisition of joint control of Newspaper Publishing, a UK company which

---

[568] Pons, J.F., 'The application of competition and anti-trust policy in media and telecommunications in the European Union, n. 567.
[569] *Ibid* .
[570] McCallum, L., 'EC Competition Law and Digital Pay Television', n. 501, 5.
[571] 'ITV Digital seeks cooperation', www.advanced-television.com, 1-8 October 2001, http://www.advanced-television.com/2001/2001_newsarchive/1-8oct.html (accessed 8 September 2007).
[572] Case M.423 *Newspaper Publishing*, OJ (1994) C 85/5.

produced "The Independent" and "The Independent on Sunday". PRISA is a Spanish media holding with interest in publishing, media relations and pay-TV. Espresso's interests included newspaper publishing and radio broadcasting and Mirror Group Newspapers was a UK newspaper publishing company. The Commission concluded that there was no overlap between Newspaper Publishing's quality newspapers and Mirror Group Newspapers' tabloids. News International, publisher of The Times and The Sun, was a much larger player on the UK market at that time. Ultimately, it was found that there was no overlap between Newspaper Publishing on the one hand and PRISA and Espresso on the other, as all three operated in three different geographic markets. For these reasons the Commission decided not to oppose the transaction as it did not affect competition on any of the markets.[573]

However, in paragraph 22 of the decision, the Commission made a very interesting and important remark. It recalled Article 21(3) of the Merger Regulation and stated that "the proposed transaction involves issues such as the accurate presentation of news and free expression of opinion". Therefore, the UK Secretary of State's formal consent under the UK Fair Trading Act was required and the Commission demanded to be kept informed of any conditions which the UK authorities might deem appropriate to attach to the transaction. This clearly indicated that the Commission believed that some conditions, aimed at protection of pluralism, *must* be attached to the decision. As it was itself not empowered to do so, it went as far as it could by suggesting to the Member State that it must make use of Article 21(3). The transaction was eventually prohibited by the UK due to media pluralism concerns, without the Commission raising any objections against this decision.

If the Commission had not expressly mentioned Article 21(3), which meant the actual legitimisation of the UK's prohibition of the concentration, it cannot be excluded that the UK would not have had the courage to go counter the Commission's decision, approving the concentration. It could be argued that the Commission realised this fact and thus its recourse to Article 21(3) was more than simple drawing it to the Member State's attention. The way the Commission structured its analysis allows suspicion that the Commission had examined the transaction from a pluralist perspective and considered it dangerous. However, as it couldn't act itself, it pointed to Article 21(3). It is, therefore, possible to see this seemingly innocent

[573] *Ibid.*, *paras.* 18-20.

"attention drawing" statement by the Commission as in fact a veiled *obligation* imposed on the UK to act against media concentration due to pluralism concerns.

Despite this, and all the other positive developments mentioned above, DG Competition under Commissioner's Van Miert rule failed to remain consistent and it didn't manage to avoid some costly mistakes. The final negative merger decision in relation to broadcasting sector taken under Van Miert can be treated as the first symptom of competition policy's inadequacy to protect pluralism. The *Telefonica/Sogecable/Cablevision*[574] case concerned the Spanish television market and, just like *HMG*, resulted in a major political clash between DG Competition and a Member State.

The case concerned the plans of a telecommunications company, Telefonica de Espana and a subsidiary of Canal Plus Spain, Sogecable to merge their activities relating to the supply of services to cable operators and pay-TV providers into a joint venture, called Cablevision. Initially, the Commission had not been notified as the parties regarded their concentration to be of a purely national dimension. Following the authorisation granted by the Spanish government, the parties completed the transaction and Cablevision started operating.[575] However, the European Commission considered that the finding of a purely national dimension of the transaction was incorrect, as the turnover of Canal Plus Spain rather than Sogecable should only be taken into account. This intervention obviously caused a serious political clash within the Spanish government. DG Competition, again, bravely went above the Member State's head in its attempts to defend competitive media markets in Europe.

The statement of objections was sent to Telefonica and Canal Plus Spain requesting the notification of the concentration to DG Competition. Against all odds, the Commission decided to prohibit the concentration. It concluded that the creation of Cablevision would lead to foreclosure effects by preventing new entry into the market for technical services for pay-TV providers and cable operators in Spain.[576] Three days after the Commission's decision, the parties decided to withdraw from the strategic alliance. Cablevision was de-merged and went under the sole control of Sogecable.

---

[574] Case M.709 *Telefonica/Sogecable/Cablevision*, OJ (1996) C167/3.
[575] XXVI Annual Report on Competition Policy 1996, Part Two, 5.
[576] *Ibid.*, 6.

The effect of the Commission's negative decision was that Canal Plus Spain and Telefonica each created their own satellite platform – Canal Satélite Digital and Via Digital respectively – which used different encryption technologies. Realising the potential of Canal Plus, which had acquired valuable soccer rights, the Spanish government tried to defend "national" Via Digital. Hence, two laws were adopted in 1997. One mandated the use of an encryption technology (multicrypt), and the other imposed mandatory sharing of soccer rights between the pay-TV operators.[577] The law on standard encryption technology, "sought to protect the consumer's right to receive information and to guarantee pluralistic offer of services. Multicrypt was a synonym of pluralism; it was more open than the simulcrypt technology which requires a prior agreement between operators".[578]

Notwithstanding the apparently vital interests of pluralism and diversity which were at the heart of the Spanish government's intervention, DG Competition, inspired by Canal Plus, opposed the laws and initiated formal proceedings against Spain. In the reasoned opinion, the Commission requested the removal of the provisions which were allegedly contrary to the free movement of goods and services. Faced with the possibility of being taken to the European Court of Justice, Spain succumbed to the Commission's demands and amended the laws removing the obligation on pay-TV providers to use the same encryption standard. The Commission's reaction in this case was astonishing and troubling for several reasons.

First, the Commission went against its own recommendations in the Television Standards Directive.[579] The rationale for the Directive was to recommend the use of uniform standards. If the Commission felt that it was not entitled to mandate such standards, then it would be logical to allow any steps taken by the Member States to make it happen. Admittedly, the Directive does not expressly allow the Member States to mandate encryption standards. However, it also doesn't expressly *prohibit* them from doing so. The Commission failed to use this unique opportunity to interpret the Directive as permitting the Member States to *impose* a common standard on market operators.[580] Thus, the Spanish government's action wasn't obviously

---

[577] Llorens-Maluquer, C., 'European responses to bottlenecks in Digital Pay-TV: impacts on pluralism and competition policy', (1998) Cardozo Arts & Entertainment Law Journal, 16 (2-3), 580.
[578] *Ibid.*, 580-581.
[579] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 54.
[580] *Ibid.*, 54.

incompatible with Community law. The Commission simply chose not to interpret the Community law in such a way so as to *make* this action lawful.

Secondly, it may also be argued that by intervening in the Spanish government's decision, the Commission did not respect the provisions of Article 21(4) of the Merger Regulation. The Article allows Member States to take appropriate measures to protect legitimate interests, other than those taken into consideration by the Merger Regulation, provided these measures are compatible with the general principles and other provisions of Community law. Plurality of the media, which was one of the rationales behind the Spanish government's intervention, is expressly mentioned as such a legitimate interest. Consequently, if simple prohibition of the Cablevision venture by the Commission was not enough to secure pluralism on the Spanish pay-TV market, Spain should be free to implement the competition ruling by any "appropriate measures". By aggressively preventing it from doing so, DG Competition threw the rationale for Article 21(4) into question. It signalled to Member States that it may be empowered to challenge any of the pluralism-oriented measures they introduce at national level by simply interpreting the Community law in such a way so as to make the national rules incompatible. This is regrettable, especially that the same DG Competition two years earlier pointed to Article 21(4) in the *Newspaper Publishing* decision. This could have been taken forward in the *Cablevision* case. Instead, the Commission decided to take a step backwards.

Thirdly, the long term implications of the *Telefonica/Sogecable/Cablevision* decision devalued the initial brave attempt to prohibit the Cablevision joint venture against the will of the Spanish government. Following the withdrawal of the obligation to use one encryption standard, Canal Satélite Digital opted for simulcrypt and Via Digital for multicrypt technology. This meant that each one required a different set-top box which locked customers into their respective systems. The competition on the content level decreased, "neither operator was able to generate enough profit to overcome the high costs of technology and sports rights".[581] Finally in 2002, the two platforms merged creating a near monopoly on the Spanish pay-TV market.[582] Therefore, the end result was as if the Commission did not intervene in the Cablevision venture at all.

---

[581] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 54.
[582] Case M.2845 *Sogecable/Canal Satélite Digital/Via Digital*, approved by the Spanish government following the referral from the European Commission.

Some argue that this was not a coincidence and the whole saga had an ulterior motive. Perhaps the Commission was actually doing everything to defend a "European champion" (Canal Plus) against a national champion (Telefonica).[583] However, if this was the case, then why prohibit Cablevision in the first place, if it would actually strengthen Canal Plus? Therefore, one could suspect that the DG Competition's behaviour was just erratic and it simply went too far in its attempts to defend competition and pluralism. It most probably failed to realise that by preventing the Spanish government from introducing standard encryption technology, it actually shot itself in the foot and instead of encouraging competition and pluralism, it allowed for a near monopoly to be created. *Telefonica/Sogecable/Cablevision* case was therefore the first symptom of DG Competition's policy becoming incoherent and thus insufficient to protect pluralism in the European media markets.

Moreover, all six prohibition decisions taken by DG Competition under Commissioner's Van Miert rule concerned transactions involving some degree of vertical integration and affecting national markets. The Commission seems to believe that it contributed to the protection of pluralism by defining narrow relevant markets, both product and horizontal in the media merger cases. While this policy has resulted in prohibiting national vertical mergers it also meant approving pan-European horizontal concentrations.

For instance in *Kirch/Richemont/Telepiù*[584] and in *Bertelsmann/News International/Vox*,[585] the Commission allowed pan-European expansion of the biggest media conglomerates in Europe. In *Kirch/Richemont/Telepiù*, a media giant of that time, the Kirch Group, was allowed to expand into Italian markets by means of acquiring joint control over Telepiù – an Italian pay-TV company. Similarly, in *Bertelsmann/News International/Vox*, not only did News Corporation expand into the German market but also, the two European media conglomerates, Bertelsmann and News Corporation, entered into a close joint venture.

In these, as well as in all the other cases involving broadcasting, the Commission defined the geographic market as national and, admittedly, at the national level the transactions were not

[583] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 61.
[584] Case M.410 *Kirch/Richemont/Telepiu*, OJ (1994) C 225/4.
[585] Case M.489 *Bertelsmann/News International/Vox*, OJ (1994) C 274/6.

objectionable from a competition perspective. The reasons the Commission has provided for defining national geographic markets around linguistic and cultural barriers[586] is that language differences influence the purchase of programme rights and varying programme mixes on the basis of cultural interests of a national or regional audience.[587] This is all despite the Commission acknowledging the growing internationalisation of broadcasting, whereby satellite and digital television renders national borders increasingly irrelevant.

Therefore, under the current Commission approach and in the current state of law, if a merger does not affect a national market, it will be permitted, even if it leads to further expansion of media conglomerates at European level. The Commission seems to believe that as long as competition is not affected at the national level, broadcasting may be provided by a handful pan-European companies. This falls perfectly into the Commission's flawed belief in the continuing need to promote "European champions" in the media sector. Commissioner Monti's words are meaningful in this respect:

> "Imagine there is a problem with a particular [media] company on a national market in Europe. We would be doing a great disservice to the citizens of that country if we were to put the globalisation interests of the company ahead of the more local interests of the citizens. The competition rules will intervene wherever there is a problem be it national, as in Kirch/Bertelsmann, or global, as in AOL/TimeWarner and Vivendi/Universal".[588]

The truth is however, that the Commission *is* in fact putting globalisation or Europeanisation interests of media companies at the forefront by being concerned with national markets only.

There is currently no cure for pan-European pluralism concerns. The first draft of the failed Media Concentration Directive suggested a 10% ceiling for audience share at the European level, which would have addressed the problem to some extent. However, this threshold disappeared in only the second draft. One would still believe that serious pluralism concerns with the current Commission approach would be alleviated, at least at the national level, by

---

[586] European Audiovisual Observatory, Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level', n. 38.
[587] Case M.410 *Kirch/Richemont/Telepiu*, n. 521, *para.* 17; Case M.489 *Bertelsmann/News International/Vox*, n. 522, *para.* 20.
[588] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', n. 60.

the use of Article 21(4) of the Merger Regulation. However, with the replacement of Van Miert by Monti in the chair of Competition Commissioner, which also coincided with the dawn of the "convergence craze", the Commission went even further. It started accepting media mergers, even those competitively affecting national markets. At least some of these mergers should trigger the use of Article 21(4) by a Member State concerned. Unfortunately, *Newspaper Publishing* remains the only case when this procedure was used.

4.2 "Convergence craze" and regulated monopolies under Monti and Kroes

Under Monti DG Competition's stance towards media mergers in the broadcasting industry, especially those with vertical aspects, was substantially relaxed. In several controversial cases, instead of smuggling public interest considerations into competition analysis in order to prohibit anti-competitive media mergers, the Commission decided to allow them, but impose extensive sets of conditions and obligations and this way the concentrated market would be "regulated". The result of the change in policy was a series of vertical mega-mergers and two horizontal near-monopoly cases.

The U-turn with regard to the approach to vertical integration can be seen as a result of the "convergence craze" which characterised the Commission's work in the early years of the 21st century. The Commission saw progress of convergence and facilitating the advance of technology and "new media" as higher values than preserving pluralistic media structures. The case in the television broadcasting sector which illustrates this trend is *Vivendi/Seagram.*[589] Vivendi is the ultimate parent company of a group active in France and internationally. Its television activities include equity interests in two pay-TV operators: Canal+ (49%) and BSkyB (25%). The Canadian-based company Seagram is active in the media industry especially through its subsidiary Universal – one of the six major Hollywood film studios. The case involved the acquisition of sole control of Seagram by Vivendi. The Commission was concerned with the strong position of Canal+ on the pay-TV market and the transaction's effect on the market for premium film rights. The merged Vivendi/Seagram entity would have the world's second largest film library and the second largest library of TV programming in

[589] Case M.2050 *Vivendi/Seagram/Canal Plus*, OJ (2000) C 311/3; significant examples of the trend in other sectors include Case M.1845 *AOL/Time Warner*, OJ (2000) C 130/06, Case M.1943 *Telefonica/Endemol,* OJ (2000) C 170/5.

the European Economic Area.[590] Canal+ was already dominant in France, Spain, Italy, Belgium and The Netherlands and had a strong position in the Nordic countries. The Commission concluded that following the merger, Canal+ would be in an even better position both to renew its existing contracts with Universal, as well as to enter into new output deals with the other major Hollywood studios, which have certain structural links and specific arrangements with Universal.[591] Therefore, the Commission feared that *post-merger*, Canal+'s bargaining power vis-à-vis the US studios would be increased, which in turn would strengthen its position on the premium film rights market and would further foreclose the pay-TV market.[592]

In order to eliminate the serious concerns raised by the Commission, Vivendi proposed a package of commitments. With regard to pay-TV markets, Vivendi undertook not to grant to Canal+ the first-window rights[593] covering more than 50% of Universal production and co-production, unless there should not be competing offers at fair market value. However, this undertaking was limited to only five years from the expiry of the current output deals because, according to the Commission, during this period competitors apparently "will in all likelihood be in a position to adapt themselves to the new structure of the market".[594] Moreover, Vivendi undertook to divest its entire stake in BskyB, which would eliminate links with both Fox, as a film supplier, and BSkyB as a potential competitor for Canal+, in the pay-TV market.

This way, after the approval of medium to harsh and some temporary commitments, the creation of the world's second biggest media group after Time Warner was sanctioned by the European Commission. One of the factors here was, without a doubt, the merged group's plan to establish an internet portal Vizzavi and engage into a then-nascent practice of online music delivery. The case raises a worrying suspicion that if media companies manage to dazzle the Commission with the promise of creating something technologically new and exciting, they are almost guaranteed to jump any competition hurdles.

---

[590] Mendes Pereira, M., 'Vertical and horizontal integration in the media sector and EU competition law', n. 55.
[591] Case M.2050 *Vivendi/Seagram/Canal Plus*, n. 526, *para.* 44.
[592] Case M.2050 *Vivendi/Seagram/Canal Plus*, n. 526, *para.* 50, see also Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 443.
[593] First window rights cover television rights to films available on pay-TV shortly after cinema screenings and video rental.
[594] Case M.2050 *Vivendi/Seagram/Canal Plus*, n. 526, *para.* 74.

This however, was not the end of the saga. Apart from adopting a far more lenient approach to vertical mega-mergers than its predecessor, DG Competition under Monti, left a dubious legacy of two horizontal near-monopolies in the pay-TV sector.

In *BSkyB/Kirch Pay-TV* the Commission allowed the acquisition of 24% of KirchPayTV by BSkyB, leading to joint control of KirchPayTV by Kirch and BSkyB. At the time of the case KirchPayTV, through Premiere, had virtually a monopoly in the provision of pay-TV services in Germany. The Commission raised concerns that as a result of the transaction a dominant position of KirchPayTV on the pay-TV market in Germany will be strengthened and a brand new dominant player will be created on the market for digital interactive television services. KirchPayTV would be the only pay-TV operator in Germany offering, through one decoder, the d-box, pay-TV in combination with digital interactive television services. The result would be the d-box becoming the standard decoder in Germany for both interactive services and pay-TV.[595] The main danger of the d-box becoming the standard decoder stems from the fact that the d-box operates with a proprietary encoding technology developed by BetaResearch.[596] Therefore, possible new entrants wishing to reach customers using the d-box would have to obtain a license from BetaResearch. Moreover, together with the license application, they would need to submit their plans in advance to BetaResearch to ensure their compatibility with the system. The result would be that BetaResearch, KirchPayTV's sister company, would first of all have no interest in granting licenses, and secondly, it would have access to commercially sensitive information on the potential competitors of KirchPayTV.[597]

Again, instead of prohibiting the merger, as was the practice under Van Miert's DG Competition, DG Competition under Monti imposed a set of conditions on the merging parties. Apart from the somewhat standard requirements of offering licenses for the d-box network on a reasonable and non-discriminatory basis, together with all necessary technical services enabling the interested third parties' digitally transmitted services to be received by viewers,[598] the Commission went beyond behavioural commitments and made the rather

---

[595] Case JV.37 *BSkyB/KirchPayTV*, OJ (2000) C 45/3, *para.* 78.
[596] See Case M.993 *Bertelsmann/Kirch/Premiere*, n. 480.
[597] Case JV.37 *BSkyB/KirchPayTV*, n. 532, *para.* 79.
[598] *Ibid.*, *paras.* 1 and 8 of Annex I.

"unorthodox use of competition law for standardisation purposes".[599] The Commission mandated Kirch to implement an open application programming interface ("**API**"),[600] as standardised by the Digital Video Broadcasting Group ("**DVB**")[601] into the d-box or any of its successors.[602] Moreover, the Commission required that Kirch enter into Simulcrypt[603] arrangements (including the provision of the necessary coding information) with all interested digital conditional access providers in the German speaking territories.[604]

On the face of it, *BSkyB/Kirch Pay-TV* is a success story whereby the Commission managed to provide for interoperability through competition law. Unfortunately, the reality proved to be much more sinister. First of all, the standardisation commitments imposed in *BSkyB/Kirch Pay-TV* stand in stark contrast to the later embarrassing result of the Canal Satélite Digital and Via Digital saga in Spain. As explained above, after the Commission prohibited the merger between Telefonica and Sogecable,[605] two separate satellite platforms, using different encryption technologies, were created. The subsequent attempt of the Spanish government to mandate the use of Multicrypt technologies were curtailed by the Commission, with the end result of the two platforms merging without a shadow of a protest from either the Commission nor the Spanish authorities.[606] Considering the fact that despite the requirement imposed by the Commission in *BSkyB/Kirch Pay-TV,* no Simulcrypt agreement has ever been concluded by Kirch with other conditional access providers due to problems with licensing[607]. It is all the more surprising therefore that the Commission has not learned from past experience and

---

[599] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', n. 472.

[600] Application Programming Interface (API) is an interface to a decoder's operating system – it defines how different programmes and applications interact with the operating system. If it is closed/proprietary other operators have to obtain a licence to provide their services through the network.

[601] As per DVB's website www.dvb.org – the Digital Video Broadcasting Project (DVB) is an industry-led consortium of over 260 broadcasters, manufacturers, network operators, software developers, regulatory bodies and others in over 35 countries committed to designing global standards for the global delivery of digital television and data services.

[602] Case JV.37 *BSkyB/KirchPayTV*, n. 532, *para.* 5 of Annex I.

[603] Simulcrypt technology allows different decoders to decode different bouquets of channels from different service providers if the appropriate smartcard is present. Other technology – Multicrypt – allows a decoder to decode different encryption systems without the necessity of inserting appropriate smartcards.

[604] Case JV.37 *BSkyB/KirchPayTV*, n. 532, *para.* 5 of Annex I; see also Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 465.

[605] Case M.709 *Telefonica/Sogecable/Cablevision*, n. 511.

[606] See below for more detailed analysis of the Case M.2845 *Sogecable/Canalsatélite Digital /Vía Digital*, referral to the Spanish authorities 14 August 2002.

[607] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', n. 472.

decided not to allow a national government to mandate common technology in the Spanish case.

The story of the "convergence craze" and technological optimism of the Monti era would not be complete without mentioning *Newscorp/Telepiù*[608] – the milestone case marking the change of the Commission's policy towards mega-mergers in the media sector, and arguably one of the most controversial media merger cases ever decided by the Commission. The case involved an acquisition of the only two Italian pay-TV operators Stream and Telepiù by News Corporation and their subsequent merger into one digital satellite pay-TV platform, to be named Sky Italia.

As the merger would lead to nothing less than a monopoly in the Italian pay-TV market, the Commission raised a series of concerns. The Commission noted that prior to the merger, Telepiù already held a dominant position in the Italian pay-TV market so there would be virtually no competition left in the pay-TV market in Italy after the merger (competition from cable operators was negligible). First of all, the Commission considered that because News Corporation was present in the upstream market for encryption technologies for Conditional Access Systems (CAS) for pay-TV, the merger would lead to a precarious situation whereby a pay-TV monopolist would own a proprietary CAS. The Commission viewed this factor as in itself increasing barriers to entry into the downstream pay-TV market in Italy.[609] Moreover, by controlling the only digital satellite pay-TV platform in Italy, News Corporation would have the incentive and the ability to refuse access or raise barriers to the consolidation of channels (for example by systematically changing their position in the EPG). Furthermore, they could impose unfair or discriminatory conditions to digital satellite channels.[610] This would give News Corporation the possibility and the incentive to set the standard for the accepted level of intra-platform competition.

The second type of concerns involved the possibility of creating or strengthening the dominant position in the market for the acquisition of content rights, in particular rights to premium films and football content. Before the merger, Telepiù already held a dominant position in the

[608] Case M.2876 *Newscorp/Telepiù*, OJ (2004) L110/73.
[609] *Ibid.*, 133.
[610] *Ibid.*, 138.

market for the acquisition of exclusive rights for premium films and Stream had had exclusive broadcasting rights for the Serie A and Serie B Italian football league. Therefore, the Commission concluded that the acquisition of Telepiù by Stream, would lead to a quasi-monopolistic situation in the acquisition of exclusive rights for films and to a quasi-monopsonistic situation of the new entity for the acquisition of exclusive rights for regular football events.[611] Thus, because potential pay-TV competitors would be prevented from having access to premium content on pay-TV for a number of years, the Commission's finding was that no other undertaking would have the essential content to establish an alternative pay-TV platform. The possibility to create inter-platform competition would therefore have been minimal.[612]

Considering the seriousness of the concerns and the fact that the result of the concentration was nothing less than a monopoly, it is rather surprising that the Commission was easily convinced by a package of commitments offered by the parties. Therefore, a set of safeguards was imposed on the merged entity. To ensure future inter-platform competition the Commission required the parties to provide access to premium input (sports and film rights). The exclusivity of key content contracts for Sky Italia was shortened (two years for top football league A-series contracts and three years for premium film content). Concerns for the lack of intra-platform competition were alleviated by the parties' undertaking to grant third-party operators access to the Sky Italia's satellite platform, in order to allow such operators to offer channels that compete with the combined platform's retail offer.[613] To give full effect to this commitment, the Commission required that in addition to granting access to platform, the parties also supply the third parties in fair, transparent, non-discriminatory and cost-oriented conditions, with the technical services that are necessary and instrumental to the offering of TV channels in Italy. Moreover, Sky Italia was compelled not to re-organise the listing of channels in its electronic programme guide, without objective justification.

This way, the most dangerous and the worst possible situation in the media sector – a complete monopoly – was sanctioned by the European Commission for the first time.[614] On the first reading, the commitments are indeed tough. However, they are arguably not only

---

[611] *Ibid.*, *paras.* 150 and 162.
[612] Case M.2876 *Newscorp/Telepiù*, n. 545, *para.* 183.
[613] *Ibid.*, *para.* 11.1 of Annex I.
[614] Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 490.

inconsistent, but also behavioural, which means that, as admitted by the Commission itself, their effectiveness depends largely on "*faithful and goodwill* interpretation by the parties".[615] The inconsistency arises from the fact that on the one hand the Commission regards the Italian pay-TV market as almost a natural monopoly with no room for two players and at the same time it imposes a set of strict remedies centred on granting access, so as to facilitate new entry. The question arises as to what the Commission actually believed? Was there a possibility of two players on the Italian pay-TV market or not? If there was, as the imposition of strict access remedies indicates – why then allow a monopoly in the sensitive media sector?

Another worrying aspect is that, despite rejecting the News Corporation's failing company defence, the Commission took the "difficult economic situation" of Stream into account as one of deciding factors for authorising the merger.[616] The conclusion was that authorisation of the monopoly subject to appropriate conditions would be more beneficial to consumers than a disruption caused by the potential bankruptcy of Stream.[617] This inevitably raises questions with regard to the mirror case in the Spanish market. In this case, the creation of a digital pay-TV platform, Digital+, by means of a merger of Sogecable, the dominant pay TV operator in Spain, with Vía Digital, the second pay TV operator in Spain, was allowed by the Spanish Competition Authority after referral from the Commission.[618] Both companies were economically viable, there was no risk of a monopoly regardless of whether the transaction was authorised or not. And yet the monopoly was sanctioned, again.

There may only be one conclusion. There is a bigger interest in facilitating the development of a digital satellite pay-TV platform than prohibiting a media monopoly.[619] This in a nutshell, is the Commission's current philosophy towards the media sector. Both cases mark a change in the Commission's policy – from discouraging mergers and favouring a new entry, to accepting monitored monopolies in order to facilitate the development and progress of new technologies. In the Commission's eyes, intra-platform competition seems to prevail over inter-platform competition or going even further – internal pluralism currently wins over structural. And, as

---

[615] Ungerer, H., 'Impact of European Competition Policy on Media', n. 355.
[616] Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 490.
[617] Case M.2876 *Newscorp/Telepiù*, n. 545, *para.* 221.
[618] Case M.2845 *Sogecable/Canalsatélite Digital /Vía Digital*, OJ (2002) C 166/6.
[619] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 93.

noted by Arino, the "Spanish and Italian concentrations may merely constitute the beginning of a wider consolidation trend across Europe".[620]

I believe that a much better solution would be, if economically feasible as in the Spanish case, to actually prohibit the creation of a monopoly and require inter-platform competition as the Commission did in the past, but accompany it with mandating, or at least allowing a Member State concerned to mandate, the same encryption technology. If it allowed Spain to do this after prohibiting *Telefonica/Sogecable/Cablevision*, it is possible that the *Sogecable/ ViaDigital* merger, would never have caused a problem. Instead, by prohibiting Spain to mandate multicrypt, the Commission shot itself in the foot and, even if only indirectly, contributed to the eventual, but not unavoidable, creation of a monopoly in the Spanish digital satellite pay-TV market.

4.3 Access to premium content as a conduit for pluralism?

It is often argued[621] that, under Commissioners Monti and Kroes, DG Competition also tackled the pluralism issue by enforcing access to premium content in a series of Article 81 cases.[622] Premium content is essentially the rights to Hollywood films and prestigious football tournaments.[623] As rightly noted by Director General of DG Competition Philip Lowe:

> "The restricted access to premium content contributes to media concentration, limits output and opens the risk of higher prices and less choice for consumers as well as less innovation in the sector".[624]

It is therefore interesting to have a closer look at two more recent cases concerning the sale of media rights to prominent football events: the pan-European Champions League and the

---

[620] Arino, M., 'Competition law and pluralism in European digital broadcasting: addressing the gaps', n. 170, 97.
[621] See, for instance, Arino, M., 'Competition law and pluralism in European digital broadcasting: addressing the gaps', n., 97; Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European intervention', n. 472.
[622] Case IV/32.150 *EBU/*Euro*vision System*, OJ (1993) L179/23; Case COMP/37.398 *UEFA Champions League*, OJ (2003) L 291/25; Case COMP/38.453 *FA Premier League*, OJ (2004) C 115/3.
[623] Geradin, D., 'Competition law problems raised by the entry of incumbent telecommunications operators in the media content delivery market', University of Zurich, 7 September 2005, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796066 (accessed 8 September 2007).
[624] Lowe, P., 'Media Concentration and Convergence: Competition in Communications', n. 75.

national Premier League in the United Kingdom. Both cases were considered before the modernisation of competition rules by Regulation 1/2003.[625] Therefore, they both involved requests for an exemption under Article 81(3) of joint-selling of media rights from ordinary competition rules and the Commission's subsequent intervention into those arrangements. However, the final outcome of the Premier League case was reached under new rules.

Article 81 of the EC Treaty prohibits anti-competitive agreements and concerted practices between competitors. The modernisation of EC competition law took place in 2004 with the entry into force of Regulation 1/2003 which replaced the previous Regulation 17/62.[626] The modernisation did not change the substance of Articles 81 and 82 of the EC Treaty, the procedures for enforcement changed radically.[627] Under the previous regime, every agreement between competitors had to be formally notified to the Commission, and the Commission was the only body which could "exempt" the agreement from the competition rules on the basis of Article 81(3), that is declare it compatible with the common market. The notification system became too burdensome both on the Commission and on the businesses once the European Union expanded to 25 Member States. Decision was thus made to abolish the notification regime, make Article 81(3) directly applicable and decentralise the EC competition law enforcement. Therefore, under Regulation 1/2003, it is now a matter for undertakings to assess whether their agreement fulfils the efficiencies mentioned in Article 81(3). If this assessment proves wrong and the agreement is suspected of being anti-competitive, both the Commission and the Member States may investigate (there is a case-allocation system in place to decide which authority or authorities are "best placed" to deal with a particular case).[628] National competition authorities and courts may now also declare the agreement compatible with the common market on the basis of Article 81(3), or incompatible – and impose sanctions.[629] If the Commission is declared as "best placed" it may accept commitments from the undertakings concerned and make them legally binding.[630]

---

[625] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ (2003) L-1/1.

[626] Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ (1962) 13/204.

[627] McCarthy, A., Power, V., *Irish Competition Law. The Competition Act, 2002*, (LexisNexis, 2003), 96

[628] Commission Notice on cooperation within the Network of Competition Authorities, OJ (2004) C-101/43.

[629] In order to aid uniform application of EC competition law throughout the Community, the Commission published Guidelines on the application of Article 81(3) (OJ (2004) C-101/97). However, decentralisation of application of Article 81(3) may potentially give rise to increased number of requests for a preliminary ruling on the basis of Article 234 of the EC Treaty.

[630] Article 9 of Regulation 1/2003.

Turning now to the Commission's Article 81 media cases, it is worth to kick off the analysis with the Champions League case. Champion's League tournament is essentially a football competition that is organised annually by a body known as the Union of European Football Associations (UEFA). The competitors in the tournament are those football teams who finish in the top tier of their respective national leagues each season. At present, it consists of three stages: three qualifying rounds, the group stages and the knockout rounds. Media rights to qualifying rounds are sold by national football associations, and the demand for these rights is generally local and does not tend to be high. It is the group stage and knockout phases that attract the great interest and, therefore, media rights to those stages are sold centrally by UEFA. The original arrangement notified by UEFA to the Commission involved central selling of both pay-TV and free-TV rights by UEFA on an exclusive basis, in a single bundle to a single TV broadcaster per national territory for periods of up to four years. Whilst the Commission generally accepted the need for consistent brand presentation of the tournament as the main justification for joint-selling, the Commission raised a series of competition concerns and demanded significant amendments to the joint-selling arrangement. The Commission believed that the benefit of single-branding did not outweigh a series of anti-competitive effects derived from central selling. The breadth of exclusivity offered to winning broadcasters meant that significant numbers of rights were effectively unexploited. Moreover, clubs were not able to sell any of the group and knock-out phase rights independently of UEFA and there was no utilisation of new media rights, as the winning broadcaster was not interested in cannibalising its viewing ratings, and thus the income, by granting licences to ISPs and mobile operators.

Following the serious concerns expressed by the Commission with regard to the anti-competitive effects of the UEFA's joint-selling arrangement, UEFA notified a modified arrangement.[631] Firstly, the single rights package was unbundled and split into several packages ensuring that more than one broadcaster would be able to obtain the rights. In order to prevent all of the most interesting matches being crammed into one package, the Commission requested that the main rights be split into Gold and Silver Packages. Secondly, the Commission required that media rights contracts with winning bidders be concluded for a period not exceeding three UEFA Champions League seasons. Further, UEFA's exclusivity

[631] Case COMP/C.2-37.398 *UEFA Champions League*, OJ (2003) L291/25, paras 21-54.

was reduced by allowing clubs to sell some of the media rights relating to matches in which they are participating. And finally, new media rights were made available for the first time. While the European Commission was generally satisfied with the changes made, it believed that the modified arrangement still restricted competition since joint exploitation of the commercial media rights of the UEFA Champions League on an exclusive basis through a joint selling body, UEFA, prevented the individual football clubs from individually marketing such rights. As there was only one source of supply, there was no competition between the football clubs and also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers in the upstream markets. Therefore, UEFA, as the joint selling body, restricted competition by determining prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. This led to uniform prices compared to a situation with individual selling. The Commission also objected to restrictions imposed on football clubs in relation to the exploitation of commercial rights that they have not granted to UEFA for joint selling, but which are exploited by themselves individually, such as (i) permission for football clubs to sell live TV rights to pay TV/pay-per-view broadcasters only; or (ii) embargoes on the exploitation of deferred media rights, in particular TV and Internet rights.

Nevertheless, the Commission decided to grant an exemption for the modified arrangement subject to the condition that football clubs would not be prevented from selling their live TV rights to free-TV broadcasters where there is no reasonable offer from any pay- TV broadcaster. After this condition had been met, the Commission was satisfied that the arrangement fulfilled the conditions for an exemption under Article 81(3), in that it improved production and distribution of the UEFA Champions League by enabling the creation of a quality branded content product and by providing an advantage for media operators, football clubs and viewers through the creation of a single point of sale.

Following the Commission's intervention, Silver and Gold packages of rights to UEFA live matches did not go to one and the same broadcaster in any of the national markets.[632] This clearly shows that the UEFA Champions League was undoubtedly a success in utilising EU competition law to disarm, if only just a little, national media giants. It also unquestionably

[632] European Commission, 'Background Note: The UEFA Champions League', 24 July 2003, MEMO/03/156.

paved the way for a positive result of the second case, involving the joint selling of media rights to a prestigious football event – this time a national football tournament with European appeal – the English Premier League.

The history of the battle between the Commission and the Football Association Premier League (FAPL) stretches over a period of five years. The first major development was a Statement of Objections issued by the Commission in December 2002,[633] in response to the notification by FAPL of a joint-selling arrangement of four packages of media rights to the Premier League football tournament. The Commission's concerns, centred on the combination of horizontal and vertical anti-competitive effects of the notified arrangement, which led to a very strong market foreclosure. Horizontal anti-competitiveness resulted from pulling the rights from the clubs to a central joint-selling agency. The effect was limited coverage of Premier League matches (only about 25% were covered), there was no right for the clubs to sell independently and no new media rights. The vertical effect became vividly apparent when, in the middle of the proceedings, FAPL held a public auction for the rights to the 2004-2007 Premier League seasons. All four packages were won by BSkyB which paid a premium to secure the deal. It was clear that the arrangement in its notified form could, and in fact has, lead to a long-term monopoly over media rights to this prestigious and highly popular regularly-held event. This intensified the Commission's work and accelerated the settlement discussions with FAPL. These resulted in substantial revisions to the FAPL joint selling arrangement, codified in the Commission's decision of March 2006, which made FAPL's commitments legally binding on the basis of Article 9 of Regulation 1/2003.[634]

The revised arrangement which will be operable as of the 2007 season onwards, provides for six balanced packages of live television rights as well as near-live and new media rights[635] sold in an open bidding process monitored by a Commission-appointed trustee. Importantly, following the BSkyB experience, there is a "no single buyer" rule. Hence, every single package of rights is subject to a separate bidding procedure and no one bidder is allowed to purchase all six packages. The commitments are legally binding until 2013. The effects of the

[633] See European Commission press release, 'Commission opens proceedings into joint selling of media rights to the English Premier League', 20 December 2002, IP/02/1951.
[634] Case COMP/38.453 *FA Premier League*, OJ (2004) C 115/3; See Commission's press release 'Commission makes commitments from FA Premier League legally binding', 22 March 2006, IP/06/356.
[635] The packages encompass: live rights; near live rights; free-to-air highlights rights; mobile clips rights and web-based clips rights.

revision were evident very quickly when in April 2006 BSkyB won only four of the rights packages with Irish firm Setanta winning the remaining two and breaking up Sky's Premiership monopoly for the first time in almost fifteen years.

It seems, therefore, that by ordering open tenders, unbundling of rights packages and limiting the exclusivity of central sales agencies as well as the length of contracts, the Commission was able to "improve the prospects of competition in providing services to consumers".[636] It has also broken up the monopolies of the likes of BSkyB, if only with regard to one type of media rights and thus contributed to a reinforcement of structural pluralism in many European media markets.

However, enforcing access to *the same* premium content by a number of broadcasters only has a very limited beneficial effect when viewed from the perspective of the two "faces" of pluralism – as an abundance of operators, providing an abundance of content. Admittedly, exclusive rights to Premier League matches contributed to strengthening the position of BSkyB by increasing its audience share. This in turn reinforced the company's media power and made it a potential influence on viewers' minds. From this perspective, by creating the conditions for other operators to enter the market, the Commission contributed to a potential increase in structural pluralism in the UK broadcasting market. Moreover, gaining access to some of the Premier League matches would increase the audience share of smaller operators or make entry of the new ones possible. This could potentially provide those operators with additional financial resources which they could spend to produce fresh content they would not otherwise produce, therefore adding to the increase in internal pluralism. The latter link is however fairly tenuous and as the other buyer of the Premier League media rights is an exclusive sports broadcaster, it will probably not materialise this time round.

The Commission's intervention in the above antitrust cases has been to a large extent *ex post*. BSkyB had already managed to build its position in the UK market based on its 14-year monopoly over Premier League matches, before the Commission gathered enough clout to break it up. Therefore, albeit noble and appreciable, the introduction of competition in the form of Setanta was "too little too late"... It will be even more profound in analogous

[636] European Commission, 'Commission makes commitments from FA Premier League legally binding', n. 635.

interventions in the future when under Regulation 1/2003 there is now no requirement to notify agreements for negative clearance or an exemption. Even if the Commission discovers an anticompetitive agreement leading to a monopoly on a media market and eventually breaks it up, the damage will already be done and a giant media powerhouse will be born. And once a strong position on the media market has been secured, it is very difficult to reverse it.[637] This is why, in the media sector, what is of utmost importance is the *prevention* of monopolies or significant market powers from ever being built. Whether is be by mergers or "natural growth", by means of acquiring premium content. Competition law is simply unable to achieve this aim.

4.4 Why competition law alone does not suffice?

The analysis of the history of DG Competition's involvement in the media sector allows the conclusion that, most notably under Commissioner Van Miert, competition law has significantly "expanded the European Union's scope for media regulation".[638] Furthermore, competition law "had more of an impact in Europe's broadcasting industry than any of the European regulation specifically targeted at the sector".[639] There have even been voices heard, that say that DG Competition takes the complexity of the media sector into account and is actually more vigilant in media cases than in other sectors.[640] Indeed one third of all prohibition decisions in merger cases, relate to mergers in the media sector.[641] And the Commission prides itself on its very narrow definitions of the relevant market in media cases – both product and geographical. Thus, as noted by Arino,[642] in several cases merger control contributed to alleviating the dangers of media concentration by enforcing access to platforms and networks. In addition, in a series of antitrust decisions the Commission managed to deprive premium content deals of their exclusivity clauses. Therefore, competition law does

---

[637] Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, n. 12, 308.
[638] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 11.
[639] Levy, D., *Europe's Digital Revolution. Broadcasting Regulation, the EU and the Nation State*, (Routledge, 1999), 81.
[640] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 109.
[641] European Commission, 'European Merger Control – Council Regulation 139/2004 – Statistics, http://ec.Europa.eu/comm/competition/mergers/statistics.pdf (accessed 8 September 2007).
[642] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European intervention', n. 472.

provide a useful tool with which to prevent the creation of barriers of *access* to content and distribution channels.[643] Moreover, as praised by economists Motta and Polo,

> "unlike regulation, competition policy can be adapted more smoothly to the complex strategic conditions of the industry. It does not require continuous intervention and it reduces the risk of market distortion which would be especially harmful in a period of technological change".[644]

The same authors even claim that "in the presence of competition laws or regulations which place strict limits on the market share of a firm, limits on shares owned by a single investor tend to be superfluous". [645]

Undeniably, when utilised, competition law not only can contribute but indeed has contributed to preventing the creation of monopolies or breaking up the existing ones, thus maintaining or even introducing structural pluralism onto European media markets.[646] Therefore, competition law does have its role, however "indirect" or "limited",[647] in the process of protecting pluralism at the EU level.

However, notwithstanding the unquestionable positive role competition law plays in safeguarding pluralism in Europe, there has been a dangerous tendency in the European Union recently, to believe that the accomplishment of digitalisation and convergence allows media pluralism to be secured solely through normal market mechanisms and competition regulation. This belief, initiated by the Commission's Convergence Green Paper, stems from the conviction that in the digital and converged media world the only concern is access to key "gateways", which are the conditional access systems, subscriber management systems, and

---

[643] Fastweb, 'Comments on 'Media Pluralism – what should be the European Union's role?', Issues Paper'', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-fastweb.pdf (accessed 8 September 2007).
[644] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 326, 327.
[645] *Ibid.*, 326.
[646] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 94, 99.
[647] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European intervention', n. 472.

electronic programme guides.[648] And indeed, those concerns can and have been addressed by competition law in cases such as *MSG* or *Nordic Satellite Distribution.*

DG Competition has often boasted about taking particular care when dealing with media markets.[649] As noted above, there are allegedly two indications of this "intensive care": narrow market definitions (both product and geographic) and more negative and conditional competition decisions in media cases, than in any other sector.

The policy of defining narrow broadcasting markets means that mergers on the same market, for instance, two pay-TV stations in one country, are less likely to be approved than mergers across markets, for instance pay-TV buying free TV as in *Bertelsmann/News International/Vox*, or pay-TV from one country buying pay-TV in another country as in *Kirch/Richemont/Telepiù.* If the only free-TV in any one country decided to buy the only pay-TV in the same country, this would probably be approved, given the currently prevailing market definition. Some argue that there is nothing wrong with this approach.[650] Certainly, if there is no harm in a small product market, there will most probably be even less harm in a larger one, so cross-media ownership is not necessarily dangerous.[651] However, even if by imposing a package of commitments, the Commission is able to prevent the risk of leveraging economic power from one service market (e.g. free-TV) to another (e.g. pay-TV), this only solves competition concerns. Accumulation of ownership in many media markets by a single conglomerate, even if fenced by a number of competition safeguards, still seriously increases the prospect that the audience will be subjected to similar content in different media outlets[652] and thus raises significant pluralism concerns. Therefore, "it is the impact of cross-ownership on the audience that is significant, not necessarily the fact of cross-ownership in itself".[653]

Therefore, narrow definitions of product and geographic markets only serve to protect national markets from being controlled by too few operators of the same type (i.e. pay-TV or free-

---

[648] Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138.
[649] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', n. 60.
[650] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 168.
[651] *Ibid.*, 169.
[652] *Ibid.*, 169.
[653] *Ibid.*, 168.

TV).[654] In line with the need for a competitive European media market, and the desire to create the mythical "European champions",[655] the current approach of DG Competition leaves the European market open to conquest by media moguls with cross-media and cross-border operations.[656] As Ward explains:

> "Regulatory ground [established by the European Commission's approach to mergers and joint ventures] was favourable to companies looking to strengthen the audiovisual market by building up company portfolios and expanding the size of production by exploiting cross border strategies within the common market zone".[657]

Moreover, in the example of free-TV buying pay-TV, even if there were more than one pay-TV in the country and the merger would not result in one company controlling the entire broadcasting market in that country, this could quickly change. For instance, the other pay-TVs could go bankrupt (as Kirch in Germany). The result would be one company controlling both free- and pay-TV in the Member State. Competition analysis at the time of the merger cannot predict such developments and given the "once off" approval of a merger it is not possible to unwind it later on. The exception to this would be unless the parties do not fulfil conditions and obligations imposed as a condition for approval. As noted by Harcourt:

> "The EC's reliance on competition policy to govern media markets has been problematic. Media markets are highly volatile. Therefore, the market status quo at the time of a decision could alter itself dramatically in a relatively short period of time. It would aid both market investor and public interest regulators if clear rules on media ownership could be agreed at the European level, rather than having to rely on case-by-case analyses".[658]

The second alleged indicator of the intensive care taken by the Commission in media cases is greater vigilance in case-analysis. Some authors rightly point out that there are generally more

---

[654] Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 532

[655] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 91, 94.

[656] The best example is the continuing expansion of Murdoch's News Corporation in Europe. After UK (where it recently bought a 17.9% stake in ITV, see 'ITV rejects merger move from NTL', http://news.bbc.co.uk/1/hi/business/6169052.stm), Ireland and Italy, it seeks to conquer the Polish and Baltic states' markets.

[657] Ward, D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', n. 9.

[658] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 50.

cases involving the media than other sectors and one third of all prohibition decisions in merger cases relate to mergers in the media sector.[659] However, as already argued above, all of the negative decisions have taken place under the particularly vigilant Competition Commissioner Van Miert. His successor, Monti, not only allowed several mergers which Van Miert would most likely have prohibited, but also expressly rebutted the suspicion of any special care being offered to media markets, expressed in a greater number of media cases:

> "There is a perception that competition rules intervene in media and telecoms cases more often than in other sectors. This is, I believe, false. There have certainly been a number of important media and telecoms cases having competition law problems. But there have also been – quite simply – a large number of media and telecoms cases".[660]

Indeed, as a direct result of the TVWF Directive, there has been a dramatic increase in the number of media mergers and joint ventures at the European level.[661] Therefore, the undeniably substantial involvement of DG Competition in the media market is not the result of some special care, but simply the reflection of the underlying problem – the consolidation trend in the media industry.

In any event, notwithstanding the above criticism of the Commission's "intensive care" claim, and even if it were actually true that the Commission, especially under Commissioner Van Miert, did in fact exercise more vigilance in media cases, competition law *by definition* cannot be used to guarantee media pluralism. This is so not only because media pluralism and diversity depend on more factors than access to key "gateways", but mainly because competition law and media concentration rules have fundamentally different focuses.[662]

---

[659] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 109.

[660] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', n. 60.

[661] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 11.

[662] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', Iris Plus, Legal Observations of the European Audiovisual Observatory, Issue 2002-2.

As noted by the Commission itself "competition rules alone may not be sufficient to ensure cultural diversity and media pluralism",[663] because fighting "dominant market position" on a relevant market differs from counteracting the development of the "dominant power of opinion" in the media sector.[664]

These different focuses result in a number of problems with the application of competition law to media merger cases. Firstly, some media mergers which are harmless for competition will raise serious pluralism concerns.[665] As already mentioned, the Commission's tendency to define narrow relevant markets may and indeed already has, led to regulatory approval for pay-TV/free-TV mono-media mergers or a newspaper/TV cross-media merger.[666] The merging companies were able to persuade the Commission that the merger actually leads to an improvement in competition on the relevant, narrowly defined markets (newspapers, pay-TV or free-TV).[667] While this may be the case, the plurality and diversity of the overall media industry, encompassing all viewers, listeners and readers may suffer as a result of a decreased number of content providers. Those media specific objectives are not taken into account in the competition analysis. They may be subject to national scrutiny as allowed by Article 21(4) of the EU Merger Regulation, however, as already discussed, Member States have not made extensive use of the possibilities offered by this Article.

Secondly, the EU Merger Regulation only deals with a concentration in the media market taking place by means of a merger, an acquisition or a joint venture. Natural growth of media companies, for instance, by adding new channels or programmes, is outside the scope of the Regulation's application. Dominant positions, held by a media company, are unquestionable from the EC competition point of view. Only the abuse of that position, in the economic sense of "abuse", will be prosecuted on the basis of Article 82 of the EC Treaty.[668] Media power,

---

[663] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n. 171; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Rec. 10.

[664] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663.

[665] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264.

[666] *Ibid.*

[667] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663.

[668] *Ibid.*

however, may be abused by the mere existence of a single or a few large media firms.[669] Dominance or oligopoly on the media market achieved by natural growth will be unproblematic from a competition law perspective, but it will eliminate structural media pluralism, which in turn will almost certainly reduce the diversity of content and "the likelihood of the audience experiencing other views of the world".[670] Therefore, because the abuse of power in the media sector may have more than just economic implications and the formation of dominant opinion is, in itself dangerous. It follows that the need to control media concentrations must be more of a "risk assessment" than a retrospective and narrower fight with the actual abuse of market power with the weapon of competition.[671] As pointed out by Scheuer and Strothmann, development of a dominant opinion in the media must be prevented "for constitutional reasons". This certainly cannot be achieved by means of competition law and there is as a consequence a need for an additional media specific regulation "separate from that which governs other parts of the national and global economy".[672]

Essentially therefore, the main argument against the exclusive reliance on competition law to foster media pluralism comes down to what seems like a trivial statement, that media power and market power are two different things. The Commission's current belief in the potential of competition law to boost media pluralism rests on two inherently false assumptions.[673] The first fallacy is that, if competitive conditions are provided "a multiplicity of operators will follow".[674] However, this has not happened – the competition for markets has resulted in concentration in the media sector.[675] Secondly, diversity of source or structural pluralism, which may be provided by competition analysis, does not automatically lead to diversity of content (internal pluralism). So far, there has even been a tendency to the contrary with

---

[669] The Campaign for Press and Broadcasting Freedom, 'Comments on 'Media Pluralism – what should be the European Union's role?', Issues Paper'',
http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-cpbf.pdf (accessed 8 September 2007).

[670] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 168.

[671] Komorek, E., 'European attempts to regulate media concentration. Persisting conflict of interests', n. 211, 76; see also Cavallin, J., 'European Policies and Regulations on Media Concentration', n. 13, 1; European Audiovisual Observatory, 'Iris Special: Television and Media Concentration. Regulatory Models on the National and European Level', n. 38.

[672] The Campaign for Press and Broadcasting Freedom, 'Response to the Commission's consultation on the revision of the TVWF directive, Issues Paper 6 (Media Pluralism)', n. 670.

[673] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264.

[674] *Ibid* .

[675] Barendt, E., *Broadcasting law. A comparative study*, (Clarendon Press, Oxford 1993), 122; see also Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264.

"competitors targeting the same, large audiences with similar products".[676] Therefore, protection of pluralism can at best only be a positive "side effect" of competition analysis. However, it is not a primary aim and there remains a strong case for retaining, or indeed introducing, media-specific anti-concentration restrictions.[677]

Even the greatest advocates of the potential of competition law in the changing media environment acknowledge the need to accompany it with media specific anti-concentration rules.[678] The Commission itself admits that "competition rules alone may not be sufficient to ensure cultural diversity and media pluralism".[679] Even economists, such as Motta and Polo, who otherwise praise the potential of competition law in the changing media environment and generally advocate for a "hands-off" approach, admit that competition law is unable to deal with a very important market failure or an externality, namely the impact of the media industry on the formation of public opinion.[680] Therefore, competition policy should be "complemented by regulations which guarantee that no single firm has enough market power to jeopardise the pluralism of opinions in society ... even if such measures are in contradiction to economic efficiency objectives".[681]

However, most of those who advocate for the complementing of EU competition law with additional media-specific anti-concentration rules are quick to point to the national, sector specific rules as the only remedy: As Hitchens observes:

"whilst Community competition law [is] not wholly suitable for the protection of pluralism, this of itself did not create need for specific Community action, particularly since mergers raising pluralism issues [can] be dealt with at national level".[682]

---

[676] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 168.
[677] Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138; see also Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, n. 6, 90.
[678] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663.
[679] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n. 171; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Rec. 10.
[680] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 313.
[681] *Ibid.*, 327.
[682] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264.

The question, therefore, is not whether there is a need for additional media-concentration rules to accompany EU competition law, as this assertion appears to be conclusive.[683] The question should rather be whether there is a need for *EU media-specific rules.* In this thesis I submit that this need not only exists, but also that it is imperative. As will be developed in the next chapters, this is mainly due to the fact that national laws are either not sufficient to counteract the appetite of global media empires to concentrate or are simply non-existent, or perhaps are in the process of being removed. The possibilities offered by Article 21(4) have not been used since the *Newspaper Publishing* case. It looks like Member States will only go counter to the Commission's assessment if the possibility of using Article 21(4) was mentioned expressly in the Commission's decision. Since the Commission has not mentioned this Article again in any other case, Member States could have assumed that the Commission had not found any pluralism concerned and, thus, they felt relinquished of the obligation to act on their own initiative.

Moreover, I disagree with allowing the uninhibited growth of global media empires, euphemistically called "European champions". I believe that the European Union should begin to be concerned with preserving pluralism in European media, taken as a whole and prevent the march towards Euro-gigantism of the likes of Rupert Murdoch. It cannot be denied that at one point it *was* concerned with such developments, when it established the 10% limit for pan-European audience share, in the first draft of the failed media-concentration directive. There is a need for a European instrument to provide for such a solution. National laws are intrinsically unable to do this.

In summary, therefore, despite the forecast that "EU competition policy will continue to be the dominant mode of European-level intervention in the ... TV market for some time to come",[684] one has to agree with the former Competition Commissioner Karel van Miert who said: "I am convinced of a need for European legislation on media concentration. From a democratic point of view, it is necessary. (...) We cannot use competition rules to govern democratic issues".[685]

---

[683] Garzaniti, L., *Telecommunications, broadcasting and the internet*, n. 503, 543.
[684] Levy, D., *Europe's Digital Revolution. Broadcasting Regulation, the EU and the Nation State,* n. 640, 81.
[685] Cited in Harcourt, A., 'The European Commission and Regulation of Media Industry', n. , 447.

5. European tools III: Flaws of fragmentary legislative measures at the EU level

The current political line in the European Union is that the combination of national legislation, EU competition law and EU legislative instruments provides a perfect and balanced solution for the protection of both structural and internal media pluralism in Europe.[686] Leaving the discussion on the validity of this belief aside temporarily, it is important to complete the discussion of the European Union's engagement in the protection of media pluralism with the analysis of existing legislative tools, directly or indirectly offsetting negative consequences of growing media concentration in Europe.

The passion and enthusiasm characterising the European Parliament's engagement in the fight for media pluralism is well known and has already been discussed in Chapter 2.2.1 above. It is the European Commission and the Council who have proven resistant to the Parliament's calls for positive legislative action in this field. Admittedly, in general statements and policy declarations, both the Commission and the Council recognise that there are more aspects to broadcasting than sheer contribution to the economy and job creation ability. In the 1999 Communication "Principles and guidelines for the Community's audiovisual policy in the digital age",[687] the Commission admitted that audiovisual media plays a central role in the functioning of modern democratic societies. And it is the social and cultural role of the audiovisual media that should form the point of departure for policy making and social impact of broadcasting should be central to any regulation.[688] Crucially, the Commission emphasised that:

> "The audiovisual is ... not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry *par excellence*. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities".[689]

---

[686] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253; European Commission, 'Services of general interest (White Paper)', n. 312

[687] European Commission, 'Principles and guidelines for the community's audiovisual policy in the digital age (Communication)', n. 1.

[688] *Ibid.*, 7

[689] *Ibid.*, 8

It follows that broadcasting should be subject to specific regulation based on values such as freedom of expression, pluralism and promotion of cultural and linguistic diversity. The Commission also asserts that the "audiovisual policy of the European Community has incorporated these principles and common objectives" in development of its own regulation of media industry according to the EU's competence, which covers the freedom to provide services and support for the industry.

Similarly, the unique status of the audiovisual sector is underlined in the Council of Ministers' Resolution, of 21 January 2002, on culture and the knowledge society.[690] This resolution emphasises the need to regulate the sector so as to incorporate its cultural, competitive and industrial dimensions at the same time. It also invites the Commission to continue to make a more effective contribution to the development of the audiovisual sector based on the approach that integrates the cultural, competitive and industrial dimensions of the industry.

However, a year after the Council's Resolution, there was a noticeable change in the Commission's position. The Commission issued a Communication on "The future of European regulatory audiovisual policy"[691] in which the most important value seems to be "a clear and predictable policy environment" allowing media companies to plan investment and develop their business strategies. The Commission continues to admit that Community policy in the audiovisual sector supports the paramount objectives of general interest. However, unlike the 1999 Communication, the 2003 Communication does not name media pluralism as one of such objectives[692] and does not perceive the social and cultural role of the audiovisual media as the point of departure for policy making. Instead, this time the Commission asserts that Community policy in the audiovisual sector is mainly aimed at promoting the development of the audiovisual sector in the EU, *through the completion of the Internal Market.*[693] With regard to media pluralism, the Communication admits that at present, secondary Community legislation does not contain any provisions specifically aimed at safeguarding the pluralism of the media. However, it is quick to point out that the protection of

---

[690] Council of the European Union, 'Culture and the knowledge society (Resolution)', 2002/C 32/01.
[691] European Commission, 'The future of European regulatory audiovisual policy (Communication)', COM(2003) 784 final.
[692] The values mentioned are: cultural and linguistic diversity, the protection of minors and human dignity and consumer protection.
[693] European Commission, 'The future of European regulatory audiovisual policy (Communication)', n. 692, 3.

media pluralism is primarily a task for the Member States[694] and Community law *allows* the application of national measures to secure this aim. Moreover, EU competition law and certain provisions of the TVWF Directive contribute to the safeguarding of media pluralism. The 2003 Communication is therefore the best summary of the current policy of the European Commission towards negative effects of excessive media concentration: national measures accompanied by EU competition law and selected EU legislation provide a complete and sufficient legal framework for the protection of media pluralism in Europe.

This view is not changed by the latest emanation of the Commission's policy, the "three-step approach" to the issue of media pluralism.[695] As already mentioned, the steps include: (i) a Commission Staff Working Paper on Media Pluralism;[696] (ii) an independent study on media pluralism; and (iii) a Commission Communication on the indicators for media pluralism in the EU Member States (in 2008), on which a broad public consultation will take place. Although the recognition of the existence of the pluralism issue is a big step forward and this development certainly allows a glimmer of hope for a change in the Commission's approach, one could wish for more. The Staff Working Paper, which has already been published, concludes that the result of the three-step approach will be the identification of indicators of media pluralism in the Member States. It does not mention any possibility for a change in the European legislation in this area and shows the Commission's reluctance to positively engage in this sensitive area.[697] Therefore, the overall conclusion is that the aim of the action is to pull the wool over of the European Parliament's eyes and pretend that the Commission is finally responding to the Parliament's decade of calls for positive action.

As a consequence the following analysis of the existing legislative measures which, according to the Commission's claims, contribute to safeguarding media pluralism at the European level, remains unchanged by the recent policy developments.

---

[694] As observed in the European Commission's Green Paper on services of general interest, n. 283.

[695] See European Commission, DG Media and Information Society, 'Media Pluralism: The need for transparency, freedom and diversity in Europe's media landscape', http://ec.Europa.eu/information_society/media_taskforce/pluralism/index_en.htm (accessed 8 September 2007).

[696] European Commission, 'Media pluralism in the Member States of the European Union (Staff Working Document)', n. 394.

[697] Beunderman, M., 'Brussels reluctant to regulate national media rules', n. 396; Beunderman, M., 'Brussels wary of rules on national media', *BusinessWeek.com*, 18 January 2007.

The aforementioned 1999 Commission Communication "Principles and guidelines for the Community's audiovisual policy in the digital age"[698] sets out principles for the regulation of the audiovisual sector in the era of digitalisation. The Commission declares that it will observe the following six rules when regulating the "new" audiovisual sector: (i) proportionality; (ii) separation of transport and content regulation; (iii) the realisation of general interest objectives, including pluralism and diversity; (iv) recognition of the role of public service broadcasting and the need for transparency in its financing; (v) the complementary role of self-regulation; and (vi) the independence of regulatory authorities.

The principle of the separation of transport and content regulation was realised in the European Union by the adoption of two separate legal frameworks for the audiovisual sector. The "Television Without Frontiers" Directive[699] deals with selected content issues and the 2003 regulatory framework for Electronic Communications and Services[700] regulates transmission through networks. According to the Issues Paper for the Liverpool Audiovisual Conference[701] prepared by Directorate General for the Information Society and Media, both of these instruments contain measures aimed at the active protection of pluralism, both in its structural and internal incarnation.

Table 4 at the end of this chapter summarises and illustrates the current EU-level legislative tools which allegedly support pluralism *actively* and the reasons why, in reality, they fail to achieve this aim.

---

[698] European Commission, 'Principles and guidelines for the community's audiovisual policy in the digital age (Communication)', n. 1.

[699] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ (1997) L 202/60.

[700] The 2003 Regulatory Framework consists of the following directives: Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive); Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

[701] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253.

5.1 Legislative support for structural pluralism

With the failure to adopt a media concentration Directive in the mid 1990s, the winners in the "war of priorities" were those advocating the liberalisation of the broadcasting sector by means of applying the "country of origin principle" and subjecting it to *ex post* regulation by means of competition law. The cultural and social reasons for the need to safeguard structural pluralism in the sector with a special *ex ante* regulation were duly swept under the carpet and dismissed as old-fashioned, inadequate in the current state of technological progress, and all in all – obsolete.

The result of the victory of the of the European Commission's propensity for convergence is the 2003 regulatory framework for Electronic Communications and Services ("**E-Communications Framework**"). This framework consists of five directives known as follows: Framework Directive, Authorisation Directive, Access Directive, Universal Service Directive and Privacy Directive.[702] The E-Communications Framework covers all electronic communications networks, regardless of the kind of services carried over them ("horizontal" approach) and aims at establishing a harmonised regulatory framework for all electronic communications networks and services, across the European Union.[703] This harmonisation is to be achieved in particular by the roll-back of individual licensing for the provision of electronic communications networks, and its replacement by the general authorisation regime provided in the Authorisation Directive. The Framework is, therefore, deregulatory as it "abolishes the burdensome old telecoms licensing system, replacing it with a much lighter weight authorisation regime for all networks and services providing electronic communications *carriage*, including those (e.g. terrestrial, satellite, cable etc.) providing broadcasting content".[704]

In accordance with the principle of the separation of regulation of content and transmission, the Framework does not deal with regulation of content broadcast over electronic communications networks. Therefore, broadcasting content continues "to be regulated

---

[702] See n. 630.

[703] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', Brussels, 14 June 2002, http://ec.Europa.eu/information_society/topics/telecoms/regulatory/digital_broadcasting/documents/onpcom02_14rev1_14062002.pdf (accessed 8 September 2007), 3.

[704] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 19.

'vertically' according to Member States' preferred socio-cultural models".[705] This means that Member States can retain content requirements attached to broadcasting licences. However, in various general policy statements[706] and also in the recitals of the Directives, the Commission claims that the Directives do *take account* of the links between transmission and content regulation, in particular in order to promote media pluralism. Recital 5 of the overarching Framework Directive states that the separation of regulation of content and transmission "does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection". Several aspects of the Directives show that the Commission at least made an attempt to stand by this statement and introduce provisions aimed at safeguarding public interests, other than effective competition in the e-communications sector. The regulation of must-carry rules in the Universal Service Directive does possibly foster internal media pluralism[707] and the rules on access and interoperability are aimed not only at enhancing competition, but also at securing structural media pluralism.

5.1.1 Access remedies

One of the main ideals underlying the E-Communications Framework is that *ex ante* regulation of e-communications networks is gradually rolled back, with the exception of operators who have a significant market power ("**SMP**") in a relevant market.[708] The designation of operators with SMP is carried out by national regulatory authorities ("**NRAs**") following market analysis and in accordance with market dominance tests established in EU competition law. In this sense, Article 14(2) of the Framework Directive provides a definition of SMP and reads:

> "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position

---

[705] *Ibid.*, 19.

[706] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', n. 704, 2.

[707] See Chapter 5.2.1 below for detailed discussion on must-carry rules.

[708] The European Commission issued Guidelines aimed at setting out the principles for use by national regulatory authorities in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services; see European Commission, 'Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services', OJ (2002) C 165/6.

of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers".

This is almost identical to the definition of a dominant position established by the European Court of Justice in its seminal competition cases *United Brands v. Commission* and *Hoffman-La Roche v. Commission.*[709]

The consequence of designating an operator with SMP, is that a national regulator may burden that operator with certain obligations, as set out in the Access and Universal Service Directives. An obligation that is particularly valid from the structural pluralism angle is that of access rights. The Access Directive establishes a regime on providing access to electronic communications networks. Operators with SMP may be obliged to meet reasonable requests for access to, and use of, networks. Associated obligations may include transparency, non-discrimination, accounting separation or price control. The principle, however, is that regulators should only intervene when commercial negotiations fail. In addition, the Access Directive makes an effort to address the issue of bottlenecks created by the existence of conditional access systems ("**CAS**") in the era of digital television.[710] The digital revolution has led to a shift in the location of bottlenecks in the supply chain.[711] In the days of analogue, there was an abundance of content spread out over scarce outlets. Today, outlets are multiplying and content is becoming scarce. Moreover, the existence of CAS resulted in market power moving down the supply chain to the level of household receiving equipment. CAS allows operators to deliver broadcasting services only to consumers that have paid for it.[712] In order to receive digital programmes safeguarded by CAS, a viewer must be equipped with special receiver technology in the form of a set-top-box ("**STB**"). A STB comprises a software called Application Programming Interface ("**API**") and an Electronic Programme Guide ("**EPG**") which allows viewers to navigate between different channels. The positioning

---

[709] In these cases the European Court of Justice defined a dominant position as "a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"; Case 27/76 United Brands v. Commission [1978] ECR 207 at para 65, Case 85/76 Hoffman-La Roche v. Commission [1979] ECR 461at para 38.

[710] For a detailed analysis of challenges posed by the existence of bottlenecks see Helberger, N., *Controlling access to content : regulating conditional access in digital broadcasting*, (Kluwer Law International, 2005).

[711] Cowie, C., Marsden, C.T., 'Convergence, Competition and Regulation' (1998) *International Journal of Communications Law and Policy* 1.

[712] Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', (2006) SCRIPT-ed, 3:3 , 226.

of channels is determined by the owner of the EPG and any bias in listings may seriously influence viewing patterns.[713]

It is, therefore, obvious that vertically integrated operators who own CAS and associated facilities such as APIs and EPGs exercise significant market power and may limit the access of these facilities to newcomers. Thus, restricting competition and also limiting structural media pluralism. For instance, BSkyB in the UK owns a proprietary CAS and controls its own API and EPG. The Access Directive addresses the issue by requiring *all* CAS operators, whether designated with SMP or not, to provide services to other broadcasters on "fair, reasonable and non-discriminatory terms". The Directive also insists that trans-control between CAS providers and other network operators must be possible. This allows, for example, cable operators to directly manage CAS services offered to their own customers.[714] NRAs may also impose obligations on CAS operators to provide access to associated facilities such as APIs and EPGs to the extent that it is necessary to ensure accessibility for end-users to digital radio and television broadcasting services. What the Directive does not regulate is content and presentational issues related to CAS and associated facilities. For instance, rules on the prominence of channels on EPGs are left to the Member States to provide, only if they so wish.

Thus, the access regime has several limitations. First, access remedies will only be imposed on operators designated with SMP, which in the current regime equals market dominance. Secondly, market negotiations between an SMP provider and a newcomer have to take place and subsequently fail, before there is any regulatory intervention. Finally, rules on access to CAS are not complete, as there is a lack of EU regulation on presentational aspects on EPGs and a lack of obligatory rules on interoperability.

5.1.2 Interoperability

With different proprietary CAS and no standardisation of APIs and EPGs, the problems posed by bottlenecks in digital interactive television will persist notwithstanding the possibility of imposing access obligations. The EU's legislative efforts in this area are not promising. The

[713] Cowie, C., Marsden, C.T., 'Convergence, Competition and Regulation', n. 712.
[714] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', n. 704, 13.

now repealed 1995 Advanced Television Standards Directive[715] specified that CAS providers should supply third-party access to their conditional access services on 'fair, reasonable and non-discriminatory' terms. It also obliged national regulatory authorities to ensure that CAS operators do not prohibit set-top-box manufacturers from including a common interface allowing connection with other access systems. However, Humphreys notes that this "was a far cry from mandating the inclusion of a common interface against the wishes of their customers".[716] In addition, the Directive was "so vague as to leave national officials unclear as to what the provisions meant, and as to which needed to be written into national law. The result was that national implementation varied hugely".[717]

Unfortunately, the E-Communications Framework, which replaced the 1995 Advanced Television Standards Directive, does not entirely solve the problem of the lack of standardisation, resulting in the lack of interoperability. The Access Directive obliges CAS operators to provide access to CAS, as well as to APIs and EPGs on "fair, reasonable and non-discriminatory terms". With regard to standards, the Framework Directive is very articulate and promising in Recital 31, which states that "interoperability of digital interactive television services and enhanced digital television equipment, at the level of the consumer, should be encouraged in order to ensure the free flow of information, *media pluralism and cultural diversity*". The recital continues that it is therefore "desirable for consumers to have the capability of receiving all digital interactive television services", regardless of the transmission mode. This is possible only through promoting open APIs which "facilitate interoperability, i.e. the portability of interactive content between delivery mechanisms, and full functionality of this content on enhanced digital television equipment." As a necessary consequence, open APIs are a must.

The Framework Directive, however, does not go as far as to mandate open APIs and common standards. Recital 31 ends with a vague statement that "digital interactive television platform operators should *strive* to implement an API which conforms to standards or specifications adopted by a European standards organization" and that "migration from existing APIs to new open APIs should be *encouraged* and organised, for example by Memoranda of Understanding

---

[715] Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals, OJ (1995) L 281/51.
[716] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 21, 22.
[717] Levy, D., *Europe's Digital Revolution. Broadcasting Regulation, the EU and the Nation State*, n. 640, 73.

between all relevant market players". This is further developed in Article 18 of the Framework Directive which requires Member States to *encourage* the use of open APIs. In accordance with Article 17 of the Framework Directive, the Commission has published a list of standards for electronic communications networks, services and associated facilities,[718] listing Digital Video Broadcasting (DVB) Multimedia Home Platform (MHP) as only a *recommended* standard for API. The Commission did not avail of the possibility to make the standards mandatory. Therefore, again, Member States are required only to *encourage* the use of listed standards. With regard to the commonly used proprietary CAS, paragraph 2 of Article 18 requires Member States to encourage the proprietors of such systems to disclose, for appropriate remuneration, all necessary information enabling other providers of digital TV services to provide all services supported by the API in a fully functional form.

Article 18(3) of the Framework Directive requires the Commission to examine its effects and, if interoperability has not been achieved, to consider mandating the use of listed standards. The most recent assessment of the interoperability of digital interactive television services is summarised in the Commission's Communication of 2 February 2006.[719] The Commission spends a lot of time applauding Italy for the most extensive deployment of interactive set-top-boxes using the MHP standard. The Italian success was basically due to a combination of two factors: the voluntary agreement of Italian broadcasters to use MHP, and the state subsidy scheme for interactive decoders. In other countries, however, the take up of interactive decoders is slow if not non-existent and there is apparently no will on the Commission's side to accelerate the process. On the contrary, the conclusions of the Communication are that there is still "no clear case" for mandating open standards and that at this point of market development mandating EU-wide standards could even have significant negative effects. The way forward is therefore to continue to promote open standards and interoperability. Exactly how this is to be done is, unfortunately, not explained...

Considering the above, I agree with EBU that there may be only one level of interoperability that counts in this case, and that is, the "citizen" level.[720] Interoperability in this respect is

---

[718] European Commission, 'List of standards and/or specifications for electronic communications networks, services and associated facilities and services, replacing all previous versions (Decision)', COM(2006)6364 final.
[719] European Commission, 'Reviewing the interoperability of digital interactive television services pursuant to Communication COM(2004)541of 30 July 2004 (Communication), COM(2006) 37 final.
[720] European Broadcasting Union, 'Comments on the Commission Staff Working Paper on the Interoperability of Digital Interactive Television Services', 20 April 2004,

achieved when viewers can access the full range of available broadcasting services without technological constraint. From this standpoint it is obvious that there is no interoperability in Europe. As emphasised by EBU, equipment made in one country cannot be used to receive services in other countries. In many Member States there are several proprietary systems in use which make access to competitive services, in practical terms, impossible. All of this leads to the situation of European television with technological frontiers.[721] The Commission's approach to the issue is somewhat unfortunate. The EBU rightly suggests that only mandating the use of open APIs, for instance as of the date of digital switchover in 2012, can remedy the problem. The accompanying measures could involve the requirement on labelling decoders equipped with open API and EU-level financial support for interactive decoders. Active promotion of open APIs is the effective way to foster structural media pluralism, as it gives access to broadcasting services offered by many providers, not constraining the viewers to the selection of channels offered by one platform provider.[722]

5.1.3 "Country of origin principle" in the Television Without Frontiers Directive

Discussion on the measures allegedly contributing to fostering structural pluralism in the European Union would not be complete without mentioning the "country of origin principle" introduced by the TVWF Directive. The principle is the cornerstone of the Directive and remains unchanged, if not strengthened, in the new AVMS Directive.

Article 2a of both the TVWF and AVMS Directives provide that "Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive". This leaves only one EU Member State with a jurisdiction over any given broadcaster in Europe. As defined in Article 2, broadcasters find themselves under the jurisdiction of a particular Member State if they are *established* there, or if they use a frequency granted by, satellite capacity appertaining to or they use a satellite up-link situated, in that Member State. This gives broadcasters the legal certainty that they have to comply with only one national legal system. The AVMS Directive extends the benefits of the "country of

---

http://www.ebu.ch/CMSimages/en/leg_pp_interoperability_300404_tcm6-12359.pdf (accessed 8 September 2007).

[721] European Broadcasting Union, 'Comments on the Commission Staff Working Paper on the Interoperability of Digital Interactive Television Services', n. 721, 2.

[722] *Ibid.*, 4.

origin" principle to new non-linear (on-demand) audiovisual services (in particular video on demand).

All of the above means that broadcasters have the freedom to choose the Member State in which they wish to establish themselves. In January 2006, there were around 400 channels in the EU, which specifically targeted a different market.[723] The European Commission believes that the "country of origin" principle contributes not only to the establishment of a competitive Internal Market in audiovisual services in the European Union, but also "should enhance media pluralism and diversity, by opening up national markets to more competition from other EU countries".[724] This is confirmed by one of the first recitals of the new AVMS Directive which states that:

> "the country of origin principle is crucial to the emergence and further development of a pan-European audiovisual market with a strong industry producing European content. Moreover, this principle safeguards the viewer's rights to choose from a wide variety of European programmes, and thus *contributes to media pluralism*".[725]

[723] European Audiovisual Observatory, 'Statistical Yearbook 2006 – Film, television, video and multimedia in Europe'.
[724] European Commission, 'The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions', n. 347.
[725] Draft proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Recital 19a, emphasis added.

5.2 Legislative support for internal pluralism

While the EU support for structural pluralism is, to say the least, limited, there are admittedly some harmonised provisions on content requirements that contribute to fostering internal pluralism in European media. They include must-carry rules regulated by the E-Communications Framework, and several provisions in the Television Without Frontiers Directive (production quotas, list of events and short reporting and the requirement of independence of regulatory authorities).

5.2.1 Must-carry rules in the E-Communications Framework

The ongoing digital revolution has led to a proliferation of the delivery networks and increased bandwidth on those networks. This development should, in theory, lead to increased pluralism and diversity in content, as there is more capacity for more providers to express various voices and ideas in the media.[726] However, as E. Varney observes, just as every revolution, the digital one also has its victims.[727] As discussed earlier, liberalisation and deregulation of the e-communications networks in Europe has led to the private ownership of the means of content transmission. Concentration tendencies of recent years has resulted in the numerous networks with theoretically unlimited capacity, being owned not only by private but also *very few* large media corporations.[728] What follows is the private control of access to networks on market terms, which runs a risk of smaller operators or public service broadcasters not gaining access due to the lack of financial leverage.[729] As analysed above, the dangers this state of affairs creates for structural pluralism, have been to some extent, addressed by the E-

---

[726] Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', in European Audiovisual Observatory, Iris Special: 'To Have or not to Have – Must Carry Rules', 2005, 31; Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', paper presented at SLS Annual Conference in Keele, September 2006 (unpublished), 1.

[727] Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', n. 713, 222.

[728] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 4; see also in general Harcourt, A., *The European Union and the Regulation of Media Markets*, n. 89; Doyle, G., *Media Ownership*, n. 69.

[729] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 4.

Communications Framework which allows Member States to impose access obligations on network operators designated with significant market power.

Equally important, however, is the threat the concentrated ownership of transmission networks poses for internal pluralism. The proliferation of transmission networks means that viewers benefit from a choice of platforms. However once they have chosen a platform, they tend to become locked-in and very rarely change provider. This has led to the fragmentation of universal coverage of certain contents, "which is a basic tenet of the public service element of pluralism".[730] It follows, therefore, that even if digitalisation and the resulting increase in capacity means that the market is indeed able to make diverse content *available*, this does not automatically mean that this content will be universally *accessible*.[731] The remedy to this concern applied by some Member States was to require mainly cable operators to carry certain "public interest" channels "supplying an unencrypted diversity of opinion over the cable bouquet".[732] This method has been transferred by the European Union to the E-Communications Framework. Article 31 of the Universal Service Directive allows Member States to impose must-carry rules in favour of certain public interest channels on certain network providers. Interestingly, although Article 31 deals only with the carriage of certain "public interest" channels and does not impose any specific requirements on content offered by those channels,[733] the regulation of must-carry is necessarily some intervention into content provision, which the E-Communications Framework declares not to do. However, as noted by EBU, the Framework:

> "cannot ignore the links which exist between infrastructure and content, particularly in terms of guaranteeing the pursuit of legitimate general interest objectives such as media pluralism, cultural diversity and consumer protection in the transmission of audiovisual content".[734]

---

[730] Marsden, C.T., 'Pluralism in the multi-channel market - suggestions for regulatory scrutiny' (1999/2000) International Journal of Communications, Law and Policy 4, 23.
[731] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 10.
[732] Marsden, C.T., 'Pluralism in the multi-channel market - suggestions for regulatory scrutiny', n. 660, 23.
[733] European Broadcasting Union, 'Comments on the Eurostrategies Report regarding Must Carry', 26 June 2003, http://www.ebu.ch/CMSimages/en/leg_pp_mustcarry_Eurostrategies_260603_tcm6-4438.pdf (accessed 8 September 2007).
[734] *Ibid.*, 5.

Moreover, an important public interest goal in broadcasting, associated with internal pluralism, is "connectivity". That is, the need to ensure that citizens have universal access to certain information and certain public interest contents.[735] This is particularly vital these days when "the commercial sphere becomes the ultimate arbiter of who is connected in a ... global economy".[736] Furthermore, public service broadcasters, as well as other operators of channels with a public interest potential, have to negotiate access with numerous powerful network operators.[737] Imposing must-carry rules offers an obvious solution to the "universal coverage" issue as they have "the potential to lead to a diverse range of material being available to viewers on all broadcasting networks.[738] Overall therefore, must carry obligations seem "a logical and necessary measure in the *transmission* layer in order to achieve [all the] public policy goals set at the *content* level".[739]

Having established the rationale behind the must-carry rules, it is interesting to have a closer look at how the E-Communication Framework regulates this matter. As mentioned above, the rules on must-carry are laid down by the Universal Service Directive. Article 31 develops general policy statement on the rationale of must-carry provided by recital 43[740] and declares that:

> "Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of

---

[735] Collins, R., 'Realising Social Goals in Connectivity and Content' in Marsden, C.T. (ed) *Regulating the Information Society* (Routledge, 2000), 108; see also Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', n. 713, 231.

[736] Rifkin, J., *The Age of Access*, (Penguin Putnam, New York 2001), 230.

[737] Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', n. 713, 231.

[738] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', (2004/2005) *Utilities Law Review* 14, 113.

[739] Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727 32.

[740] Recital 43 of the Universal Service Directive: 'Currently, Member States impose certain 'must carry' obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review. 'Must carry' obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such 'must carry' obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.'

radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review."

Consequently, must-carry obligations must first and foremost be reasonable, that is to say, they must be proportionate and transparent "in the light of clearly defined public interest objectives".[741] Therefore, as interpreted by the European Commission in two Working Documents,[742] before any must-carry obligation can be imposed and accepted as "reasonable", a range of complex requirements must be fulfilled.[743] These are with regard to (i) undertakings burdened with must-carry, (ii) channels benefiting from must-carry, and (iii) transparency and proportionality of the imposition of the must-carry obligation.

(i) Which undertakings can be burdened?

A broadcasting value chain consists generally speaking of three levels: content providers, service providers (or "packagers") and network providers.[744] These days, the three roles may be provided by two or three separate undertakings, but also more and more often by one vertically integrated company. For instance, BSkyB has its own Sky channels and is a service provider – a packager of channels, but it does not control the satellite network that carries Sky channels as this is operated by the Astra satellite. On the other hand, Irish cable company Chorus used to fulfill all three functions: it had its own channel, Chorus Sports,[745] it packaged and offered bouquets of channels and owned its own cable network.

---

[741] Roukens, T., 'What are we carrying across the EU these days? Comments on the interpretation and practical implementation of Article 31 of the Universal Service Directive', in European Audiovisual Observatory, Iris Special: 'To Have or not to Have – Must Carry Rules,' 2005, 10.

[742] European Commission 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', n. 704; European Commission, 'Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', Brussels, 22 July 2003, http://ec.Europa.eu/information_society/topics/telecoms/regulatory/digital_broadcasting/documents/onp_dbeg_doc_re_must_carry.PDF (accessed 8 September 2007).

[743] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 114.

[744] Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727, 36.

[745] The channel was closed in January 2007.

Article 31 makes it clear that must-carry obligations may be imposed on operators located at only one level of the broadcasting value chain: *network operators*. Recital 44 of the Directive explains that networks include cable, satellite and terrestrial broadcasting as well as other networks, such as DSL, "to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts". As clarified by recital 45, must-carry obligations should not be imposed on service providers.[746] Moreover, not all network providers may be subject to a must-carry obligation. First of all, Member States may impose must-carry obligations only on network operators under their jurisdiction. And secondly, only on operators of those networks which are used by a significant number of end-users as their principal means to receive radio and television broadcasts.

In addition, as explained by the European Commission,[747] Article 31 of the Universal Service Directive does not give broadcast content providers access to associated facilities, such CAS, API or EPG. As explained above, access to such facilities is regulated by the Access Directive which requires *all* CAS operators, whether designated with SMP or not, to provide these services on "fair, reasonable and non-discriminatory terms to any requesting broadcaster, including the one benefiting from a must-carry regime". Therefore, even though network operators might be obliged to carry certain channels, "if the channels require access to CAS, API and EPG, they must still negotiate for access to these facilities under market conditions"[748] and pay for the access, which represents a significant cost for broadcasters who are granted must-carry status.[749] Admittedly, currently must-carry channels tend to appear on first positions on the EPG, because they are usually the popular public service channels generating a significant audience. However, the popularity of those channels is not guaranteed

---

[746] Recital 45 of the Universal Service Directive: 'Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services'.

[747] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', n. 704; European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743.

[748] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 121.

[749] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 7.

and is not time-resistant. To leave the issue unregulated means possibly jeopardising the favoured EPG positioning of must-carry channels in the future.

(ii) Which channels benefit?

Article 31 of the Universal Service Directive allows Member States to impose must-carry obligations, for the transmission of *specified*, i.e. clearly identified in advance, radio and television broadcasts channels and services.[750] Moreover, the channels benefiting from must-carry must meet certain, clearly defined *general interest* objectives. Recital 43 explicitly states that one of the public interest motives behind the imposition of "must-carry" obligations may be the transmission of services designed to enable appropriate access by disabled users. Other than that, the Directive does not specify what exactly it means that a channel pursues a general interest. It is the analysis of the Commission's approach to must-carry rules that is actually imposed by the Member States on the basis of Article 31 that allows certain conclusions to be drawn.

Neither the Directive itself nor the accompanying Working Documents and Notices require that only public service broadcasters may benefit from must-carry status. The Working Document on must-carry obligations explains only that the general interest objectives pursued by beneficiary channels should be *"clearly defined"* and they will *"normally include considerations linked to pluralism or cultural diversity"*.[751] The Working Paper goes as far as to say that these considerations are not, *per se,* limited to radio and television broadcasts of public service broadcasters. Nevertheless, it is obvious, and it has been confirmed by the ECJ's case-law, that the support of public service broadcasters will generally be considered to be in the general interest.[752] In fact, most of the Member States have imposed must-carry obligations in favour of the core *public service* channels.[753] For instance, in Ireland the must

---

[750] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', n. 704.
[751] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.1.
[752] See for instance state aid cases Case NN88/89 *BBC News,* Case NN 631/01 *BBC Licence Fee;* see also Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 119.
[753] *Ibid.*, 114.

carry television channels on cable are RTE1, Network 2, TV3 and TG4.[754] In the UK the must carry channels on both analogue and digital cable are the BBC channels, Channel 3 (ITV) and Channel 4.[755] All of these channels are either public service broadcasters (RTE, Network 2, TG4, BBC) or with some PSB obligations (TV3, ITV, Channel 4).

However, although the Commission has expressly vowed that it would not limit the must-carry status to public service channels, the reality proved somewhat different. Some Member States have encountered opposition from the European Commission to the imposition of must-carry status in favour of channels without any explicit public interest obligations. The Commission used the well known ECJ statement that "economic considerations would not be considered general interest obligations"[756] to oppose certain Dutch and Belgian must-carry channels as incompatible with the public interest requirement enshrined in Article 31.[757] Both countries have imposed extensive must-carry obligations in favour of, not only public service broadcasters, but also commercial channels, without any specifically assigned public service remit. The Belgian government justified the imposition of must-carry obligations in favour of some non-PSB channels with the need to "reflect the linguistic and cultural diversity of Belgian society".[758] Although the Commission seems to acknowledge these reasons,[759] it is still investigating whether the Belgian rules are compatible with Article 31. The situation is even more solemn in the Netherlands where there is practically no linguistic or cultural diversity justification for the imposition of must-carry rules in favour of certain smaller commercial channels which could fail if it were not for the must-carry status. The Commission will most probably view the rationale for must-carry in this case as economic and not "in general public interest" and declare the rules incompatible with Article 31. It seems, therefore,

---

[754] See document of the Irish Commission for Communications Regulation (ComReg), 'Television Transmission Licensing For Cable and MMDS Systems', available at: http://www.comreg.ie/_fileupload/publications/odtr9863.pdf (accessed 28 April 2008).

[755] Section 64 of the Communications Act, 2003.

[756] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.1; see Case C-211/91, *Commission v. Belgium* [1992], ECR I-6757.

[757] European Commission, 'New round of infringement proceedings in electronic communications: What are the issues?', MEMO/06/371, 12 October 2006.

[758] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 14.

[759] European Commission, Annex to the 11th Report on the European Electronic Communications Regulation and Markets, 2005, SEC(2006)193, 85.

that the European Commission leans towards a very narrow definition of "public interest" in relation to channels which may possibly benefit from the must-carry status.[760]

(iii) Transparency and Proportionality

Article 31 allows Member States to impose *reasonable* and *proportionate* must-carry rules in a *transparent* fashion. The transparency requirement is closely related to the condition that must-carry rules must be *specified.* It is relatively easy to fulfil by simply publishing the networks that are burdened by and the channels benefiting from the must-carry obligations in a legislative act[761] or on the regulator's website.[762] It must, however, be borne in mind that mentioning broadcasting organisations and not specific channels, or leaving it to the *ad hoc* decision of a regulator to grant a must-carry status, would most probably not pass the transparency test.[763]

It is the requirement of reasonableness and proportionality that poses more difficulty. The Commission's Working Documents highlight that the principle of proportionality is well-established in Community law and that "in order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim..."[764] The Commission further explains that the disproportionality of the imposition of must-carry rules may derive from the nature of networks burdened, too high a number of benefiting channels and the lack of remuneration.

To begin with, the Commission noted that the imposition of must-carry rules on other networks other than cable, satellite and terrestrial (e.g. 3G mobile networks or DSL) would be disproportionate at the present stage of technological and market development. This is

---

[760] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 15.

[761] For instance Article 63 of the Communications Act 2003 in the United Kingdom.

[762] See for instance the website of the Irish telecommunications regulator – Commission for Communications Regulation www.comreg.ie.

[763] Roukens, T., 'What are we carrying across the EU these days? Comments on the interpretation and practical implementation of Article 31 of the Universal Service Directive', n. 742, 14.

[764] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.2.

primarily because the vast majority of viewers are expected to use traditional networks for reception of broadcasting for some time to come.[765] The imposition of must-carry obligations on those "new" networks will only be legitimate once a significant number of viewers begin using them as the principal means to receive radio and television broadcasts.

Secondly, the Commission explained that the situation in which the number of channels and services benefiting from must-carry status actually constrained the capacity of a burdened network, this would most probably be regarded as disproportionate.[766]

Finally, and rather controversially, the Commission notes that remuneration can be one means of ensuring that the universal access to specified channels and services guaranteed by must-carry is secured in an economically efficient way, and therefore would be proportionate.[767] As M. Varney notes, "must-carry is the area where the interplay between two vital constitutional issues is at stake: on the one hand lies freedom of expression and media pluralism, while on the other lies broadcaster's right to private property".[768] The European Commission's original plan was to allow Member States to impose must-carry obligations, but only and where necessary and with a compensation obligation attached. However, the remuneration requirement was removed during the consultation period for the Universal Service Directive.[769]

There is therefore no *obligation* on Member States to require remuneration for network operators in return for must carry obligations. However, as noted by the Commission, Article 31 may be read as *implying* that "under specific circumstances some form of remuneration should be provided in order for the must-carry obligation to be considered proportionate or reasonable".[770]

---

[765] European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting' (Working Document), n. 633, 11.
[766] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.2
[767] *Ibid.*
[768] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 114.
[769] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 19.
[770] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.2

This argument has been strengthened by the report prepared by Eurostrategies for the Commission, which asserts that it is *logical* for must-carry broadcasters to pay for the benefit they receive for cable carriage.[771] This is because commercial negotiations between cable operators and must-carry broadcasters are generally biased in the broadcasters' favour. The report suggests that the Commission should issue guidelines for the remuneration of the carriage service. Some argue that the Report is the Commission's attempt to encourage Member States to provide for the remuneration of must-carry in every instance, despite the wording of Article 31 to the contrary.[772] Many reject the Eurostrategies line of reasoning.[773] The argument is that cable is a local monopoly wherever it exists in Europe, and there is little competition between platforms at end-user level due to the lock-in effect. Moreover, through market consolidation most markets in Europe are left with two digital platform operators (one satellite and one cable, with cable holding dominant position). This means that, especially when mirrored with must-offer, commercial negotiations between the cable operator and must-carry broadcasters, is biased in the *cable operators' favour.* The truth is that cable operators do not really need the money for transport of must-carry channel and government's support for cable may come in other ways such as reduced VAT rates.[774] But for channels benefiting from must-carry, any money they have to pay cable companies for carrying their channels will no longer be available for investment in diverse and quality programmes.[775]

Finally to ensure that the existing must-carry rules *remain* reasonable and proportionate, Article 31 requires Member States to subject their must-carry rules to *periodic* review. In the Working Document on must-carry the Commission states:

> "The obligation to review must-carry regime on a regular basis should encourage Member States to re-evaluate the need for and scope of must-carry rules and, in particular, regularly assess, taking into account technology and market developments and the views of

---

[771] Eurostrategies, 'Assessment of Member States Measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communications networks and services in the context of the new regulatory framework (Report)', March 2003, http://ec.Europa.eu/information_society/topics/telecoms/regulatory/studies/documents/finrep_18_march_2003.pdf (accessed 8 September 2007), 12, emphasis added.

[772] Roukens, T., 'What are we carrying across the EU these days? Comments on the interpretation and practical implementation of Article 31 of the Universal Service Directive', n. 742, 15.

[773] European Broadcasting Union, 'Comments on the Eurostrategies Report regarding Must Carry', n. 734.

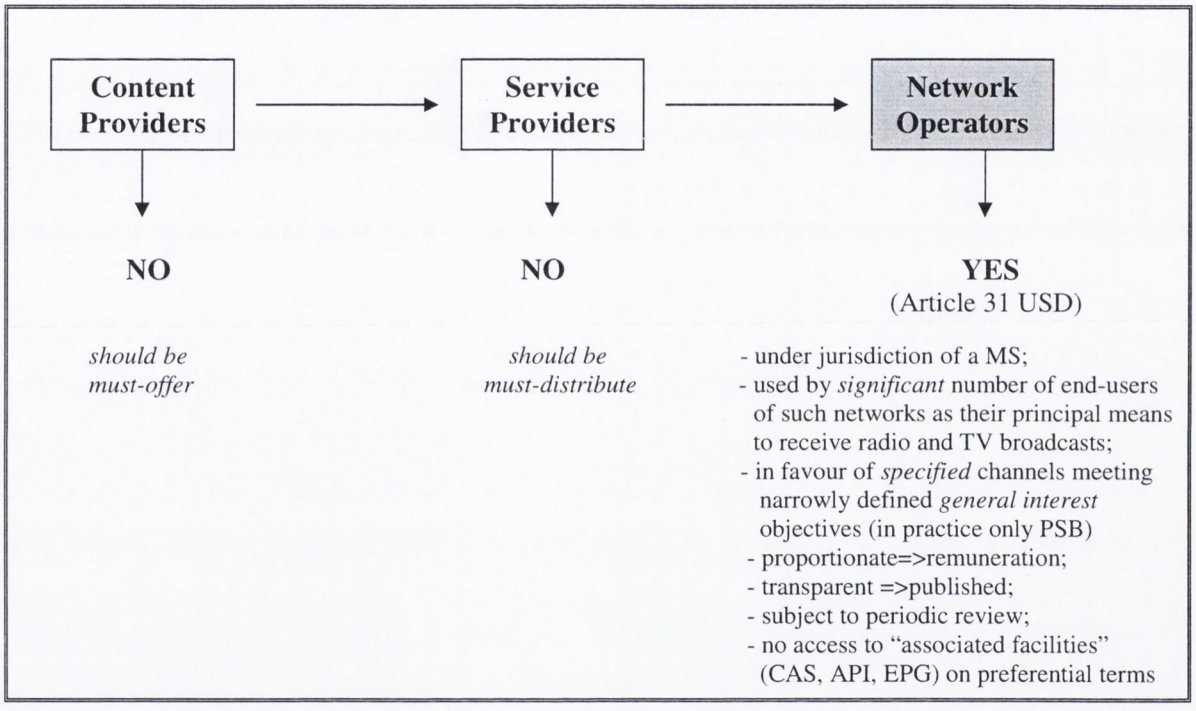
[774] *Ibid.*, 12.

[775] *Ibid.*, 2.

interested parties, whether such rules still match the necessity and proportionality requirements."[776]

The implication is that Member States will gradually phase out the must-carry obligations which the Commission seems to view as an anomaly in the digital era.[777] Table 2. below, illustrates the EU must-carry regime as regulated by the Universal Service Directive.

Table 2. EU rules on must-carry in the broadcasting value chain:[778]



(iv) Weaknesses in the EU must-carry system

It must be observed at the outset, that contrary to some claims, must-carry rules will not become obsolete in the digital broadcasting era, since in the jungle of hundreds of channels there will still be a requirement to ensure the universal coverage of general interest content.

---

[776] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.

[777] Arino, M., Valcke, P., 'The future (or non-future) of must-carry', *OfcomWatch*, 11 April 2005, http://www.OFCOMwatch.co.uk/2005/04/future-or-non-future-of-must-carry (accessed 8 September 2007); Roukens, T., 'What are we carrying across the EU these days? Comments on the interpretation and practical implementation of Article 31 of the Universal Service Directive', n. 742, 14.

[778] Based on Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727, 36.

However, what the imminent switch to digital broadcasting does bring is the need for reform. Must-carry rules must be changed and adjusted, but not abandoned. The three areas which require particular attention in this regard are: (i) a too narrow definition of "public interest" currently applied by the Commission; (ii) no preferential access for must-carry broadcasters to "associated facilities"; and (iii) the need to complement the must-carry system with must-offer and must-distribute rules.

- *A too narrow definition of "public interest"*

First of all, as has already been discussed above, the European Commission seems to lean towards a very narrow definition of "public interest" in relation to channels which may possibly benefit from must-carry status.[779] Although, it has officially vowed not to limit the must-carry status to public service broadcasters,[780] the reality, however, proved much different. The result is that many public service channels benefit from must-carry status even though they would be carried by cable operators anyway. Furthermore, new commercial channels under current regime are denied the benefit of must-carry status, even though they could just as easily as PSBs, contribute to the promotion and development of local culture and language, but often encounter problems in gaining access to the cable.[781] A must-carry regime which endorses only PSB channels or channels with some public service remit is necessarily very shallow and limited, no matter how good the public service broadcasters' channels actually are.[782] Therefore, M. Varney warns that "if such a narrow interpretation of Article 31 is reached, then it seems likely that the must-carry regime in Europe is destined to be a very limited one that will be ineffective in delivering enhanced pluralism and diversity".[783]

---

[779] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 15.
[780] European Commission, ''Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', n. 743, section 1.2.2.1.
[781] Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727, 33.
[782] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 14.
[783] *Ibid.*, 14.

- No preferential access to associated facilities

As explained above, the current EU system of must-carry does not guarantee the must-carry beneficiaries any preferential access to "associated facilities" in digital broadcasting such as CAS, API or EPG. It is regulated by a "normal" regime based on access on a "fair, reasonable and non-discriminatory" basis. This solution is a serious oversight, as negotiations merely on the basis of fair, reasonable and non-discriminatory access rules run the serious risk of being unsuccessful.[784] And it is very likely that at some point all broadcasters will need access to the technical facilities in order to facilitate digital broadcasting.[785] Therefore, the fact that currently the EU must-carry regime does not envisage an obligation on the network provider to provide must-carry beneficiaries, with access to associated facilities on preferential terms (without charge, or for a heavily reduced fee), "reduces the effectiveness of the must carry obligations".[786] The EBU has suggested remedying the situation by amending the first sentence of Article 31(1) of the Universal Service Directive so as to allow Member States to impose must-carry obligations on either network providers, or providers of conditional access and other associated facilities.[787]

The problem of the lack of preferential access to associated facilities for must-carry channels is particularly relevant in countries which impose must-offer obligations on certain broadcasters without mirroring them with must-carry benefits. Must-offer "sits on the opposite side to must-carry" as it requires particular channels, usually the public service ones, to offer their services on *all* delivery platforms.[788] The upside of must-offer is universal coverage of public service channels regardless of the delivery mode chosen by a viewer. The downside, however, is that channels burdened with must-offer conditions that are not mirrored with must-carry, have to negotiate for access to the technical facilities on market terms, placing the

---

[784] European Broadcasting Union, 'Proposed EU Regulatory Framework for Electronic Communications. EBU comments for the European Parliament's second reading', http://www.ebu.ch/CMSimages/en/leg_pp_communications_261001_tcm6-4369.pdf (accessed 8 September 2007).

[785] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 121.

[786] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 8.

[787] European Broadcasting Union, 'Proposed EU Regulatory Framework for Electronic Communications. EBU comments for the European Parliament's second reading', n. 785.

[788] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 122.

network operator in an advantageous position.[789] The recent Eurostrategies report ordered by the Commission argues that "...must offer may distort negotiations between network operators and broadcasters, to the benefit of network operators".[790] Since Articles 5 and 6 of the Access Directive clearly provide that access to associated facilities must be *negotiated*, Member States cannot mandate access to these facilities at a rate below the market rate. Even if commercial negotiations fail, regulators may only intervene in order to allow access on "fair, reasonable and non-discriminatory terms".[791] M. Varney observes that operators of associated facilities are unlikely to "make endeavours to facilitate access for channels which may not have the same ability or willingness to pay as mainstream commercial competitors."[792]

The United Kingdom is one of the Member States which imposes a must-offer on public service broadcasters without mirroring it with a must-carry on every platform.[793] Public service broadcasters are obliged to provide their services on BSkyB's satellite platform, but BSkyB is not burdened with must-carry obligations.[794] BSkyB levies charges for access to its platform, and in particular it charges the public service broadcasters for use of a proprietary CAS, as if they were pay channels using it to collect subscriptions, rather than being obliged to purchase conditional access primarily to meet their obligations to provide regional services.[795] This obviously creates an unequal negotiating position between the broadcasters and BSkyB. During the drafting of the current Communications Act 2003, public service broadcasters lobbied for matching "must offer" with "must carry" on BSkyB, that is, to require it not only to carry the PSB channels, but also to make available on preferential terms all facilities

---

[789] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 122.

[790] Eurostrategies, 'Assessment of Member States Measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communications networks and services in the context of the new regulatory framework (Report)', n. 772, 75.

[791] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 122.

[792] *Ibid.*, 123.

[793] It is worth noting that the UK is one of relatively few EU Member States not singled out in the most recent Commission report on implementation as being investigated for a potential breach of Article 31, see Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 19.

[794] Compare Section 64 of the Communications Act 2003, which regulates must-carry on *network operators* with Section 273 of the Communications Act 2003, which regulates must-offer on *network operators* and *satellite television services*.

[795] BBC, 'Memorandum to the Joint Committee on The Draft Communications Bill', http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2062002.htm (accessed 8 September 2007).

required to ensure that audiences receive them.[796] This has not materialised and BSkyB gets paid for carrying channels it currently needs anyway.[797] While this is still the case it shows some reason in calculating the fees, even though it could probably go higher, given the fact that PSBs are under statutory obligation to have their channels present on Sky. Still, in the future when channels multiply and BSkyB will not be in a desperate need to carry the PSB channels, failure to mirror must-offer with must-carry could result in a significant increase in fees. It is worth noting that in Ireland, the second Member State in which BSkyB is present, there are no must-offer obligations on public service broadcasters. Cable operators are burdened with must-carry of the PSB channels, and BSkyB carries them anyway since it would not generate subscriptions otherwise.

However, the greatest difficulty with the idea of mirroring must-offer with must-carry on Sky is that the must-carry regime applies to *network operators*. And while BSkyB is a service provider, Astra is the satellite operator – which is a network provider. And because its satellite uplink and the ownership of the relevant satellite capacity is situated in Luxembourg,[798] the network is outside the jurisdiction of the UK. This is vital as Article 31 of the Universal Service Directive allows Member States to impose must-carry obligations upon

> "...undertakings *under their jurisdiction*[799] providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts."

---

[796] BBC, 'Memorandum to the Joint Committee on The Draft Communications Bill', http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2062002.htm (accessed 8 September 2007).

[797] In Ireland Sky offers 'Bonus Mix' package with every purchase, which includes *inter alia* RTE One, RTE Two, TV3, TG4, BBC One, BBC Two and Channel 4 – the channels Sky needs anyway if it is to count for any sales in Ireland; see http://www.sky.com/portal/site/ireland (accessed 8 September 2007).

[798] Barendt, E.M., Hitchens, L.P., *Media Law: Text, Cases and Materials*, (Longman, London 2000), 97; Humprheys, P., *Mass Media and Media Policy in Western* Europe (Manchester University Press, 1996), 168-169; for a perspective on the private law issues see Robertson, G., Nicol, A. *Media Law*, 4th Edition, n. 210, 837-840.

[799] Jurisdiction is determined by Article 2 of the 'Television Without Frontiers Directive' – Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23 as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202/60. The activities of British Sky Broadcasting are covered by both paragraphs 3 and 4 of Article 2, rendering jurisdiction in Luxembourg's hands.

This means that the largest digital broadcaster in the UK, with over a 50%[800] share of the market for digital television viewers, is not caught by the must-carry provisions. This is one of the major weaknesses of the current must carry regime and has been extensively criticised.[801]

- *The need to complement must-carry with must-offer and must-distribute*

The solution to the problem with the likes of BSkyB who escape the must-carry regime is to apply a "layered approach" as suggested by Valcke.[802] She believes that there should be a switch-in approach to the must-carry regime. Rather than being treated as an issue involving only PSBs and cable operators, must-carry rules should be made part of a global concept of "universal service obligations with regard to content".[803] Therefore, Valcke recommends that safeguards should be built in at every level of the broadcasting value chain. Certain content providers should be burdened with must-offer obligations, which should be mirrored by must-distribute obligations on service providers (such as BSkyB) and must-carry obligations on network operators. This would solve the jurisdiction issues with the must-carry regime and would offer a comprehensive safeguard for universal coverage of content serving the "public interest".

(v) Overall conclusions on must-carry

In summary, I agree with M. Varney that "an examination of the operation of the provisions in Article 31 reveals what is a relatively weak protection for pluralism and diversity"[804] In fact, the narrow interpretation of "public interest", coupled with no preferential access to associated facilities and the Commission's insistence on remuneration as a guarantee of proportionality

---

[800] OFCOM, 'The Communications Market 2004. Television', http://www.ofcom.org.uk/research/cm/cmpdf/cmr04_print/tele.pdf (accessed 8 September 2007), 17.

[801] See for instance, Cowling, J. 'Winner Takes All' *Media World*, 1 January 2004; Gibson, O. 'Davies Hits Out over Satellite Coverage' *The Guardian*, 25 November 2002; Didizian, M., Romer, J. 'The Communications Bill – The Place of the BBC', (2003) Computer and Telecommunications Law Review 9(4) 95, 98; Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727, 31-40.

[802] Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', n. 727, 36.

[803] *Ibid.*, 36.

[804] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 123.

allow the conclusion that, despite being social in concept, the EU must-carry rules do not offer much more than the economic rights of access.[805] The narrow approach adopted by the European Commission towards the must-carry rules prevents the Member States from expanding the lists of must-carry channels beyond the obvious public service broadcasters. The result of the outright exclusion of smaller commercial channels with obvious quality but with no public service remit may be, that viewers will have access to a basic package of public service channels on whatever platform they choose, but there will be little value added to pluralism and diversity.

Obviously, must-carry rules are only one of the weapons available in the armory of the defenders of pluralism and diversity of media.[806] However, if the weapon is not constructed properly it will not fire properly, and it will be ineffective in the battle for media pluralism and diversity. Therefore, due to the many flaws of the current EU system of must-carry, the Commission's claim that the rules are one of the mechanisms of *actively* safeguarding pluralism, unfortunately appears to be false.

5.2.2 Measures supporting internal pluralism in the Television Without Frontiers Directive

In several recent statements, the European Commission has declared that because the European Union is committed to protecting media pluralism as well as the right to information and freedom of expression, the Television Without Frontiers Directive contains several measures which *actively* promote internal media pluralism.[807] Indeed, the new AVMS Directive will only strengthen this contribution.[808] The Commission claims that after the first reading in the European Parliament and in the Council, in December 2006 there is now "a broad agreement with the Commission about the future legal framework for Europe's

---

[805] Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', n. 739, 123; Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 228, 229.

[806] Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', n. 727, 23.

[807] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253; European Commission, 'Why and how Europe seeks pluralism in audiovisual media', http://ec.Europa.eu/information_society/services/doc_temp/tvwf-sht5_en.pdf (accessed 8 September 2007).

[808] European Commission, 'The Commission Proposal for a Modernisation of the Television Without Frontiers Directive: Frequently Asked Questions', n. 347.

audiovisual sector" and that the AVMS Directive reaffirms the pillars of Europe's audiovisual model, which are, *inter alia,* cultural diversity and media pluralism.[809] The Commission boasts that "the new Directive enhances media pluralism in the 27 EU Member States by opening up national media markets to more competition from other EU countries and by facilitating a diversified offer of TV- and audiovisual on-demand content from all over Europe".[810] According to Commissioner Reding, the adoption of the Directive will mean that "Europe's new legal framework for a more competitive, more diverse and more pluralistic audiovisual sector is now within reach".

Meanwhile, the first 1989 version of the Television Without Frontiers Directive declares in one of the recitals that "it is essential for the Member States to ensure the prevention of any acts which may ... promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole".[811] The AVMS Directive replaces this recital by the following two:

> "(3) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services";
>
> and

"(28) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the European Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the European Union.

---

[809] European Commission, 'Boosting the Diversity of European TV and On-Demand services: Commission paves the way for the new Directive 'Audiovisual without Frontiers', press release IP/07/311.
[810] *Ibid* .
[811] Recital 16 of the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0552:EN:NOT (accessed 28 April 2008).

It is notable that the following recital present in the previous draft has disappeared from the AVMS Directive:

(47a) Cultural diversity, freedom of expression and media pluralism of means of communication are some important aspects of the European audiovisual sector and are therefore preconditions for democracy and diversity.[812]

These general declarations from the recitals are, according to the Commission's statements,[813] given concrete meaning in the substantive part of the Directive in the form of regulation of (i) broadcasting of events of major importance and short reporting, (ii) independent and European production quotas, and (iii) independence of national regulatory authorities.

(i) Broadcasting of events of major importance and short reporting

In the era of digitalisation and conditional access, the acquisition of exclusive rights to popular events became the standard practice of pay-TV broadcasters. The acquisition of exclusive rights to the Premier League football tournament by BSkyB serves as the prime example. The risks that this carries are the "information divide" or a "digital divide" – "splitting society into groups with different levels of access to information".[814] The EU legislation tries to tackle this problem by regulating must-carry rules (as discussed above) and by introducing the possibility of Member States to draw up a list of events which have to be shown on widely accessible free-TV. It must be noted that the list may only include organised events and not films or documentaries which are subject to copyright law.[815] The solution was first introduced in the 1997 version of the TVWF Directive,[816] following an extended pressure from the European

---

[812] See Draft Audiovisual Media Services Directive, Consolidated Text including EP First Reading amendments accepted in full and the amended Commission proposal http://ec.Europa.eu/avpolicy/docs/reg/modernisation/proposal_2005/avmsd_cons_amend_030_en.pdf (accessed 8 September 2007).

[813] See European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253; European Commission, 'Why and how Europe seeks pluralism in audiovisual media', n. 735; European Commission, 'The Commission Proposal for a Modernisation of the Television Without Frontiers Directive: Frequently Asked Questions', n. 347.

[814] Schoental, M., 'Major Events and Reporting Rights', IRIS-plus, 2006-04.

[815] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', (2006) Entertainment Law Review, 2, 70-80.

[816] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ (1997) L 202/60.

Parliament.[817] The Parliament's initial ambitious proposal was to introduce a binding EU list of basic events which should be accessible to all European viewers with an option for Member States to extend the list if they so wished. Not surprisingly, the suggestion did not materialise due to claims of breaches of the principles proportionality and subsidiarity.[818] Member States are the only subjects responsible for drafting the lists and they have full discretion whether to prepare such a list or not. The Commission's role is limited to approving the lists and ordering their publication in the Official Journal. The result of the compromise was the introduction of Article 3a to the text of the TVWF Directive (in the current AVMS Directive it is Article 3j), which states that:

> "Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society..."

Despite the extended discussions and major political heat surrounding the introduction of Article 3a, only eight Member States, out of 27, have notified their lists so far.[819] Most, but not all, of the listed events relate to sport. As noted by Commissioner Reding, "all of the lists notified contain the Olympic Games – though in Ireland only the Summer Olympics – and a variety of football events. For other Member States, the lists take into account national interests like the Giro d'Italia in Italy, the Derby in the UK or skiing events in Austria".[820] Table 3 below illustrates the events of major importance listed by Member States pursuant to Article 3a. In paragraph 3, the Article introduces the concept of the "mutual recognition of the

---

[817] European Parliament, Resolution of 22 May 1996 on the broadcasting of sports events, OJ (1996) C 166; European Parliament, Committee on Culture, Youth, Education and the Media (Rapporteur: Galeote Quecedo, G.), Recommendation for second reading on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive amending Directive 89/552/EEC, A4 - 0346/96; see also Schoental, M., 'Major Events and Reporting Rights', n. 815.

[818] Schoental, M., 'Major Events and Reporting Rights', n. 815.

[819] Denmark was the ninth Member State, but it has withdrawn its list.

[820] Reding, V., 'Sport and Television: Ready to Face New Challenges? ', Sportel Monaco, 11 October 2004, SPEECH/04/448, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/448&format=HTML&aged=1&language=EN&guiLanguage=en (accessed 8 September 2007).

lists of events of major importance" by requiring Member States to: "... ensure ... that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters ... in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State."

For instance, if hypothetically BSkyB, which is under the jurisdiction of the United Kingdom, purchased the exclusive rights to broadcast the All-Ireland Senior Inter-County Football and Hurling Finals, which is an event listed by Ireland, it is up to United Kingdom to ensure that BSkyB allows the finals to be shown on free TV in Ireland. The concrete example of the functioning of the "mutual recognition" principle comes in the form of the House of Lords judgment *R. v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd.*[821] The case was decided before Denmark withdrew its notification of the list of events of major importance. One of the events included in Denmark's list were all football matches involving the Danish men's football team. TV Danmark 1, a pay-TV operator broadcasting via cable and satellite in Denmark, but registered in the UK, acquired exclusive rights to broadcast Denmark's Football World Cup qualifying matches and intended to show the matches in an encrypted form. The United Kingdom objected on the basis of Article 3a(3). This is despite the fact that TV Danmark 1 was regarded as a free-TV operator in Denmark due to its 60% coverage. The UK's regulator, however, believed that in order for Article 3a to be observed, at least 90% of the public needs access to the listed events. The decision of the regulator[822] was upheld by the House of Lords and not objected to by the European Commission.[823] The judgment provides a valuable example not only of the application of Article 3a(3), but also sheds a light on what is to be understood as the notion of the *"substantial proportion of the public"*.

Overall, Article 3a may be said to have introduced a "new category of universal service", as the basic concept behind the article is "to limit the exclusive exploitation of transmission rights for the sake of a general public interest in the wide accessibility of certain content".[824]

---

[821] *R. v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd*, [2001] UKHL 42.
[822] Then the Independent Television Commission (ITC) – now merged into OFCOM.
[823] Schoental, M., 'Major Events and Reporting Rights', n. 815.
[824] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', n. 816.

Moreover, the existence of lists may indirectly lead to increased internal pluralism in free-to-air television. As noted by Schoental, major events, and in particular sports events, "guarantee high viewing figures, which in turn mean substantial advertising revenue and good publicity for the broadcaster. This also leads to larger audiences for other programmers that are advertised during the sports broadcasts".[825] Free-to-air broadcasters have more money to invest in other innovative quality programming such as documentaries and films and as a result audiences have free access to diverse content. All these arguments, led Commissioner Reding to believe that "Article 3a of the Directive is useful, necessary, effective and proportionate"[826] and that is why it is undoubtedly a tool that actively promotes pluralism at EU level.

It is worth mentioning that the idea of a pan-European list of events of major importance for European society returned during discussions on the revision of the Television Without Frontiers Directive.[827] The idea of such a list was suggested by some public service broadcasters, who were concerned with the necessity of marketing certain rights on a territorial basis. However, there was no consensus as to how to define at European level the notion of "a substantial proportion of the public" and by and large, the proposal "met with widespread scepticism".[828] The regulation, therefore, remained unchanged because the overall conclusion of the Commission was that "the concept of a European list would have no value added as the present concept of the Directive leaves it to the Member States to designate events of major importance owing to national and regional cultural and societal specifities".[829] It is probably still too early to expect the Commission to acknowledge, even to a limited extent, the existence of a "European society".

---

[825] Schoental, M., 'Major Events and Reporting Rights', n. 815.
[826] Reding, V., 'Sport and Television: Ready to Face New Challenges?', n. 821.
[827] European Commission, 'The future of European regulatory audiovisual policy (Communication)', n. 692.
[828] *Ibid.*
[829] *Ibid.*

Table 3. Events of major importance listed by the Member States pursuant to Article 3a of the Television Without Frontiers Directive [830]

Country	Event
Austria	Summer and Winter Olympic Games; FIFA World Cup football matches (for men) if the Austrian national team is involved, as well as the opening match, the semi-finals and the final of the football World Cup (for men); European Championship football matches (for men) if the Austrian national team is involved, as well as the opening match, the semi-finals and the final of the football European Championship (for men); The final of the Austrian Football Cup; FIS World Alpine skiing championships; World Nordic skiing championships; The Vienna Philharmonic Orchestra's New Year Concert; The Vienna Opera Ball
Belgium	Summer and Winter Olympic Games; Belgian Football Cup Final (men), live and in full; All matches involving the Belgian men's football team; Football World Cup Finals (men); European Football Championship, final round (men); Champion's League, matches involving Belgian clubs; UEFA Cup, matches involving Belgian clubs; Tour de France, men, professional; Liège-Bastogne-Liège; Amstel Gold Race; Tour of Flanders; Paris-Roubaix; Milan-San Remo; Belgian Road Cycling Championships, professional (men); World Road Cycling Championships, professional (men); Ivo Van Damme Memorial; Belgian Formula 1 Grand Prix; The following Grand Slam tennis tournaments: Roland Garros and Wimbledon, quarter finals, semi finals and finals involving a Belgian player; The Davis Cup and the Fed Cup, quarter finals, semi finals and finals involving the Belgian team; Queen Elisabeth Music Competition, the final; La Flèche wallonne; World Athletics Championships, where Belgian athletes are taking part
Finland	Summer and winter Olympic Games, the opening match, quarter-finals, semi-finals and final of the World Cup as well as the matches of the Finnish team in that tournament, men's Ice Hockey World Championships, organized by the International Ice Hockey Federation (IIHF), Nordic World Ski Championships (cross-country skiing, ski jumping and Nordic combined), organized by the International Ski Federation (FIS), World Championships in Athletics, organised by the International Association of Athletics Federations (IAAF), and the European Athletics Championships, organised by the European Athletics Association (EAA)
France	Summer and winter Olympic Games, the opening match, semi-finals and final of the football World Cup as well as the semi-finals and final of the European Football Championship, the official matches of the French national football team in the FIFA calendar, the final of the UEFA Cup, where a French club involved in one of the French championships is playing, the French football Cup final and the final of the football Champions' League, The French Rugby Championship final, the European Rugby Cup final where a French club involved in one of the French championships is playing, the Six Nations rugby tournament, and the semi-finals and final of the Rugby World Cup
Germany	Summer and Winter Olympic Games, All European Championship and World Cup matches involving the German National Football Team, as well as the opening match, the Semi-finals and Finals The Semi-finals and Final of the German FA Cup; The German National Football Team's home and away matches; The Final of any European Football club competition (Champions League, UEFA Cup) involving a German club
Ireland	***Live broadcasting:*** The Summer Olympics; The All-Ireland Senior Inter-County Football and Hurling Finals; Ireland's home and away qualifying games in the European Football Championship and the FIFA World Cup Tournaments; Ireland's games in the European Football Championship Finals Tournament and the FIFA World Cup Finals Tournament; The opening games, the Semi-finals and Final of the European Football Championship Finals and the FIFA World Cup Finals Tournament; Ireland's games in the Rugby World Cup Finals Tournament; The Irish Grand National and the Irish Derby; The Nations Cup at the Dublin Horse Show; ***Coverage on a deferred basis:*** Each of Ireland's games in the Six Nations Rugby Football Championship
Italy	Olympic Games (summer and winter games); The Football World Cup Final and all matches involving the Italian national team; The European Football Championship Final and all matches involving the Italian national team; All matches involving the Italian National Football Team, at home and away, in official competitions; The Final and the Semi-finals of the Champions' League and the UEFA Cup where an Italian team is involved; The Tour of Italy (Giro d'Italia) cycling competition; The Formula One Italian Grand Prix; The San Remo Italian music festival
United Kingdom	***Group A (full live coverage):*** Olympic Games (summer and winter games); The FA World Cup Finals Tournament; The European Football Championship Finals Tournament; The FA Cup Final; The Scottish FA Cup Final (in Scotland); The Grand National Steeplechase; The Derby; The Wimbledon Tennis Finals; The Rugby League Challenge Cup Final; The Rugby World Cup Final; ***Group B (adequate secondary coverage):*** Cricket test matches played in England; Non-Finals played in the Wimbledon Tournament; All other matches in the Rugby World Cup Finals Tournament; Six Nations Rugby Tournament matches involving the United Kingdom's National Teams (England, Scotland, Wales, Northern Ireland); The Commonwealth Games; The World Athletics Championship; The Cricket World Cup — the Finals, Semi-finals and matches involving the United Kingdom's National Teams (England, Scotland, Wales, Northern Ireland); The Ryder Cup; The Open Golf Championship;

[830] Source: European Commission, http://ec.Europa.eu/comm/avpolicy/reg/tvwf/implementation/events_list/index_en.htm (accessed 8 September 2007).

While the model of the lists of events of major importance is well embedded in EU law, the access of "secondary" broadcasters to short extracts from newsworthy events has not been regulated at the EU level, until recently. That is, however, not to say that there was no European regulation whatsoever on this issue. Article 9 of the Council of Europe's Convention on Transfrontier Television[831] has paved the way for "short reporting" rights in Europe. The Article urges Member States of the Council of Europe to:

> "where necessary, take legal measures such as introducing the right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission".

This led many Member States to introduce "short reporting" rights into their national legislation, which in turn presented a case for harmonisation at EU level. This is just one of the examples of the Council of Europe's ability to influence legislation in the European Union. The new AVMS Directive ads Article 3k, which requires Member States to ensure that for the purposes of short news reports, any broadcaster established in the EU must have access on a fair, reasonable and non-discriminatory basis, to the extract from broadcasts of events of *high interest* to the public, which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. Examples of events to which access is guaranteed by Article 3k include less important sports and cultural events, as well as "newsworthy events such as a report about an accident, a natural disaster, or an armed conflict".[832] Recital 27 clarifies further that short extracts should not exceed 90 seconds and should be transmitted before the event concludes, or for sports events before the end of a single day's play - whichever is the sooner. The Article does not mention whether short reporting rights may also include access to the site of event and a negative interpretation dictates that there is no such right provided by the AVMS Directive. The Council of Europe is, however, deliberating whether Article 9 of the Convention on Transfrontier Television should be complemented, so as to encompass the right

[831] European Convention on Transfrontier Television, Strasbourg 5 May 1989, European Treaty Series No.132.
[832] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', n. 816.

of secondary broadcasters to enter the site of event.[833] Should this happen, the European Union may again be inspired.

It is notable, that whereas the lists of events only apply to events of "major importance" to society, it is sufficient that the event is of "high interest to the public" for the short reporting rights to be applicable.[834] Listed events require a stricter test, since they are to be accessible *in full* on free TV. Moreover, Helberger observes, that unlike the lists concept, short reporting rights do not remove the exclusivity of the transmission rights.[835] Instead, the effect of Article 3b is similar to an exception to copyright law – the exercise of exclusive transmission rights is subject to limitations created by the right to short reporting.

Before the introduction of Article 3k, some authors[836] expressed concerns that even with the time limit the "short reporting" rules may be liberally interpreted and may lead to abuses. The example of Austria was given, where hour long sports programmes were created based entirely on broadcasting a number of "short extracts" followed by a studio discussion.[837] My instinctive answer to those concerns has been "limit the 'short reporting' rights to news programmes only" and I was glad to see that Article 3b of the new AVMS Directive does exactly that by saying that the short extracts may "be used exclusively for general news programmes". The rights of "primary" broadcasters are further protected by the right to compensation for the costs incurred (Article 3k(5)).

Overall, the idea of "lists of events of major importance" and short reporting rights is valuable and worth keeping in mind. However, it has some critical weaknesses. Not all Member States assumed it was necessary to draft and submit a list. And it is difficult to believe that only in eight European societies there are events of such importance that they should be available on free TV. Moreover, because viewers are not involved in the list-making process,[838] it is the

---

[833] Council of Europe, Report of the group of specialists on the democratic and social implications of digital broadcasting (MM-S-DB), 8th meeting, 6-8 October 2003, http://www.coe.int/t/e/human_rights/media/1_intergovernmental_co%2Doperation/archives/mm-s-db(2003)008_en.asp#topofpage (accessed 8 September 2007).

[834] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', n. 816.

[835] *Ibid.*

[836] Schoental, M., 'Major Events and Reporting Rights', n. 815.

[837] *Ibid.*, 7.

[838] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', n. 816.

state which decides whether a list ought to be drafted at all, and if it did, which events should be included. Had the viewers been consulted, the end result could have been quite different. In this regard, Helberger observes that the right to short reporting is more flexible than the concept of a list of important events and there are potentially more events that can be subject to a right to short reporting as they are not restricted to a predefined list.[839] Nevertheless, the biggest problem is that contrary to the Commission's claims, neither the lists of events nor the short reporting rights are tools *actively* promoting internal media pluralism at the EU level. Both concepts are mainly concerned with guaranteeing everybody equal access to information and therefore they only, to a very limited extent, contribute to internal media pluralism.

(ii) Independent and Euro*pean production quotas*

While Articles 3j and 3k of the AVMS Directive are concerned mainly with the right to information and have, at best, only indirect effect on internal media pluralism. Articles 4 and 5 deal with European and independent production quotas respectively, and are specifically designed to protect cultural values, for example media pluralism and diversity.

Article 4 requires Member States "to ensure where practicable and by appropriate means, that broadcasters reserve for European works ... *a majority* proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping". European works are defined in Article 6 as: (i) works originating from Member States; (ii) works originating from European third States party to the European Convention on Transfrontier Television; and (iii) works co-produced in the framework of agreements between the European Community and third countries, and which fulfil the conditions defined in each of these agreements. The European works quota has been introduced primarily as one of the remedies against swamping European television with cheap American imports.[840] Article 5 on the other hand, obliges Member States, again where practicable and by appropriate means, to ensure that broadcasters reserve *at least 10%* of their transmission time or, this time alternatively also programming budget, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping for European works

[839] Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', n. 816.
[840] McGonagle, M., *Media law*, n. 8, 417.

created *recently* by producers who are independent of broadcasters. While recent works are defined as those, less than five years old, the notion of "independent producer" is not defined in the Directive and is left to the discretion of the Member States. Recital 49 of the AVMS Directive gives only a general indication that when defining the term "independent producer", Member States should take account of the ownership and proprietary rights of the production company and the number of programmes provided to the same broadcaster.

Member States are required to provide the Commission with a bi-annual report on the application of Articles 4 and 5, including statistics on the achievement of the quotas, the reasons for the failure to attain the quotas and the measures adopted or envisaged in order to achieve them. On the basis of the country reports the Commission prepares its own summary report. The latest, which is the seventh report by the Commission on the application of Article 4 and 5, dates from August 2006 and covers the period from 2003 to 2004. The report highlights that the total number of reported channels[841] covered by Articles 4 and 5 increased from 584 in 2003 to 767 in 2004. The EU-average transmission time reserved for European works was 65.18% in 2003 and fell slightly in 2004 to 63.32%. The EU-average proportion reserved for European works by independent producers was approximately 31% in both referenced years. Both indicators suggest that Member States went significantly over the minimum quotas provided for in Articles 4 and 5. Therefore, on the face of it, it looked like both measures would provide a powerful tool in the EU quest to be the campaigner for internal media pluralism in the European media industry.

Nevertheless, the quota system has many enemies. Their arguments centre on the questioning of the two main reasons for independent production quotas, that is: i) the tendency of independent producers to select projects that have a higher innovative content than those promoted by big networks; and (ii) the reduction of the risk of vertical integration and the risk

[841] Reported channels are all channels excluding local channels, non-operative channels and exempted channels (news, sports events, games, advertising, teletext services or teleshopping; or exempted otherwise), see European Commission, 'Background documents to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC 'Television without Frontiers', as amended by Directive 97/36/EC, for the period 2003-2004', COM(2006) 459 final.

of market foreclosure.[842] Opponents of the quota system reject the first reason on the grounds that:

> "the production of programmes is a very risky activity and a TV group may be in a better position than small producers to promote innovative projects, since it may be able to spread its risk over many different projects ...[and] it may also have a clearer idea about what projects the market will accept". [843]

The second "sectoral" aim of the quota system can be just as effectively achieved by competition law which is "less distortionary than making use of quotas".[844]

Bearing this in mind, the Commission considered the need to revise Articles 4 and 5 during the revision process of the TVWF Directive. Issues Paper No 3 for the Liverpool Audiovisual Conference in September 2005, dealt with cultural diversity and the promotion of European and independent audiovisual production.[845] The starting point of the Issues Paper was the conclusion that the quotas provided for in Articles 4 and 5, "appear still to be valid in substance" since, as evidenced by the latest Commission report on the application of Articles 4 and 5, transmissions of European works have grown consistently, which proves that the two Articles have achieved cultural objectives and contributed to strengthening of the European audiovisual industry. This seems to rebut the claims of the opponents to the system that quotas constitute a "disproportionate restriction on broadcasters' scheduling freedom"[846] and that "European consumer demand will in any case ensure a high level of original content on screen".[847]

The Commission provided stakeholders with several issues regarding Articles 4 and 5, which may require adapting or reforming in the new media environment. They included: (i)

---

[842] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 325.
[843] *Ibid.*, 325.
[844] *Ibid.*, 325.
[845] European Commission, 'Cultural diversity and the promotion of European and independent audiovisual production', Issues Paper, n. 210.
[846] Association of Commercial Television in Europe, 'Response to Issues Paper 3 for the Liverpool Audiovisual Conference 2005 on 'Cultural Diversity and Promotion of European and Audiovisual Production'', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip3-act.pdf (accessed 28 August 2007).
[847] *Ibid.*

extension of the quota system to non-linear services; (ii) the strengthening of monitoring of the application of Articles 4 and 5; (iii) the encouragement for broadcasting of non-national European works; and (iv) an EU level definition of an "independent producer".[848]

With regard to the extension of the quota system to non-linear services, the Commission considered that there should be a signal sent by the European Union that new non-linear services will be expected to contribute to the promotion of European works.[849] In the end, however, the AVMS Directive only mentions the European works quota for non-linear services in one of the recitals. Recital 48 declares that non-linear audiovisual media services have the potential to partially replace linear services, and therefore, they should promote the production and distribution of European works and actively contribute to the promotion of cultural diversity. The caveat is that this promotion and contribution should only take place "where practicable". The recital provides some examples of the support: a minimum share of European works proportionate to economic performance, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides.

Further, the reason the Commission considered strengthening the monitoring of the application of Articles 4 and 5 was that there are often significant differences between Member States as regards the nature and intensity of checks.[850] Moreover, in previous consultations many broadcasters and producers expressed concerns that national monitoring and enforcement of the EU production quota requirements is relatively relaxed.[851] The adherence to the quotas is not systematically monitored, many of the regulatory authorities do not apply sanctions against channels that fail to meet the quotas and there are often inconsistencies between the data submitted by Member States and the data collected independently.[852] In addition, due to the non-binding wording of Articles 4 and 5 ("where practicable") the application and

---

[848] European Commission, 'Cultural Diversity and Promotion of European and Audiovisual Production', Issues Paper for the Liverpool Audiovisual Conference, July 2005, http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/ispa_cultdiv_en.pdf (accessed 8 September 2007).

[849] *Ibid.*, 2.

[850] European Commission, 'Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC 'Television without Frontiers', as amended by Directive 97/36/EC, for the period 2003-2004, 14 August 2006', COM/2006/0459 final.

[851] European Commission, 'Cultural Diversity and Promotion of European and Audiovisual Production', Issues Paper, n. 849, 3.

[852] Feintuck, M., Varney, M., *Media regulation, public interest and the law*, n. 7, 216.

monitoring of the quota system is only as effective as a Member State wishes it to be. Some Member States continue to exempt a large number of channels from the quota requirements for very unclear reasons. Examples include Italy exempting satellite channels and the United Kingdom, where only PSBs are burdened with quotas, leaving other providers, such as BSkyB, free from the quota obligations. This means, that the European Union is not going far enough in the enforcement of the quota system.

In the Issues Paper No 3, the Commission proposed to address the problems associated with monitoring, by revising the "Suggested guidelines for the monitoring of the implementation of Articles 4 and 5" of 11 June 1999.[853] The revision would include inserting an obligation for an independent audit of Member States' statistical statements before their submission to the European Commission. In addition, there would be a requirement for efficient imposition of sanctions of cases of non-compliance or non-reporting. In addition, some stakeholders[854] suggested that the overall effectiveness of the quotas is questioned not only by poor monitoring and sanctioning, but more generally, by the non-binding nature of the system caused by the existence of the "where practicable" clause. Some broadcasters used the clause to find a "loophole" in the Directive. As explained by Tongue:

> "BSkyB has been allowed to use a loophole [created by the 'where practicable' clause] placed in the TVWF Directive by Margaret Thatcher ... In the past, BSkyB has claimed that adherence to EU quotas was impracticable because the satellite channel was still not profitable. This is clearly no longer the case. [Still] BSkyB relies heavily on imported programming and commissions little work from local independent producers. It makes about 14,000 first-run hours, mostly in sport and news production – none of which counts as far as the TVWF quota is concerned".[855]

The suggestion was therefore, not only to strengthen monitoring, but also to remove the words "where practicable" from the text of Articles 4 and 5. However, so far, there has been no

---

[853] European Commission, 'Suggested guidelines for the monitoring of the implementation of Articles 4 and 5', 11 June 1999, http://ec.Europa.eu/comm/avpolicy/docs/reg/tvwf/eu_works/controle45_en.pdf (accessed 8 September 2007).
[854] Endemol, International Federation of Actors (FIA), European Coordination of Independent Producers (CEPI).
[855] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 120.

amendment to the "Suggested guidelines" and the "where practicable" clause is still firmly in place in the AVMS Directive.

Further, the Commission was concerned with limited trade in non-national European works:

> "Article 4 may have reinforced national objectives to protect and encourage the domestic content sector rather than fostering a truly European market in programming and encouraging the exchange/circulation of European TV programmes within Europe".[856]

The suggestions to remedy this scenario included creating incentives for the increased distribution of European co-productions as well as encouraging the circulation of European works of non-domestic origin. Again, as with almost all previous suggestions for reform, the issue was addressed in the AVMS Directive in one of the recitals only. Recital 50 only recommends that Member States should make provision for broadcasters to include an adequate share of co-produced European works or of European works of non-domestic origin. One of the reasons for this cautious approach, could have been a concern that any positive encouragement of the circulation of non-domestic European works could run counter Article 12 of the EC Treaty which prohibits any discrimination on grounds of nationality.[857]

A final, although probably most important, suggestion for a reform presented by the Commission during consultation process, was the need to have a European-level definition of an "independent producer". The Commission pondered whether the clarification of the concept of "independent producer" would lead to a more uniform application of Article 5.

Despite the extended consultation, the end result can be described as nothing less than "much ado about nothing". The AVMS Directive does not include a binding EU-level definition of an "independent producer". As has already been mentioned, Recital 49 provides Member States only with limited guidance, recommending that "in defining the term 'independent producer', Member States shall take account notably of the ownership and proprietary rights of the production firm and of the number of programmes provided to the same broadcaster".

---

[856] European Commission, 'Cultural Diversity and Promotion of European and Audiovisual Production', Issues Paper, n. 849, 4.
[857] *Ibid.*, 5.

Moreover, although the criteria for definition have been moved from recitals in TVWF Directive to the body of AVMS Directive, there was not much of a change in the actual wording. During the consultation process, the Commission was suggested changing the wording so as to include a phrase "*at least* the following three criteria".[858] This has not materialised, although now the AVMS Directive leaves out the words "such as" before enumerating the criteria for definition. This may or may not suggest that the Commission would recommend *all three* criteria to be used. Much uncertainty still remains.

Overall, therefore, despite significant support from a number of stakeholders,[859] the new AVMS Directive, only to a limited extent, addresses the issues concerning the quota system that were discussed during the revision process. The Commission apparently followed the advice of the stakeholders, who opposed any changes or even advocating for gradual weakening of the quota requirements.[860]

Moreover, some stakeholders[861] raised one other issue which requires attention and which was conspicuously missing in the Commission's consultation process of the revision of the TVWF Directive. The issue is the actual percentage of the quotas, especially the independent production quota. It was argued that some Member States introduced 25% quota of independent production[862] and in the UK this was actually lowered from the initial proposal of 40%.[863] The argument was that there is no reason that other Member States cannot follow this example and, therefore, there is a need to raise the European independent production quota to 25% of *programming budget*. This has not only failed to materialise, but has not even been discussed.

---

[858] European Commission, 'Cultural Diversity and Promotion of European and Audiovisual Production', Issues Paper, n. 775, emphasis added.

[859] See written contributions to the Public Consultation for the review of the Television without Frontiers Directive, e.g. Endemol, FIA, UK Film Council, European Film Companies Alliance (EFCA), CEPI, http://ec.Europa.eu/comm/avpolicy/reg/tvwf/modernisation/consultation_2005/contributions/index_en.htm (accessed 8 September 2007).

[860] Examples include Association of Commercial Television in Europe (ACT) or Fox.

[861] Endemol, CEPI, EFCA.

[862] The United Kingdom, Ireland, Denmark, The Netherlands, Austria.

[863] European Coordination of Independent Producers (CEPI), 'Contribution to the 2003 public consultation on the review of the Television Without Frontiers Directive', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/2003_review/contributions/wc_cepi.pdf (accessed 8 September 2007).

In summary, therefore, while in theory the quota system has probably the greatest potential to be a tool actively fostering internal media pluralism in European media, it has a range of weaknesses which prevent it from being such a tool in practice. The percentages should be higher, non-binding wording should be abandoned, independent producers should be defined, monitoring and enforcement should be strengthened and non-domestic circulation of European works promoted. And as neither of these suggestions materialised in the AVMS Directive, the Commission's claims that the quotas *actively* promote pluralism at the EU level, are a little overstated.

(iii) Independence of national regulatory authorities

Finally, it is worth mentioning that the European Commission believes that the proper exercise of independent regulatory powers, such as awarding licences, programme monitoring or adopting codes of practice, is vital to ensuring pluralism.[864] Therefore, Recital 65 of the AVMS Directive states the obvious that, "regulators should be independent from national governments as well as from audiovisual media service providers in order to be able to carry out their work impartially and transparently and to contribute to pluralism". Article 23a requires Member States to establish national regulatory bodies and institutions, and to guarantee their independence and to ensure that they exercise their powers impartially and transparently.

While this is clearly laudable and one cannot complain about this development, it is quite interesting that, after almost 10 years of the functioning of the TVWF Directive, the Commission still found it necessary to remind Member States about this obvious fact. The examples of countries like Poland or Italy[865] may provide some answers to the question, "why".

[864] European Commission, 'The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions', n. 347.
[865] For a detailed discussion see Chapter 6 below.

5.2.3 Subsidising European audiovisual production – MEDIA programme

A necessary response to requiring broadcasters to adhere to independent production quotas must be to subsidise the European audiovisual production. It is all the more important in the digital era. The development of digital television in Europe led to a multiplication of channels, but it has not been accompanied by the abundance of new European audiovisual content. The newly created broadcasting capacity has been filled mainly with cheap American imports. The result is that currently, as defined by Jacques Delors, European television is for the most part "a [European] viewer watching an American programme on a Japanese television set".[866] There is a multiplicity of distribution channels, but there is no diversity on offer. Therefore, one of the techniques suggested by Gibbons as possible alternatives to media ownership regulation was "to target programme production and supply in order to guarantee diversity of output", in order to ensure that the supply of content "does not fall into too few hands".[867]

In addition, Tongue warns that unless the EU invests more in the production of diverse content, "the digital age will be a failure for all, except the Hollywood studios".[868] And instead of passing a flourishing European culture to the next generations, we will pass nothing on but a monoculture.[869] She argues that the current digital age has actually reduced diversity, instead of creating it and that "...developments over the last decade have proved that technological progress cannot be translated into *real* progress without more investment in TV programmes".[870]

The fight against diminishing internal pluralism in European television caused by the invasion of cheap American imports is, therefore, a fight for pluralism and diversity on the one hand and for the heart and soul of Europe on the other:

---

[866] Fraser, M.W., 'Television', in Kassim, H., Menon, A., *The European Union and National Industrial Policy*, (Routledge, 1996), 204.
[867] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 171.
[868] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 101.
[869] *Ibid.*, 106.
[870] *Ibid.*, 101.

"in Europe, we have less to learn from the American social model, and more to learn from our European partners. It is time that we started getting to know them, and we can begin by watching more of their programmes and less American TV".[871]

Tongue believes that the European deficit in trade in television broadcasting programmes with the United States and the resulting diminished diversity is a clear example of market failure.[872] Culture is a positive merit and it needs to be defended against market forces. It, therefore, calls for a regulatory intervention.

The Commission's response was to launch the so called MEDIA[873] programme to finance the development of the European audiovisual industry. The first programme was initiated in January 1991 and since then there have been four multiannual programmes: MEDIA I (1991-1995), MEDIA II (1996-2000), MEDIA Plus (2001-2006) and MEDIA 2007 (2007-2013). The current MEDIA 2007 programme has a budget of 755 million Euro, an increase from 453 million Euro in the previous MEDIA Plus.[874] There are three main objectives of the current programme: (i) to strive for a stronger European audiovisual sector, reflecting and respecting Europe's cultural identity and heritage; (ii) to increase the circulation of European audiovisual works inside and outside the European Union; and (iii) to strengthen the competitiveness of the European audiovisual sector by facilitating access to financing. MEDIA 2007 provides support in five main areas: professional training (in screenwriting, business and new technologies), project development, distribution and promotion of European audiovisual works and pilot projects. Interested parties, that is producers of film, television, animation, new media companies, distribution and sales companies training bodies or film schools and promotional events or festival organisers,[875] may apply for financing to a MEDIA office in one of the Member States. In the cinema sector, the programme seems to be achieving some success. The German film "The Lives of Others" ("Das Leben der Anderen") by Florian Henckel von Donnersmarck, which benefited from the MEDIA initiative won an Oscar for the

---

[871] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 127.
[872] *Ibid.*, 125.
[873] MEDIA: Mesures pour Encourager le Development de l'Industrie Audiovisuelle (Measures to Encourage the Development of the Audiovisual Industry); see http://ec.Europa.eu/information_society/media/index_en.htm (accessed 8 September 2007).
[874] Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), OJ (2006) L 327/12.
[875] MEDIA Desk Ireland, http://www.iftn.ie/mediadesk/index.html (accessed 8 September 2007).

best foreign language film at the 2007 Academy Awards ceremony. The 500,000 Euro of EU funding helped to boost the distribution of the film in cinemas and on DVDs outside Germany.[876]

With regard to the television broadcasting sector, MEDIA 2007 offers support for the production stage of fiction, documentary, and animated films involving the co-operation of broadcasters from two or more Member States that belong to different language zones.[877] Half of the production budget financed by European sources must be in place before application is made for MEDIA support. The MEDIA 2007 programme assistance will only cover up to 12.5% of the production budget for fiction and animated films and 20% of the production budget for documentary films, with the maximum financial contribution awarded not exceeding 500,000 Euro for each work.[878]

Some believe that subsidising the broadcasting production may be a better way to achieve diversity than regulating media ownership or audience share. For instance, Hitchens notes that:

> "the use of grants and subsidies to enable independent alternative or community media groups to operate might be much more likely to encourage diversity than the encouragement of a competitive environment which will do little more than enable yet another profit motivated company to enter the media field."[879]

I believe that the MEDIA programme would be a perfect supplement to media concentration legislation that would ensure that there is a multiplicity of operators present who may benefit from financial support for the production of new and original content. I do not think one can *replace* the other. There is a need for safeguards for both the internal and external faces of pluralism in the television sector. Furthermore, the MEDIA programme, however laudable and necessary, is still rather modestly financed[880] and it does not have a significant impact on diversity of content available on European television. The European Film Companies Alliance (EFCA) has noted that while, at theatrical level, the MEDIA programme provides a valuable

---

[876] 'EU claims a bit of Oscars glamour', *EU Business*, 26 February 2007.
[877] MEDIA Desk Ireland, n. 876.
[878] *Ibid.*
[879] Hitchens, L.P. 'Media Ownership and Control: A European Approach', n. 264.
[880] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 9.

contribution to the cross-border distribution of European works, it had very little effect on television: "the quantity of non-national European programmes available to viewers across the EU is incredibly low and the situation seems to be getting worse.[881]

There is, therefore, no reason for the Commission to rest on its laurels and feel satisfied that it has done everything it possibly can to secure diversity in the European broadcasting content.

5.3 Overall conclusions on legislative EU measures supporting media pluralism

The comments on the EU legislative measures directly or indirectly contributing to safeguarding media pluralism may be summarised in one sentence: there are some measures present, however they are flawed, fragmented and insufficient.

This applies in particular to safeguards for structural media pluralism. First of all, there are still no EU rules on the concentration of media ownership. The Commission claims that "the discussion on media pluralism is often focused on questions relating to media ownership [and] one should not forget other important aspects".[882] While this is obviously true, the Commission is forgetting the media ownership aspect to begin with. It is very interesting to note that the Commission expressly recognises pluralism and diversity as one of the aims of regulation at the EU level, and still consequently refuses to regulate media concentration. Secondly, the other rules contributing to a larger or lesser extent to structural media pluralism are economic in focus and have only a passing effect on media pluralism. Access rights regulated in the Access Directive apply only in situations where an operator is designated with significant market power. Therefore, they are effective only in situations of dominance and they have an inevitable *ex post* effect, which for media pluralism, is far from ideal. The E-Communications framework also fails to take action in terms of securing interoperability, as there are no binding EU standards on CAS and APIs. As aptly described by Humphreys:

---

[881] European Film Companies Alliance (EFCA), 'Contribution to the public consultation on the revision of the 'Television without frontiers' Directive launched by the European Commission ahead of the Liverpool Audiovisual Conference',
http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip3-efca.pdf (accessed 8 September 2007).

[882] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253.

"The European Commission abdicated from the responsibility to regulate for either common standards on access terms for digital TV networks and instead chose to defer to the decisions of an industry grouping – the Digital Video Broadcasting (DVB) project. This group reached agreement only over a common European digital transmission standard, but provided no common standard for conditional access systems. This allowed the market players to develop their own proprietary systems and resulted in the emergence of a fragmented European digital TV market, characterised by incompatible conditional access systems in different national or linguistic areas".[883]

Finally, the country of origin principle which is the cornerstone of the TVWF Directive, can indeed contribute to structural pluralism. However, it can also lead to situations where operators purposefully locate themselves in countries with liberal regulatory regimes and thus avoid more strict regulations in countries to which they actually intend to broadcast. The example of BSkyB licensed in the UK and broadcasting to Ireland is one of the most prominent ones. Similar practices have caused serious concerns among the defenders of media pluralism in Europe. The result is the introduction of an infringement procedure in the new AVMS Directive.

Article 3 clarifies that Member States are free to require media service providers under their jurisdiction to comply with more detailed, or stricter rules *in the areas covered by this Directive.* Article, 3(2)(c) specifies that where a Member State considers that a broadcaster under the jurisdiction of another Member State takes advantage of the Directive in an abusive or fraudulent manner in order to circumvent such stricter rules, it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution. Within two months of the request, the Member State with jurisdiction over the broadcaster shall inform the requesting Member State of the results obtained. If the requesting Member State is not satisfied with the result and it is *certain* that the that the media service provider concerned has established itself in the Member State having jurisdiction in order *solely* to avoid the stricter rules, it may adopt appropriate measures against the operator in question. The Commission must be informed about every step of the procedure and it has already clarified that "the mere fact that a service provider does not offer services in the Member State in which it is

[883] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 20.

established, cannot in itself be considered an abuse of this principle".[884] Such abuse has in fact, been defined very narrowly by the Commission as taking place only "if the audiovisual service provider's choice of establishment could be shown to have been made for the purpose of fraudulently avoiding national rules that would otherwise have applied to it".

Leaving aside the obvious difficulty, if not impossibility, of proving fraudulent intent, the infringement procedure will not be applicable to the cases, where media ownership rules are avoided, as this is not covered by the Directive. Moreover, the European Court of Justice openly allowed for the circumvention of media ownership rules by relocating to countries with more liberal regimes. For instance, all the rules, set by the Broadcasting Commission of Ireland apply to media operators under Irish jurisdiction. Therefore, even if, for example, BSkyB gains a substantive market and audience share in Ireland, the BCI will not be able to take any corrective steps because it is not the regulator which licensed BSkyB.

Turning now to measures supporting internal media pluralism, these are admittedly more numerous and with a more specific public interest focus. Still, the picture arising is that internal media pluralism is safeguarded at the EU level in an inconsistent and incoherent manner and it is assembled in a fairly random way. The flaws of must-carry, as already explained, centre on too narrow definition of public interest, no preferential access to associated facilities, and the fact that they should be implemented with must-offer and must-distribute rules on other levels of the broadcasting value chain. Lists of events and short reporting rights focus on citizens' right of information, and only in an indirect manner contribute to media pluralism. Finally, the production quotas have probably the greatest potential, but they too have their shortcomings in that they are non-binding (the unfortunate "where practicable" clause), they are too modest (if the UK can have 25% independent production quota, why can't the others?) and it is poorly monitored, executed and sanctioned. With regard to the MEDIA programme, it is laudable, but still rather modestly financed and it has, in practice, had little impact on increasing the diversity of content available in European television.

[884] European Commission, 'The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions', n. 347.

In general, therefore, the EU legislative approach to media pluralism is fragmentary, random and incoherent. As put by Craufurd Smith, "the approach of the Community institutions to the principle of pluralism seems at times confusing, even schizophrenic".[885] The sense of schizophrenia stems from the contradiction between the words of the EU, and its actual action. Verbally, there are numerous statements on the importance of pluralism and how the EU is actually safeguarding it. The actions however reveal an obvious and apparent deregulatory and economic approach by the EU towards the media sector. All EU level measures aimed at supporting pluralism are based on voluntary action by Member States. Everything is about being "allowed" (must-carry, list of events) or "where practicable" (quotas). As a result, if Member States suddenly decided to abolish all national media pluralism rules and if they got rid of public service broadcasting, the EU could not, and would not want to, do anything about it.

Therefore, the EU's *active* safeguarding of pluralism relies on the good will of the Member States. As long as they do something, the EU can claim it actively promotes pluralism by gratefully accepting the national rules and following the lowest possible common denominator. However, as the Parliament noted in its 2005 report on the application of Articles 4 and 5 of the TVWF Directive,[886] Member States are unable to tackle the problem of media concentration which crosses national borders. With the lack of binding EU level media concentration rules, the EU is powerless unless the concentration comes under EU competition rules. Relying on the Member States to adopt binding measures and persistently ignoring the need to introduce EU level media concentration rules, is not an "active" promotion of media pluralism as claimed.

---

[885] Craufurd Smith, R., *Broadcasting Law and Fundamental Rights* , n. 406, 183.

[886] European Parliament, 'Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the 'TV without Frontiers' Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (Rapporteur: Henri Weber), n. 323.

Table 4. Current tools for the protection of pluralism in Europe and their limitations

		Tool	EU level	Limitations	National level	Limitations
STRUCTURAL PLURALISM	Public Interest Focus (direct impact)	Legislative measures aimed at prevention of media concentration	**NO**	Lack of it	**Yes**	Dispersed, varied. not in every MS, unable to prevent creation of pan-European giants; liberalisation trends
	Economic focus (indirect impact)	Competition law	**Yes** Art.81.82 EC Treaty +Merger Regulation	*Ex post* protection, different focuses	**Yes**	*Ex post* protection, different focuses, no use of Art.21(4) Merger Regulation
		Access to SMPs' infrastructure, including access to CAS	**Yes** Art.5.5 Access Directive	*Ex post* protection	**Yes** (implementing EU rules)	*Ex post* protection; no public interest focus in regulation of access
		Standardisation of CAS, APIs and EPGs	**NO** Only encouragement in Art.17 and	Only "encouragement" to use open APIs	**NO**	Voluntary, industry-driven=not standardised
		Country of origin principle	**Yes** Article 2 of the TVWF directive	Open to abuse. Infringement procedure imperfect	**Yes** (implementing EU rules)	MS cannot impose their national media ownership thresholds to broadcasters outside their jurisdiction
INTERNAL PLURALISM	Public Interest Focus (direct impact)	Must-carry*	**Yes** Art.31 Universal Service Directive	Not obligatory, no obligation on CAS providers	**Yes** (implementing EU rules)	Not all MS; CAS, API and EPG not covered; not every level of broadcasting value chain
		Production quotas*	**Yes** Art.5 TVWF directive	Ceiling not floor; not obligatory ("where possible")	**Yes** (implementing EU rules)	Not all MS
		List of events of major importance + short reporting rights*	**Yes** Art.3 TVWF directive	Indirect impact only; rather "right to information"	**Yes** (implementing EU rules)	Indirect impact; not all MS
		Subsidising*	**Yes** MEDIA programme	Modestly financed; support mainly for cinema, less impact on television	**Yes** (various instruments)	Do not achieve the desired effect; television production often openly excluded from financing schemes
		PSB*	**Yes/No** Protocol to the Treaty of Amsterdam	Support not strong enough; just permission	**Yes**	Shrinking licence fees; retreat from PSB tradition
	Economic focus (indirect impact)	—	—	—	—	—

* According to the European Commission, these are the measures which *actively* promote media pluralism at the EU level (see Issues Paper on Media Pluralism for the Liverpool Audiovisual Conference, July 2005)

6. National tools: Why they fail

As explained in the previous chapters, the European Union is happy to hand over full responsibility for guarding media pluralism in Europe to individual Member States. Meanwhile, media laws and, consequently, the levels of protection for media pluralism vary hugely within the 27 EU Member States. A staggering 21 Member States do not have any special rules for media mergers.[887] Six[888] have no specific media concentration rules whatsoever, and three[889] have very limited media concentration rules. Ten Member States[890] have no cross-media ownership rules,[891] that is rules prohibiting for instance owners of national television stations from holding interests in national newspapers. Crucially, in many Member States the rules, even if they are in place, are not being observed (Italy is a prime example).

Hallin and Mancini, in their seminal book *Comparing Media Systems*, identify three basic models of media regulation in Europe: (i) the Mediterranean or "Polarized Pluralist" model present in countries like France, Greece, Italy, Portugal and Spain; (ii) the Northern/Central European or "Democratic Corporatist" model in Austria, Belgium, Denmark, Finland, Germany, The Netherlands and Sweden; and (iii) the North Atlantic or "Liberal" model in the United Kingdom and Ireland.[892] Hallin and Mancini's book left post-Communist countries out of consideration, but there have been voices suggesting that these countries' media systems are closest to the polarized-pluralist ("Mediterranean") model.[893] Having the above taxonomy in mind, I will briefly analyse media concentration laws in four selected EU Member States, which are most interesting from this thesis' point of view: United Kingdom as one of the biggest, most influential, but also one of the most liberal media markets in Europe; Ireland as

---

[887] Media specific competition law applies only in the United Kingdom, Ireland, Germany and Austria.
[888] Denmark, Finland, Estonia, Lithuania, Poland, Portugal.
[889] Sweden, Latvia, Luxembourg.
[890] Spain, Poland, Portugal, Czech Republic, Belgium, Sweden, Denmark, Finland, Lithuania, Latvia, Luxembourg.
[891] Kevin, D., 'Media ownership and pluralism: regulatory trends and challenges in the European Union Member States', presentation at the 20th EPRA meeting, Istanbul 2004, www.epra.org/content/english/press/papers/Media%20ownership%20and%20pluralism%20Kevin%20Istanbul%2 final.ppt (accessed 4 September 2007).
[892] Hallin, D., Mancini, P., *Comparing Media Systems*, (Cambridge University Press, 2004).
[893] See for instance Conference on 'Comparing Media Systems. West meets East', 23-25 April 2007, Wroclaw, Poland, http://www.zksid.politologia.uni.wroc.pl/index.php?lang=en (accessed 8 September 2007); Jakubowicz, K., 'PSB in Post-communist Countries: Finding the Right Place on the Map', the 2007 Spry Memorial Lecture, Montreal, 27 November 2007, available at: http://www.com.umontreal.ca/Spry/spry-kj-lec.htm (accessed 2 May 2008).

an example of a smaller Member State heavily influenced by its bigger neighbour; Italy as an arena of the most spectacular abuses of media pluralism in recent years, and Poland as a representative of new Member States from Central and Eastern Europe and the one where plans to introduce cross-media ownership restrictions resulted in major political scandal and the resignation of the government.

I will then turn to consider why national laws fail to secure media pluralism in Europe and, thus, why the issue of media concentration can no longer be left solely in the hands of the Member States. National liberalisation tendencies resulting in sweeping reforms of media concentration laws, as well as growing global media empires which cannot be controlled by individual countries, all call for the EU-level action.

6.1 Media concentration laws in selected Member States

6.1.1 United Kingdom

Structure of the British television market

The United Kingdom has one of the largest media markets in Europe and its television sector has undergone a significant change over the last 15 years. However, what remained unchanged and unique about the British television broadcasting is that all terrestrial broadcasters have some form of public service obligations.[894] Initially there were only three terrestrial channels: BBC1 and BBC2 provided by the BBC and Channel 3 provided by the companies that comprised the ITV network. BBC, with an audience share of almost 38%, now has 2 national channels and a range of free digital channels (a youth channel BBC3, BBC 4, BBC News 24, BBC Parliament, and two children's channels – CBBC and CBeebies).[895] With no advertising revenue, the BBC still manages to earn additional income through its wholly owned commercial subsidiary BBC Worldwide, which distributes television programmes, sells videos, publishes books and magazines (e.g. Radio Times), organizes exhibitions, live events and English language teaching. The ITV network, with an audience share of almost 55%,

[894] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1605.
[895] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 206.

consists of 15 regional licenses and one breakfast television license.[896] One company, ITV Plc, formed after the merger of Carlton and Granada in 2003, now owns eleven of ITV's licences. As will be explained below, the merger was made possible by the liberalisation of media ownership laws.[897]

The fourth channel, Channel 4, was established in 1982 as "a non-profit public corporation with a unique remit to innovate and cater to the programme areas and groups that were neglected by the established broadcasters".[898] In addition, its original programming was to be commissioned from the independent production sector. FIVE (or Channel 5) is the final terrestrial broadcaster. It was lincenced in 1995. In 2000 RTL Group bought 66.6% majority share in FIVE from Pearson – an international media company.

The public service nature of British terrestrial television is unique and has been praised by Tongue:

> "Television in the UK is a shared experience, and for the most part it is one we can trust. Unlike most other European Countries, broadcasters in the UK have remained distant from political parties. Our broadcast news coverage is the most balanced in the world. Almost uniquely among British institutions, our four main channels have maintained respect both at home and abroad. The BBC and Channel 4 have escaped privatisation. Britain can boast the finest broadcasting ecology in the world. If the UK urges one institution upon its partners as a model, it should be the BBC".[899]

Multichannel, pay television in the UK is provided by BSkyB via satellite and Virgin Media via cable. It is fair to say that satellite dominates over cable in terms of both subscribers and revenue share.[900] BSkyB, with News Corporation as its largest shareholder, has a monopoly in

---

[896] *Ibid.*, 206.

[897] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 206; Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', published by the Commissariaat voor de Media, 2004, http://www.mediamonitor.nl/html/documents/mappingstudy_ward_jun2004.pdf (accessed 8 September 2007), 204.

[898] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1607.

[899] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 100.

[900] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 203.

the satellite industry. In fact, many claim that any real competition in the satellite market in the foreseeable future is highly unlikely.[901] With regard to cable, there used to be two operators NTL and Telewest. In 2006 they merged with Virgin Mobile under the Virgin Media brand. However, rather than being BSkyB's competitor, Virgin Media is its main customer. Although Virgin Media owns the Flextech production company which produces several channels (for instance UKTV, Living TV, Bravo), these are low profile when compared to BskyB's main channels. Therefore, Virgin Media broadcasts the main Sky channels as one of its principal selling points.[902]

Media concentration regulation in the United Kingdom

The Broadcasting Act of 1990 was the first major piece of legislation in the UK to affect the terrestrial broadcasters. This is because it changed the way that licenses for the ITV franchises were allocated. There was the introduction of an auction plus quality threshold, and a 25% independent production quota for all UK terrestrial broadcasters was established.[903] However, the first rules on media concentration and ownership based on audience share were introduced in the UK by the 1996 Broadcasting Act. In 2003 the rules underwent a significant overhaul, which was officially meant to encourage competitiveness whilst theoretically protecting media pluralism.[904] It was intended to bring about a greater degree of liberalisation and improve the commercial prospects of UK media groups.[905]

One of the main changes brought about by the Communications Act 2003 was to merge the powers and functions of the five previous regulatory authorities into one "converged" regulator – the Office of Communications (OFCOM). Before that, three regulatory bodies dealt with content issues (the Independent Television Commission (ITC), the Radio Authority (RA) and the Broadcasting Standards Commission (BSC)). The Radio Communications

---

[901] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 207.

[902] See Search.com, 'British Sky Broadcasting', http://www.search.com/reference/British_Sky_Broadcasting (accessed 8 September 2007).

[903] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1607.

[904] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', 2005, http://www.ifj-Europe.org/pdfs/EFJownership2005.pdf (accessed 8 September 2007).

[905] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 197; European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 154.

Agency was responsible for spectrum management, and OFTEL was the telecommunications regulator.[906] OFCOM, therefore, regulates both structural (market and technical) and content issues regarding the media.[907] In addition, the relevant government departments involved in the regulation of the media are the Department for Business, Enterprise and Regulatory Reform (BERR) and the Department of Culture, Media and Sport (DCMS). Mergers and acquisitions in the media sector are assessed by the Competition Commission, which is an independent body established by the Competition Act of 1998. The Competition Commission conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries, at the request of the Office of Fair Trading (OFT) or other authorities such as the Secretary of State for Culture, Media and Sport, or by the regulators relating to other industries.[908]

The Communications Act 2003 created a deregulatory regime and the most liberal media ownership regime in Europe. This in turn is expected to lead to more foreign ownership of media assets in the UK and is expected to speed up the process of consolidation in the media sector.[909] Indeed, the Act relaxed restrictions in most aspects:[910]

(i) 15% market share limit

The 2003 Act removed the previous basic threshold for interests in the broadcasting sector which was set at 15% of the total market share, measured in terms of audience share.

(ii) No joint ownership of two ITV London franchises

The rule introduced by the 1996 Act preventing the joint ownership of the two ITV (Channel 3) London franchises was removed by the 2003 Act. This has allowed for the merger of Carlton and Granada in 2003 – the two main owners of the ITV franchises, and the creation of a single ITV company, ITV plc., in February 2004. ITV plc. owns all, but three of ITV

---

[906] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 154.
[907] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 204.
[908] *Ibid.*, 204.
[909] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 154.
[910] See Chapter 5 (Sections 348-357) of the Communications Act 2003.

franchises.[911] The Department of Trade and Industry claimed that the reason behind allowing the merger was that "a stronger ITV will be better able to invest in and provide programming of high quality, including regional programmes. Broadcasting as a whole will benefit".[912]

(iii) No joint ownership of an ITV company and Channel 5

The rule preventing ownership of both an ITV company (a franchise from the network) and Channel 5 was removed by the Communications Act 2003.

(iv) Newspaper owner with a market share of over 20% cannot hold national terrestrial licences (Channel 3 or Channel 5 licences)

The provisions on cross media ownership in the Broadcasting Act 1996 preventing a newspaper owner with a market share of 20% from holding national terrestrial licenses of Channel 3 or FIVE, were meant to limit the cross-media expansion of media companies.[913] The Communications Act 2003 removed the restriction in relation to Channel 5. However, any attempt by a newspaper owner to acquire the Channel 5 license may be subject to review under the "public interest test" (see below). A newspaper owner with 20% national market share still cannot own an ITV franchise. On the other hand, the owner of an ITV license in a particular region may not acquire an interest of 20% or more in a body corporate, running one or more national newspapers with an aggregate market share of 20% or more.[914]

(v) Prohibition of non-EEA ownership of UK terrestrial television companies

The removal of the restriction on non-EEA ownership of UK terrestrial television companies has been viewed by many as one of the most controversial changes introduced by the

---

[911] See Competition Commission *Carlton Communications Plc / Granada Plc: a report on the proposed merger*, http://www.competition-commission.org.uk/rep_pub/reports/2003/482carlton.htm#full (accessed 8 September 2007).

[912] Statement by the Department of Trade and Industry, *Media Guardian*, 7 October 2003.

[913] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 211.

[914] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 205.

Communications Act 2003.[915] There is now nothing in UK law preventing the acquisition of British TV companies by large US media conglomerates, such as Rupert Murdoch's News Corporation, which is the largest shareholder of BSkyB. Even though any attempt, by a non-EEA company to acquire a UK terrestrial broadcaster will have to undergo a public interest test,[916] the change is still perceived as detrimental.

(vi) Qualified restriction on certain bodies (e.g. religious bodies) from holding Channel 3 and Channel 5 licences

Religious bodies are still prohibited from holding the television licenses of Channel 3 and Channel 5.

(vii) Public interest test

Although the 15% audience share limit was removed by the Communications Act 2003, concentration in the media sector remains subject to competition regulation under the Enterprise Act 2002.[917] Mergers or acquisitions between media companies are reviewed by a combination of OFCOM and the Office of Fair Trading, which may refer the case to the Competition Commission if they believe the merger may result in a substantial lessening of competition in a relevant market. They also submit their opinions to the Secretary of State, who may issue an intervention notice to the Competition Commission allowing for the assessment of the case on both competition and public interest grounds.[918] The above rules contained in the Enterprise Act with regard to the newspaper and radio sectors have been extended to the television sector by Part V, Chapter 2 ("Media Mergers") of the Communications Act 2003. In taking a decision to allow or prohibit a media merger, account must be taken not only of competition issues, but also public interest grounds such as the need for accurate presentation of news and free expression of opinion; the need for a sufficient plurality of views and a sufficient plurality of persons with control of the media enterprises

[915] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1634.
[916] *Ibid.*, 1634.
[917] OFCOM, 'Review of Media Ownership rules', 14 November 2006, http://www.OFCOM.org.uk/research/media_owners/rulesreview/rules.pdf (accessed 8 September 2007), 23.
[918] *Ibid.*, 46; Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1634; European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 205.

serving that audience; and the need for the availability throughout the United Kingdom of a wide range of broadcasting which is both of high quality and calculated to appeal to a wide variety of tastes and interests.[919]

The extension of the test is a result of a last minute compromise between the Government and the House of Lords during the debates on the Communications Act 2003. A cross-party group in the House of Lords, led by Lord Puttnam, was concerned about the removal of the cross-media restrictions regarding the acquisition of Channel 5 by large newspaper owners like News Corporation. The group managed to convince the government to accept that, just like as is the case with newspaper and radio sectors, major mergers and acquisitions in the television sector should be subject to a "public interest" or a "plurality" test".[920] OFCOM explains that the rationale for an extension of the public interest test to the broadcasting sector is that television has a special influence which may require public interest considerations, including plurality, to be taken into account in deciding whether or not to allow mergers to go ahead.[921]

Therefore, as it now stands, the public interest test *can* be employed by the Secretary of State in mergers involving television companies. In particular mergers or acquisitions with any of the following characteristics are more than likely to be subject to the public interest test. Mergers involving national newspapers with more than 20% of the market share and the Channel 5 license holder; mergers involving a change of control of the Channel 3 license holder; mergers involving the national Channel 3 license holder and a national radio service; mergers involving the Channel 5 license holder and a national radio service or mergers involving on the one hand, owners outside the EEA, and, on the other, any of Channel 3; Channel 5, digital and analogue radio licenses. Mergers involving satellite and cable services are unlikely to be subject to the public interest test and, as the merger of NTL and Telewest in October 2005 illustrated, they will only be analysed under competition criteria.[922]

---

[919] Communications Act 2003, Section 375.
[920] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 205.
[921] OFCOM, 'Review of Media Ownership rules', n. 918, 23.
[922] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 217.

(viii) Comments

On the whole, therefore, the Communications Act 2003 repealed the *ex ante* provisions on media ownership and replaced them with a liberalised, case-by-case procedure.[923] The result is that regulators are required to balance between the economic benefit of a merger or acquisition and its potential harmful effects on competition, as well as pluralism and diversity.[924] The first intervention on the basis of the public interest test in a television merger case followed the recent acquisition of a minority stake in ITV by BSkyB. In November 2006 ITV rejected a merger proposal from the cable company NTL, saying that there was little strategic logic for it to combine with NTL and the offer materially undervalued ITV.[925] Meanwhile, BSkyB purchased a 17.9% stake in ITV for 940 million pounds. Although this was a minority stake it still was significant as it would allow Rupert Murdoch to make his views known at board meetings.[926] The move caused widespread protest, which were most loudly expressed by Sir Richard Branson who owns 10.5% of NTL (NTL merged with Telewest in 2005 and changed its name to Virgin Media early in 2007).[927] Following Branson's comments, OFCOM announced that it was considering whether or not there had been a change of control over one or more of ITV's licenses. In addition, OFCOM's analysis would focus on the Communications Act 2003 provisions for the prohibition of mergers between Channel 3 license holders and companies which own 20% or more of the national newspaper market. Rupert Murdoch, owner of BSkyB, also has a large share of the national newspaper market through News International. The examination of the BSkyB's acquisition of a stake in ITV has also been taken up by the OFT.

In December 2006 the UK's Parliament's All-Party Commons Media Group requested a meeting with Media Minister Tessa Jowell to discuss the implications of BSkyB's acquisition of a 17.9% stake in ITV. The MPs were concerned that the purchase of the stake could restrict

---

[923] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 215.

[924] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 205.

[925] 'ITV rejects merger move from NTL', *BBC News*, 21 November 2006.

[926] Hedges, M., 'It is a Fight to the Death : Branson v. Murdoch', n. 73.

[927] Possibly as an act of 'revenge', Virgin Media cut off basic BSkyB channels from its pay-TV network., the official explanation being that they are overpriced. The distribution deal between Virgin Media and BSkyB was not extended. This is also currently investigated by OFCOM.

ITV's ability or willingness to broadcast rival programmes to those shown by BSkyB, thus lessening media competition and customer choice.[928] They also feared that the acquisition could be the first step towards a takeover of ITV by BSkyB. Although this would not be allowed under the rules at present, a 17.9% stake would leave BSkyB well placed to take advantage of any deregulation in years to come.[929]

On 26 February 2007, the Secretary of State Alistair Darling, intervened in the BSkyB/ITV deal, for the first time using the power provided by Section 378 of the Communications Act 2003 to apply the public interest test to a merger involving television companies.[930] Darling asked both OFCOM and the OFT to make recommendations allowing him to decide whether to refer the deal to the Competition Commission. The OFT examined the competition issues and OFCOM checked "whether the case raises public interest concerns about the number of different owners of media enterprises".[931] In late April both OFCOM and OFT recommended that the Competition Commission investigate BSkyB's acquisition of the 17.9% stake in ITV. Both regulators agreed with NTL that, although the acquisition of almost 18% of ITV does not amount to a "change of control", it would allow BSkyB to command a "material influence" over ITV's content. OFT explained that "Sky's shareholding means that ITV is no longer fully independent, and this may alter the future competitive landscape, especially as we approach the digital switchover".[932] The OFT also established that despite the low shareholding, BSkyB could exert significant influence by appointing a member of ITV's board or becoming an uncooperative shareholder, destabilizing ITV's policy. There could also be a reduction in strategic rivalry between BSkyB and ITV.[933]

---

[928] Bosnjak, A., 'UK's media minister in talks over Sky's ITV stake', http://www.ovum.com/go/content/c,68460 (accessed 8 September 2007).

[929] Vass, S., 'Murdoch's empire under threat as spotlight shines on it for the first time', *Sunday Herald*, 6 March 2007.

[930] Choueka, R., 'United Kingdom: Competition in the television sector', Lawrence Graham's 'SmartLaw' Newsletter, March 2007, http://www.mondaq.co.uk/article.asp?articleid=47038&searchresults=1 (accessed 4 September 2007).

[931] 'OFCOM inquiry awaits BSkyB', *Global Competition Review*, 27 February 2007.

[932] 'OFT calls for broadcasting probe', *Global Competition Review*, 20 April 2007.

[933] McGrath, B., of Berwin Leighton Paisner LLP in London quoted by *Global Competition Review* in 'The UK Competition Commission to investigate BSkyB's merger with ITV, following a referral from the Trade and Industry Secretary, Alistair Darling', 25 May 2007.

The Competition Commission examined the impact of the deal on competition as well as considered public interest issues that relate to pluralism and diversity.[934] In December 2007, it reached the conclusion that the acquisition harms competition in the UK TV market and is against public interest. The Commission, therefore, recommended that BSkyB lowers its stake in ITV to 7.5% (which means a loss of over £200 million for BSkyB).[935] In January 2008, the Secretary of State for Business, Enterprise and Regulatory Reform, John Hutton, decided to impose the remedies recommended by the Competition Commission. The decision was appealed to the Competition Appeal Tribunal both by BSkyB and Virgin Media (arguing for even greater lowering of the BSkyB's stake). However, both appeals are very unlikely to succeed.[936]

However, although this first "public interest" intervention in a media merger was spectacular and may indeed prevent a detrimental media concentration, there is no denying that the overall effect of the replacement of an automatic intervention based on audience share with the case-by-case regime, will lead to less regulatory involvement in media concentration in the UK.[937]

---

[934] 'UK government orders investigation into Sky's 17.9% stake in ITV', www.followthemedia.com, 25 May 2007.

[935] Global Competition Review, 'BSkyB to divest ITV stake', 29 January 2008.

[936] Global Competition Review, 'BSkyB will appeal', 21 February 2008; Global Competition Review, 'Virgin asks for review of BSkyB decision', 26 February 2008.

[937] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 205.

Table 5. Media concentration regulations in the UK before and after the 2003 Communications Act

Pre-2003	2003 Communications Act
Media concentration rules	
15% of market share limit (measured in terms of audience time)	REMOVED – no audience share limit, no restrictions on accumulation of TV licences*
No joint ownership of the two ITV (Channel 3) London franchises	REMOVED**
No joint ownership of an ITV company and Channel 5	REMOVED with regard to Channel 5
Cross-media concentration rules	
Newspaper owner with a market share of over 20% cannot hold national terrestrial licences (Channel 3 or Channel 5 licences)	Removed with regard to Channel 5 (only subject to Pubic Interest Test); Newspaper owner with 20% market share cannot acquire a Channel 3 licence; the holder of a Channel 3 licence may not acquire an interest of 20% or more in a body corporate running one or more national newspapers with an aggregate market share of 20% or more
Foreign media ownership rules	
Prohibition of non-EEA ownership of UK terrestrial television companies	REMOVED***
Other rules	
Prohibition on certain bodies (e.g. political parties, local authorities, advertising agencies) from holding broadcasting licences	UPHELD
Qualified restriction on certain bodies (e.g. religious bodies) from holding Channel 3 and Channel 5 licences	UPHELD
* Allowed for Carlton/Granada merger ** Allowed for Carlton/Granada merger *** Allowed for BSkyB acquiring 17.9% stake in ITV; currently under investigation with regard to compatibility with competition law as well as with the Public Interest Test	

Section 391 of the Communications Act 2003 requires OFCOM to review media ownership rules at least every three years and, as a result of that review, make recommendations to the Secretary of State if any changes are deemed necessary. OFCOM conducted the first review of the rules in 2006 and recommended that no changes in media ownership rules should be made at this stage.[938] Moreover, OFCOM noted that the media landscape is changing rapidly and that *further* liberalisation of the rules might be needed before long.

[938] OFCOM, 'Review of Media Ownership rules', n. 918, 2.

6.1.2 Ireland

Structure of the Irish television market

Until the late 1990s terrestrial television in Ireland was provided only by the public service broadcaster, RTÉ (*Radio Telefis Éireann*). RTÉ operates two channels: RTÉ 1 with an audience share of over 20% and RTÉ 2 with an audience share of around 11%.[939] It also cooperates with the Irish language channel TG4 (*Teilifis na Gaeilge).* Ireland has, therefore, three national television channels that receive public funding through an annual licence fee payable by those in possession of a television receiver.[940] The fourth terrestrial channel, and the first commercial station in Ireland, was launched in 1998 under the name TV3. Its main shareholders are CanWest Global Communications and Granada Media and it had almost 12% audience share in 2006.

It is also important to note that Ireland's television landscape is influenced by historical and geographical relations with the United Kingdom.[941] British terrestrial television channels are available to, on average, 70% of the population, mainly through cable services.[942] BBC reaches a market share of around 12% and Channel 4 – around 5%.[943]

While BSkyB, through Sky Digital, remains the sole provider of digital satellite television services in Ireland,[944] the Irish cable market was recently fundamentally restructured. Ireland used to have two main cable operators: NTL (Eire) and Chorus Communications. In 2004 Chorus was fully taken over by Liberty Media's affiliate, UGC Europe (now called Liberty Global Europe) and, according to 2005 data, provided cable services to 112,000 subscribers.[945] In 2005 NTL, which had 347,000 subscribers in Ireland at the time, announced the sale of its Irish business to Liberty Global *via* a financial services firm, Morgan Stanley. Morgan Stanley held the stake on Liberty Global's behalf until all regulatory clearances have been achieved.

---

[939] Audience share data for 2006 from AGB Nielsen Media Research, see http://www.medialive.ie/Television/chshare.html (accessed 8 September 2007).
[940] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 78.
[941] *Ibid.*, 78.
[942] *Ibid.*, 79.
[943] Audience share data for 2006 from AGB Nielsen Media Research, n. 940.
[944] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 79.
[945] See www.chorus.ie.

At the time of the notification of the merger to the Competition Authority,[946] Liberty Media had a 16% stake in News Corporation – a parent company of BSkyB. The Competition Authority investigated the NTL/Chorus merger and noticed that there was a link between News Corporation and Liberty Media. The Authority was concerned that this relationship could result in limiting competition between the combined NTL/Chorus cable network and BSkyB's satellite network. On 4 November 2005 the Competition Authority cleared the merger, subject to 19 conditions, including the appointment of an independent director to the board of UPC Ireland and restrictions on the influence of John Malone, chairman of Liberty Global, in the running of the Irish business.[947] However, these conditions no longer apply since the Authority specified that they should remain in place only for as long as Liberty Media had more than 5% of the voting rights in News Corporation. In December 2006 John Malone and Rupert Murdoch reached a share-swap agreement. News Corporation agreed to exchange its 38.4% stake in DirecTV Group and three regional sports networks for Liberty Media's 16.3% stake in News Corporation.

The merger was also approved by the Minister for Enterprise, Trade & Employment, Micheál Martin in early December 2005, and was closed on 12 December 2005. The combined company, named UPC Ireland, is now the parent company of NTL Ireland and Chorus. It provides television, broadband internet and telephone services and at the end of September 2007 it reported over 591,100 customers in Ireland.[948]

Finally, although this thesis concentrates on the television sector, it is worth mentioning the Irish press and radio markets here as they are particularly affected by excessive media concentration. The top selling daily newspapers
and the two top selling Sunday papers are owned by one company, Independent News & Media (Ireland) Ltd. The company also publishes fourteen local newspapers in counties Cork, Kerry, Dublin, Louth, Wexford and Wicklow.[949] In addition, the Independent News & Media group has interests across newspaper and magazine publishing, digital media and outdoor

[946] Pursuant to Section 18 of the Competition Act 2002, mergers and acquisitions have to be notified to the Competition Authority if parties to the merger or acquisition achieve turnovers exceeding certain thresholds; see *infra* for a more detailed discussion on the irish competition rules in relation to media mergers.
[947] Competition Authority assessment M/05/024 - *UGC (Chorus) / NTL* of 4 November 2005, www.tca.ie.
[948] See http://www.upc.ie/about/.
[949] See the company's website at http://www.inmplc.com; See also European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 112.

advertising in the UK, France, Portugal, South Africa, Australia, and New Zealand.[950] Independent News & Media is dominant in both the daily and Sunday newspaper market segments in Ireland, where it has 48% and 46% market share respectively. Nevertheless, the Competition Authority concluded that the Irish newspaper industry has sufficient editorial diversity and, thus, media pluralism is not threatened.[951]

However, while it may be true that there is a large degree of editorial diversity, such dominance in any media market is always a threat to media pluralism. There is also a problem with the cross-ownership of newspapers and radio stations. In July 2007, Denis O'Brien's company Communicorp, which owns two Dublin radio stations (98FM and Spin FM), one national radio station (Newstalk) and a 10% stake in Independent News & Media, acquired national radio station Today FM and Dublin station FM104 from Emap.[952] This acquisition would give Communicorp control over almost 25% of all commercial radio licenses in Ireland and over 53% audience share in Dublin, and this undoubtedly would equate to dominance in this area. In December 2007 The Competition Authority ordered Communicorp to divest FM104.[953] The competition concerns centered on both stations' similar programming format which made them the closest competitors in the Dublin area. At the end of 2007, Communicorp sold FM104 to UTV.[954] However, the cross-ownership issue with the Independent News&Media was dismissed by the Competition Authority which stated shortly that radio and press advertising are two separate markets.

Media concentration regulation in Ireland

The responsibility for regulating the broadcasting sector in Ireland falls to several different authorities. The Broadcasting Commission of Ireland (BCI) issues licenses and deals with media concentration and pluralism aspects. The Department of Communications, Energy, and Natural Resources develops a policy and legislative framework for broadcasting in Ireland and is also responsible for policy on Public Service Broadcasting. Department of Enterprise, Trade

[950] *Ibid.*, 112.
[951] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 112.
[952] Shaw, H., 'O'Brien bidding to rule the airwaves', *The Irish Times*, 24 July 2007.
[953] The Competition Authority, Determination of Merger Notification M/07/040, *Communicorp/SRH*, 7 December 2007.
[954] The Competition Authority, Determination of Merger Notification M/07/069, *UTV/FM104*, 17 January 2008.

and Employment takes part in the approval of media mergers from the media pluralism perspective while the Competition Authority deals with competition issues.[955]

The BCI replaced the Independent Radio and Television Commission (IRTC), established by the Radio and Television Act, 1988 to license and oversee the operation of independent radio and television broadcasting in Ireland.[956] The Broadcasting Act, 2001 changed the IRTC's name to the Broadcasting Commission of Ireland.[957] The Act defines broadcaster very broadly as "a person who supplies a compilation of programme material for the purpose of its being transmitted or relayed as a broadcasting service (whether that person transmits or relays that material as such a service or not").[958] A "broadcasting service" is defined as "a service which comprises a compilation of programme material of any description and which is transmitted or relayed by means of wireless telegraphy, a cable or MMD system or a satellite device, directly or indirectly for reception by the general public, whether that material is actually received or not, but does not include such a service that is provided by means of the Internet".

The relevant provision of the Broadcasting Act, 1988 concerning media ownership and control is contained in Section 6(2), which requires the IRTC, in awarding a broadcasting license, to have regard to a number of criteria. These include, the character of the applicant, the adequacy of the experience and of the financial resources the applicant has at its disposal, as well as the desirability of allowing any person to have control of, or substantial interests in an undue number of sound broadcasting services or communications media in the area specified. The "undue number" is not specified and is determined on a case by case basis. Section 60 of the Broadcasting Act, 2001 amended Section 6 of the 1988 Act by adding that "in considering the suitability of an applicant for the award of a broadcasting contract, the Commission shall have regard to the overall quality of the performance of the applicant with respect to the provision by him of a sound broadcasting service under any sound broadcasting contract held by him at, or before, the date of the making of the application". In addition, Section 11(2) of the Broadcasting Act, 2001 provides that:

---

[955] The Competition Authority was established by the Competition Act of 1991 and since the Competition Act 2002 it has the power to examine mergers in the media industry.

[956] Ireland, Radio and Television Act, 1988, Public Act No. 20/1988; see also Institute of European Media Law (EMR) 'Media Market Definitions – Comparative Legal Analysis. Report for the European Commission', Chapter 7: Ireland; July/October 2003, http://ec.Europa.eu/comm/competition/publications/studies/media/ireland.pdf (accessed 8 September 2007).

[957] Ireland, Broadcasting Act, 2001, Public Act No. 4/2001, Section 10(1).

[958] Section 2(1) of the Broadcasting Act, 2001.

"In performing the function conferred on it by this section or the functions conferred on it by the Act of 1988, the Commission shall endeavour to ensure that the number and categories of broadcasting services made available in the State by virtue of this Act or the Act of 1988 best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity".

Finally, with regard to media concentration, Section 38(6) of the 2001 Act requires the BCI to consider whether awarding a license to a particular person or a company could operate against the public interest. In particular, the BCI must have regard to: (i) the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the locality served by the cable or MMD system that is proposed to be used to transmit that material; and (ii) the desirability of promoting diversity in the sources of information available to the public and in the opinions expressed in the communications media.

Under the terms of their contract with the BCI, all radio and television service providers are obliged to notify the BCI, and obtain its consent for the changes to their ownership and control structures. Substantial changes are closely examined by the Commission under its Ownership and Control Policy.[959] Under this policy, the BCI also defines the "undue amount of communications media" mentioned in Section 38(6) of the Broadcasting Act, 2001. In the 2005 document "Ownership and Control Policy",[960] the BCI specifies that one investor should not hold more than 25% of the licenses. Up to 15% of the total number of licenses is deemed "acceptable" with up to a further 10% ownership of the total number requiring "more careful consideration by the Commission". There are no specific cross-media ownership restrictions in Ireland, except for the already mentioned general provision of Section 6(2)(h), which allows the BCI to assess "the desirability of allowing any person ... to have control of ... an *undue amount* of the communications media in the area specified". The lack of specific cross-ownership rules has allowed the development of some major players, such as Communicorp in the Irish market. Other examples of cross-ownership between the print, the audiovisual and the

[959] See www.bci.ie
[960] Broadcasting Commission of Ireland 'Ownership and Control Policy', 2005, n. 437.

online media sectors in Ireland include the shareholdings in seven local commercial radio stations by some of the local/regional newspapers.[961]

In December 2002 the Minister for Communications announced that he intended to create a new structure for regulation in this area, coupled with the creation of a new Broadcasting Authority (incorporating the BCI), which will regulate both public and commercial media.[962] In September 2006, the Minister for Communications, Marine and Natural Resources published a draft scheme for a Broadcasting Bill for public consultation under the eConsultation initiative. The key features of the Bill are: (i) the establishment of a single content regulator for all commercial, community and public service broadcasters in Ireland, to be known as the Broadcasting Authority of Ireland (BAI); (ii) the introduction of a right of reply mechanism; (iii) the extension of the public service remit of RTÉ; and TG4 and (iv) the provision for the two broadcasters' establishment as limited companies.[963] The BAI will encompass the existing regulatory functions of the Broadcasting Commission of Ireland, the Broadcasting Complaints Commission and the RTÉ Authority. BAI will, however, not be a fully integrated broadcasting and communications regulator similar to OFCOM because the communications regulator (ComReg)[964] and the Competition Authority will remain separate. The Broadcasting Bill also promises to provide for a wider right of reply than that provided for in existing legislation. The definition of a television set will also be examined. Finally, the Broadcasting Bill proposes to extend the existing public service remit of RTÉ and TG4 to incorporate: (i) the broadcasting of public service programming to Irish communities in the UK; (ii) the use of new web-based technologies in delivering on their mandates; and (iii) assisting the relevant public bodies to disseminate information in the event of an emergency.[965] The Bill was published in April 2007 and the Heads of Bill are with the Office of Parliamentary Counsel for drafting.

---

[961] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 108.

[962] *Ibid.*, 107.

[963] Ireland, Department of Communications, Energy and Natural Resources, 'Broadcasting Bill', http://www.dcmnr.gov.ie/Broadcasting/Broadcasting+Bill/ (accessed 8 September 2007).

[964] See Communications Regulation Act, 2002 (No. 20 of 2002), which established the Commission for Communications Regulation (ComReg), Sections 6-38.

[965] *Ibid.*

The unique features of the media sector and the concentration thereof have been recognised by the Irish Competition Act, 2002,[966] which provides for a specific procedure for the review of media mergers. Before the Competition Act 2002, Irish competition law was regulated by four statutes: (i) the Mergers, Take-overs and Monopolies (Control) Acts 1978-1996; (ii) the Restrictive Practices (Amendment) Act 1987; (iii) the Competition Act 1991; and (iv) the Competition (Amendment) Act 1996. Competition Act 2002 amalgamated the rules into one statute, and introduced significant changes into Irish competition law in order to put it in line with the reforms brought about by the modernisation of EC competition law in 2004.[967] The Act moved the majority of competence in competition law enforcement from the Minister for Enterprise, Trade and Employment to the Competition Authority. The Minister retains his role in proposing legislation and, most importantly, in evaluating media mergers.

Generally, mergers have to be notified to the Competition Authority only after certain turnover thresholds are exceeded.[968] However, Section 18(5) of the Competition Act provides that the Minister for Enterprise, Trade and Employment can by Order exclude the thresholds from certain classes of mergers or acquisitions, where he is of opinion that the exigencies of the common good so warrant. By Competition Act, 2002 (Section 18(5)) Order 2002,[969] the Minister designated media mergers as such a class of mergers. According to Section 23(10) of the Competition Act, a media merger means a merger or acquisition in which two or more of the undertakings involved carry on a *media business* in Ireland. Media business is defined by the Competition Act as: (i) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs; (ii) a business of providing a broadcasting service;[970] or (iii) a business of providing a broadcasting services platform. Until

---

[966] Ireland, Competition Act 2002, Public Act No. 14/2002.

[967] For instance the notification regime for agreements between competitors has been abolished. For a discussion on the modernisation of EC competition law see Chapter 4.3 above.

[968] Section 18(1) of the Competition Act 2002 provides that each of the undertakings involved is obliged to notify the Competition Authoity of the merger or acquisition if in the most recent financial year: (i) the world-wide turnover of each of 2 or more of the undertakings involved in the merger or acquisition is not less than €40,000,000; ii) each of 2 or more of the undertakings involved in the merger or acquisition carries on business in any part of the island of Ireland; and (iii) the turnover in the State of any one of the undertakings involved in the merger or acquisition is not less than €40,000,000,

[969] Competition Act, 2002 (Section 18(5)) Order 2002, S.I. No 622/2002.

[970] Broadcasting service is defined by Section 23(10), as 'a service which comprises a compilation of programme material of any description and which is transmitted or relayed by means of wireless telegraphy, a cable system or a multipoint microwave distribution system, a satellite device or any other transmission system, directly or indirectly for reception by the general public, whether that material is actually received or not, ... , but does not include any such service (whether involving audio-visual material or audio material) that is provided by means of the system commonly known as the Internet'.

recently, a notification to the Authority was mandatory where just *one* undertaking involved in a merger carried on a "media business" in the Republic of Ireland. This stringent approach was widely criticized as putting too much of an administrative burden on companies which had to notify even if there was *no impact* on competition in Ireland. Therefore, on 1 May 2007 the Competition Act 2002 (Section 18(5) and (6)) Order 2007[971] refined the class of media mergers which must be notified to the Competition Authority and the Minister. From that date, a merger must be notified only where *two* or more undertakings involved carry on a media business in the Republic of Ireland or where one or more carries on a media business in the Republic of Ireland and one or more of the others carry on a media business elsewhere.

All media mergers must be notified to the Competition Authority, irrespective of the turnover of the merging companies.[972] According to Section 23 of the Competition Act, 2002, within five days of receiving a notification in relation to a media merger, the Competition Authority forwards a copy of the notification to the Minister of Enterprise, Trade and Employment. While the substantive test applied by the Competition Authority in merger analysis is whether the merger would substantially lessen competition in markets for goods and services in Ireland,[973] The Minister evaluates the merger for potential media pluralism issues. The Minister has quite wide ranging powers in this respect. If the Authority decides to approve the merger in the first phase, the Minister may, notwithstanding that determination, within 10 days after the date on which that determination is made, order the Authority to open a second phase investigation. That is, to carry out a full investigation. If following the full investigation the Authority decides to approve the merger or approve it subject to conditions, the Minister may still, within 30 days after the date of the Authority's decision, and notwithstanding that decision, decide that the merger may not be approved. The Minister's decision takes precedence over the Authority's determination. An appeal may be made to the High Court against the decision prohibiting or approving a merger. Table 6. below illustrates the media merger review procedure in Ireland as provided by Section 23 of the Competition Act, 2002.

The Competition Act makes it clear that in making his decision, the Minister may not have regard to competition criteria and may only consider the relevant public interest, or media

---

[971] Competition Act 2002 (Section 18 (5) and (6)) Order 2007, S.I. No. 122 of 2007.
[972] McCarthy, A., Power, V., *Irish Competition Law. The Competition Act, 2002*, n. 628, 309.
[973] Section 20(1)(c) of the Competition Act 2002.

pluralism criteria. According to Section 23(10) of the Act, the 'relevant criteria' which the Minister must take into account when evaluating a media merger include: (i) the strength and competitiveness of media businesses in Ireland; (ii) the extent to which ownership or control of media businesses in Ireland is spread amongst individuals and other undertakings; (iii) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses; and (iv) the share in the market in Ireland of "media business" held by any of the undertakings involved in the media merger. There is a significant amount of uncertainty associated with the above criteria. For instance, aren't the 'competitiveness' of media businesses in Ireland mentioned in criterion (i) or 'the share in the market' in criterion (iv) competition related factors which the Minister is not entitled to assess?[974]

There have been over 50 media mergers notified since the entry into force of the Competition Act 2002. All have been cleared without the Minister raising any media pluralism concerns.[975] This may have unforeseen long term consequences. If successive Ministers do not intervene then deals in the media market will be determined solely on competition grounds and will not involve an assessment of wider issues. There is, however, some hope in the establishment of the Media Mergers Advisory Group by the Minister of Enterprise, Trade and Enployment in 2008. The Group's specific task is to examine the existing criteria for the assessment of how a proposed media merger might affect the diversity of views and the concentration of ownership.

However, some may think that the Irish media market, despite some pluralism concerns mainly involving press market, is generally immune from global media concentration trends. As Emmet Oliver wrote in 2005 in The Irish Times:

> "When truly global media players like Rupert Murdoch, Ted Turner and Barry Diller sit down for monthly board meetings in New York, London or Los Angeles it is unlikely the Irish media market is listed near the top of the agenda. In other words, most international

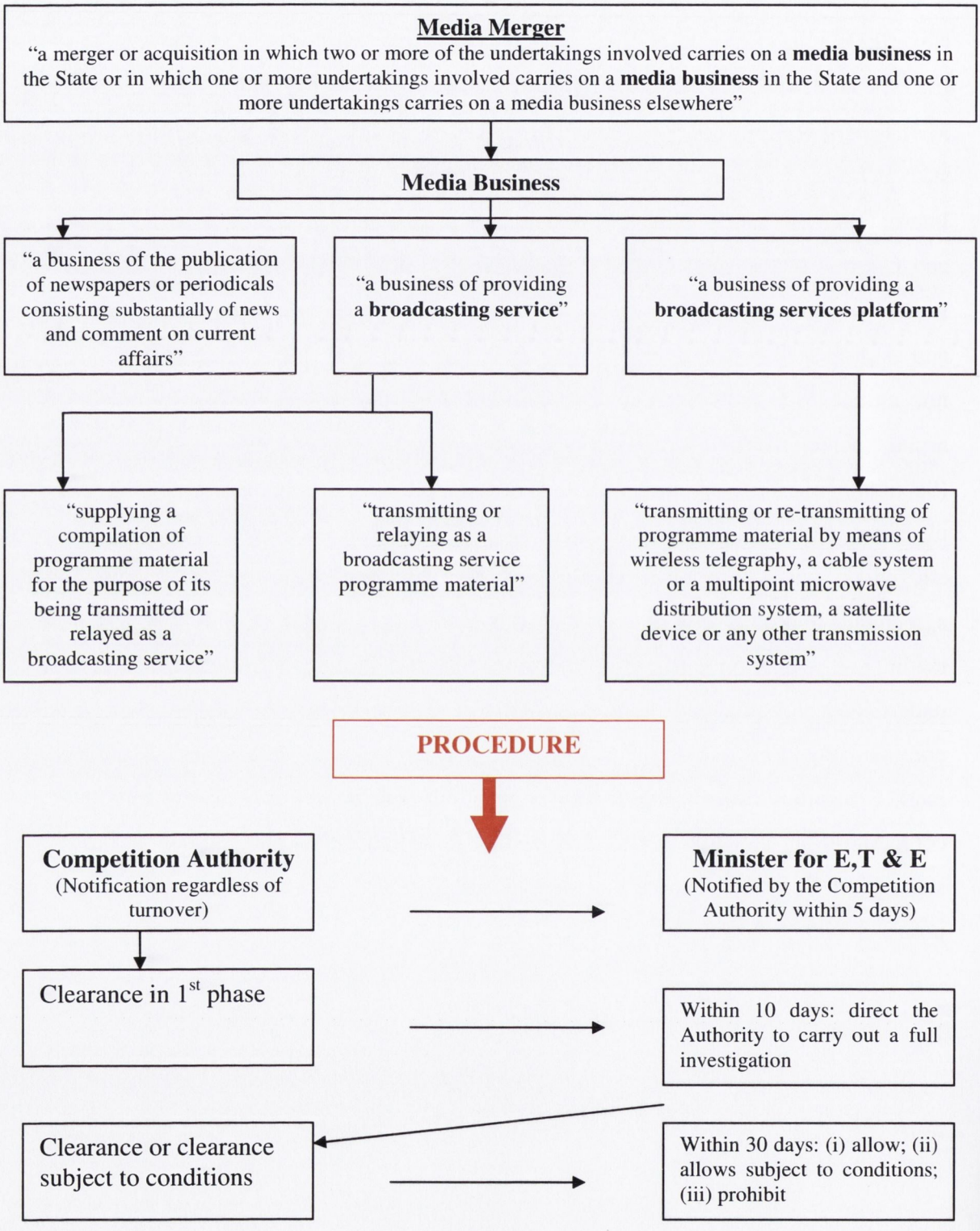
[974] McCarthy, A., Power, V., *Irish Competition Law. The Competition Act, 2002*, n. 628, 319-320.
[975] At the time of writing (June 2007) three media mergers have not been completed yet.

media tycoons do not spend their days thinking up Machiavellian ways to buy up Irish media assets".[976]

Nevertheless, as Oliver has himself since observed, there are subtle changes taking place in the Irish media market and media pluralism concerns do not centre around Independent News and Media anymore, but apply to other companies as well. Several large British media groups, such as Emap, Johnston Press, Daily Mail and General Trust, not to mention BSkyB and News International or Liberty Global, have entered the Irish market. The 2005 merger between NTL and Chorus, which is owned by Liberty Global, is a poignant example. After the merger, Ireland was only left with two pay-TV platforms – NTL/Chorus (cable) and BSkyB (satellite) and as discussed above, there are substantial links between the two. And yet, this merger did not attract Minister's intervention. General Irish competition rules on anti-competitive arrangements (Section 4 of the Competition Act 2002) and abuse of a dominant position (Section 5 of the Competition Act 2002) can play only limited role in alleviating media pluralism concerns in Ireland for the same reasons as Articles 81 and 82 play a limited role in alleviating media pluralism concerns at the EU level. Prevention of anti-competitive agreements and concerted practices has only an indirect impact on pluralism and diversity of media, and if Section 4 has to be used to punish an abuse of dominant position by a media undertaking – it is already too late. Media companies should be prevented from achieving dominant positions as such, before they can abuse them. The changes on the Irish media market, together with the limited specific media concentration rules, inadequacy of general competition law to address media pluralism issues and the lack of interest on the part of the subsequent Ministers responsible for evaluating public interest concerns in media mergers, pose a challenge to plurality and diversity in the media in Ireland.[977]

[976] Oliver, E., 'Small media players ensure competition', n. 153.
[977] Oliver, E., 'Small media players ensure competition', n. 153.

Table 6. Media merger review procedure in Ireland, Sec. 23 Competition Act 2002[978]



[978] Taking into account the Competition Act 2002 (Section 18(5) and (6)) Order 2007, S.I. No. 122 of 2007.

6.1.3 Italy

Structure of the Italian television market

The Italian media sector is probably one of the most concentrated, contradictory and complex in all of Europe.[979] Although there are 14 free-to-air national channels and ten to fifteen regional and local channels, the Italian television market is dominated by two players – public service broadcaster, RAI and commercial, Mediaset. Each of them provides three national terrestrial channels – RAI 1, RAI 2 and RAI 3 operated by RAI and CANALE 5, RETEQUATTRO and ITALIA 1 operated by Mediaset. RAI is a public-owned company, financed from both license fees and advertising. It is governed by a board that is appointed by the Chamber of Deputies and the Senate.[980] A controlling 35% stake in Mediaset belongs to Fininvest, the company owned by the Italian Prime Minister, Silvio Berlusconi and members of his family. No other individual or company owns more than 2.3% of Mediaset.[981] In addition to broadcasting, Mediaset is active in advertising (Publitalia '80), publishing (Mondadori) and record production. It also holds a 25% stake in the Spanish television broadcaster Telecinco and its advertising company Publiespaña. Due to the overwhelming media interests held by Berlusconi, as well as the influence he has had on RAI in his role as Prime Minister, he's been nicknamed "Sua Emittenza" – "Mr. Broadcasting".[982] There was brief attempt to undo the effects of this unprecedented blend of political and media power and the legislative chaos in the media sector, which are largely a result of Berlusconi's term as Prime Minister. This will be discussed in more detail in this chapter, as well as in chapter 6.2.2. However, with Berlusconi's return to the position of Prime Minister in April 2008, a quick change is unlikely.

The six channels operated by RAI and Mediaset are complemented by some other minor national networks, such as LA 7 and MTV Italia which is owned by Telecom Italia. Sport Italia (Europa TV) and DFREE (Prima TV) which is owned by Holland Coordinator – TF1.

---

[979] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 93.
[980] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 84.
[981] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 117.
[982] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 82.

HSE (Home Shopping Europe) which is owned by Fondo Convergenza, Rete A, Elefante TeleMarket (Telemarket) and Rete Capri (TBS).[983] However, the six national channels run by RAI and Mediaset account for almost 90% of audience share, about 85% of net advertising revenues and almost 75% of all the revenues collected in the sector.[984] In addition, the situation is not alleviated by the large number of local television outlets. Despite an estimated 650 local television stations, the development of local television has also been constrained by the duopoly of RAI and Mediaset, in terms of both audience and revenue share.[985]

Multi-channel television is dominated by satellite in Italy. Until 2003, there were two competing pay digital platforms, Stream and Telepiù. Their merger was conditionally approved by the European Commission and in July 2003 an integrated platform, Sky Italia, was launched. It is 80% owned by News Corporation with Telecom Italia having a 19.9% share and it reported over 2 million subscribers in 2005.[986]

Media concentration regulation in Italy

In 1997 Italy adopted the Broadcasting Law No. 249/97, known as the "Maccanico Law". It reformed the audiovisual and telecommunications system and took into account media pluralism.[987] Under its provisions, a single company could not own more than 20% of television or radio networks and digital television or radio programmes. Furthermore, national broadcasters were precluded from achieving more than 30% of advertising revenue in the relevant sector (radio or television). Those who exceeded the thresholds had to move their channels to cable or satellite. The Law also established the Autorità per le garanzie nelle comunicazioni (AGCOM) – a regulatory authority for the communications sector. The two main functions of AGCOM are to ensure fair competition in the industry through the

---

[983] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media' (Opinion No. 309/2004), 13 June 2005, Doc. No. CDL-AD(2005)017, 5.

[984] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 98; European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 117.

[985] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 98.

[986] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 83.

[987] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 115.

application of antitrust rules in the field of communications, and to protect the fundamental rights of all citizens by safeguarding the principles of universal service, quality and distribution of services and products, political and social and economic pluralism in broadcasting.[988]

However, the key ownership rules enshrined in the Maccanico Law have not been successfully enforced. This has mainly been due to the transitional provisions and their subsequent prolongation, which allowed both Mediaset and RAI to exceed the prescribed thresholds. This meant impossibility of a new entry to the market. For instance, in 1999 a company called Centro Europa 7 was granted rights for terrestrial television broadcasting in Italy. However, the national allocation plan for radio frequencies adopted on 30 October 1998 has not been implemented. Therefore, although it had rights according to Maccanico law, Centro Europa 7 has never been in a position to broadcast for lack of radio frequencies. In January 2008, answering the Italian court's request for a preliminary ruling, the European Court of Justice decided that by refusing to release broadcasting frequencies and continually extending transitional periods, Italy was in breach of Article 49 of the EC Treaty and the E-Communications framework.[989] The national court will now probably rule in favour of Centro Europa 7.

The situation of unending prolongation of transitional periods for RAI and Mediaset was also severely criticized at national level by the Italian president, Carlo Azeglio Ciampi, who in July 2002 requested the parliament to adopt legislation that would foster media pluralism and would, effectively prevent media concentrations. In addition in November 2002, the Italian Constitutional Court declared as unconstitutional the undefined transitional periods in the Maccanico Law that protected the programmes transmitted by broadcasters that exceeded the thresholds from being transferred to satellite or cable television. The Court concluded that "the *de facto* situation does not guarantee respect for external pluralism of information"[990] and set a final deadline for the introduction of new legislation as 31 December 2003. As a result, the

---

[988] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 115.

[989] Case 380/05, *Centro Europa 7* (unpublished), para 116.

[990] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 10.

Berlusconi government drafted a new law aimed at the reform of the communications system, known as the Gasparri Law, which was named after the Communications Minister at the time.[991] The legislation was finally adopted in May 2004, despite the objections by President Ciampi, who refused to sign the first draft and returned it to the parliament for reconsideration.[992]

The objections arose after the Gasparri Law changed the ownership restrictions for the television sector. They were based on a combination of two thresholds, relating to the share of the overall number of available licenses, and the share of revenues. First of all, under the Gasparri Law, one company could not hold licenses allowing it to broadcast more than 20% of all television channels that may be broadcast on terrestrial frequencies at national level and, secondly, companies registered as communications operators could not, directly or indirectly, earn revenue greater than 20% of the total revenue of the "integrated communications system". At first glance, therefore, the Berlusconi government appeared to be tightening media regulations in Italy. The share in revenues was brought down from 30% to 20%. However, the difference was that the threshold no longer applied to each segment of the media market individually, but was calculated for "an integrated communications sector". This included profits from television, radio, film, Internet and postal services. This enormously broad definition of the relevant market as a basis for the calculation of one of the thresholds meant that the duopoly of RAI and Mediaset was not brought to an end, but was actually strengthened. Moreover, the Gasparri Law provided for the abolition of cross-ownership restrictions between television and press by 2008 and formed a legal basis for the progressive privatisation of RAI.[993]

In its opinion on the Gasparri Law, the European Commission for Democracy through Law operating under the auspices of the Council of Europe commented that, the primary beneficiary of the new legislation would not surprisingly, be Mediaset. The concept of an

---

[991] 'The Principles governing the broadcasting system and RAI-Radiotelevisione Italiana SpA, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting' ('The Gasparri Law'), CDL(2004)092.

[992] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 10.

[993] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 115.

integrated communications system introduced by the new Law as an indicator of the market share diluted the effectiveness of instruments used to protect external pluralism based on the share of revenues "on individual markets".[994] Therefore, Gasparri Law would allow Mediaset to expand virtually without any constraint, since it would be almost impossible for any company to be dominant in the integrated communications system. The fact that the general anti-trust measures remained applicable[995] did not alleviate the negative consequences of the Gasparri Law as they prohibit the *abuse* of dominant positions and in the media sector dominant positions are forbidden, *as such.* The Commission finished its crushing criticism by concluding that without other indicators such an audience share threshold and a "relevant market" indicator, the thresholds provided by Gasparri Law are largely redundant as indicators of diversity.[996]

Indeed, Gasparri Law enabled Berlusconi to expand his media empire. Since the value of total revenues collected in the Italian "integrated communication system" was calculated at 31,814 million Euro in 2002, 20% of that, that is the maximum permissible threshold, equals 6,363 million Euro. This would mean that Fininvest, which had consolidated revenues in 2002 of 4,880 million Euro, would be able to increase its annual turnover by almost 1,889 million Euro.[997] And just as predicted, in 2005, with a turnover of 603.4 million Euro, Mediaset was more powerful than ever.[998] As a direct result of the Gasparri Law, one of Mediaset's channels, Retequattro, was allowed to continue broadcasting on terrestrial frequencies, despite the Constitutional Court's judgment that it should be moved to satellite by January 2004.[999]

The second attempt of the Berlsuconi government to pull the wool over everybody's eyes was the adoption of the law seemingly aimed at counteracting conflicts of interests between

---

[994] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 22.

[995] Law no. 287 of 10 October 1990, Competition and Fair Trading Act (Official Gazette no. 240 of 13 October 1990) applies to the media sector. The Italian Competition authority (Autorità Garante della Concorrenza e del Mercato) is required to request a non-binding opinion by AGCOM on the draft decisions concerning the communications market.

[996] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 23.

[997] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 106.

[998] Cece, B., 'Italy labours to rid itself of Berllusconi', 18 July 2006, http://www.cafebabel.com/en/article.asp?T=T&Id=7535 (accessed 8 September 2007).

[999] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 83.

business and politics. It is a widely commented fact that when Silvio Berlusconi became Italian Prime Minister in 1994, the issue of the potential conflicts of interest between his private interests and his public functions came to the fore.[1000] Nevertheless, neither of his subsequent governments did anything to tackle the situation by adopting appropriate legislation. When Berlusconi was re-elected in 2001, he committed himself to solving the conflict of interest issue within one hundred days.[1001] The result of the commitment is the law on conflicts of interest, known as the Frattini Law.[1002] This particular law disqualifies persons holding a government office, from *inter alia* performing *managerial tasks* or other duties in professional societies or associations. Within thirty days of taking office, Government officials must declare to the Competition Authority their disqualifying conditions, as well as, within sixty days of taking office, inform the Authority about their assets, including shareholdings. Despite the government's wishful statements, the Frattini Law did not offer an adequate solution to the problem. On the contrary, it reinforced the *status quo*, because, it actually declared that incompatibility between public office and the *management* was unlawful rather than *ownership,* of a company. And as Berlusconi is the owner, but not the manager, of extensive media interests in Italy, the most important aspect of the conflict of interest in Italy, the very one which indeed made it necessary to adopt the law in the first place, was not resolved.

This resulted in further, severe criticism from the European Commission for Democracy through Law. Apart from stating that the incompatibility with a public post should arise also from ownership of a company, the Commission recalled the 2003 "Guidelines for Managing Conflict of Interest in the Public Service" adopted by the Organisation for Economic Co-operation and Development (OECD).[1003] The Guidelines defined "conflict of interest" as one involving "a conflict between public duty and the private interests of a public official, which could improperly influence the performance of their official duties and responsibilities." They also listed a number of "strategies for positive resolution or management of a continuing or pervasive conflict". These included divestment or liquidation of the interest by the public

[1000] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 36.
[1001] *Ibid.*, 37.
[1002] 'Rules for the resolution of conflicts of interest' ('the Frattini Law'), CDL(2004)93rev.
[1003] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 39.

official, recusal of the public official from involvement in an affected decision-making process, assignment of the conflicting interest in a genuinely "blind trust" arrangement, and resignation of the public official from their public office. Meanwhile, none of the above measures were required by the Italian Frattini Law. The government members who found themselves in a situation of conflict of interest only had to inform the competent Authorities, but were put under no other obligation to remove such conflict of interest.[1004] The Italian government explained to the Commission that introducing any of the measures mentioned in the OECD Guidelines would be in breach of the provisions in the Italian Constitution protecting private property and the guaranteeing free access to public office.[1005] The Commission rebuffed those arguments and noted that if the obligation to sell the business is contrary to the Constitution, then the institution of a "blind trust" could be an answer. The argument that the Italian law does not provide for such an institution is unfounded as nothing prevents the legislator from introducing it. The Commission rightly observed that entering the political arena is the free choice of each individual. It also entails prerogatives and duties and carries with it some incompatibilities and limitations. Furthermore, as noted by the Commission, "the mere possibility of suffering some financial loss should not be, in itself, a reason to exclude an activity from the list of activities incompatible with public office".[1006]

Hope for remedying this unhealthy legislative environment in Italy emerged together with the new centre-left government formed by the former President of the European Commission, Romano Prodi, after Berlusconi's electoral defeat in the spring of 2006. In the electoral manifesto, Prodi's party The Union (L'Unione), promised that it would address the two major problems – media concentration regulations and the conflict of interest law. Prodi observed that "these two issues must be resolved as soon as possible because the current situation does not meet European standards".[1007] However, as reforms had not been quickly introduced or even started, the European Commission felt the need to interject. In July 2006, it sent a formal letter to the Prodi government, urging it to modify the Gasparri Law.[1008] The Commission reminded the government that the law unfairly favours Italy's existing dominant broadcasters

---

[1004] *Ibid.*, 45.
[1005] *Ibid.*, 45.
[1006] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 46.
[1007] Cece, B., 'Italy labours to rid itself of Berllusconi', n. 999.
[1008] *Ibid.*

and may stifle competition in the nascent digital broadcasting market.[1009] Moreover, even though Berlusconi was no longer the Prime Minister he was the still the head of the opposition party and via Mediaset he still had substantial influence over public opinion. The fact that Italy remains the only European country in which a centre-stage politician owns three main national TV channels, renders the need for reform paramount. Communications Minister Paolo Gentiloni promptly embarked on reforming the media regulations aiming at allowing "more pluralism and more competition".[1010] The "Gentiloni Law" was expected to be adopted in autumn 2007. The government promised to introduce a cap on advertising whereby no TV company can earn more than 45% of the available advertising revenue. It was also to set a firm provision that companies exceeding the thresholds would be obliged to move their channels to cable or satellite.[1011] Both RAI and Mediaset would in any event, have to switch one of their channels to digital TV in 2008 or 2009. This would free up frequencies for digital TV market entrants, such as L'Espresso Editoriale SpA, RCS MediaGroup SpA and privately-owned De Agostini. Minister Gentiloni admitted that the aim of the reforms is to increase the number of TV players in Italy to three or four, which is the EU average per country.[1012]

Moreover, the new law was to provide for the reform of RAI. First of all, the public broadcaster was to get an overhaul of its management structure. An 11-member foundation modeled on the BBC Trust would be set up as RAI's holding company, with four members nominated by the parliament, two chosen by regional entities, and the remainder named by non-political professional organisations. The foundation would then appoint a five-member board which will oversee RAI's day-to-day operations. [1013] Secondly, the reform plan included having two RAI channels mainly funded by a license fee and the third channel mainly funded by advertising. The reform was expected to be implemented before 2010. [1014]

Along with tightening the media ownership regulations, the Prodi government proposed to reform the Frattini Law on the conflict of interests. The new law would render it impossible to combine government positions and the *ownership* of assets exceeding 15 million Euro in value. Furthermore, if elected to government, owners of media companies operating under

---

[1009] Schomberg, W., Sanderson, R., 'EU challenges Italy over Berlusconi media law', *Reuters,* 19 July 2006.
[1010] *Ibid.*
[1011] Vivarelli, N., 'A year without Berlusconi', *Variety,* 20 March 2007.
[1012] 'Italy govt plans RAI reform in next stage of TV revamp', *AFX News*, 29 November 2006.
[1013] Vivarelli, N., 'A year without Berlusconi', n. 1012.
[1014] *Ibid.*

state concessions would have a choice of either selling their companies or handing their management to a blind trust.[1015] Berlusconi was quick to brand the new law "an *ad hoc* attempt to murder Mediaset" and an attempt to prevent him from being the Prime Minister again. He rejected the prospect of handing the management of his company to a blind trust by saying that "no one can ask me to entrust my entire property to someone I don't know, especially since it's the result of a life of hard work".[1016]

Berlusconi has, therefore, remained very vocal and active and despite the long awaited reforms, Mediaset continued to be strong and influential. Thus, commentators have never ruled out Berlusoni's return to the top position in government. Indeed, "Sua Emmitenza" seemed to be doing everything he can to secure Mediaset's position before the reforms come into full effect. In May 2007, Mediaset led the consortium which purchased Endemol, the Dutch production company and Europe's second-largest TV producer. Using de Mol and Goldman Sachs' private equity arm, Mediaset acquired a 75% controlling stake in Endemol.[1017] The acquisition raised concerns in RAI which has recently become heavily reliant on Endemol products. RAI is now facing a situation whereby its top-rated programs are owned by Mediaset. An informal poll in the newspaper La Repubblica showed that 96% of its readers thought the acquisition of Endemol by Mediaset would "inevitably penalize RAI".[1018]

The above shows that the danger to media pluralism still looms in Italy. The perseverance and diligence of the current government in pursuing sweeping reforms of Italian media law, which will remain in place and will not be reversed by any future governments, was absolutely crucial. Nevertheless, with the resignation of Prodi government in January 2008 after the loss of the vote of confidence in the parliament, Berlusconi won the elections in April 2008 and returned to the position of the Italian prime minister. Hope for a quick change is, therefore, lost again.

[1015] 'National interest and summer holidays', *Inside Italy,* 8 May 2007, http://www.loccidentale.it/node/1847 (accessed 8 September 2007).
[1016] *Ibid.*
[1017] Vivarelli, N., 'RAI not sure which Endemol's up', *Variety,*18 May 2007.
[1018] *Ibid.*

6.1.4 Poland

Structure of the Polish television market

Poland, with almost 40 million inhabitants, has one of the largest and most rapidly developing television markets in Europe. The media sector underwent radical transformation after the fall of the communist regime. It was only after 1989, when censorship was abolished, that independent media started to develop.[1019] In addition, it was after this time that foreign media companies began investing in Poland.[1020]

Currently, the Polish television market consists of three main players: the public service broadcaster Telewizja Polska (TVP) and the two commercial stations – Polsat and TVN. They are accompanied by a number of smaller players such as TV Puls.

TVP maintains the dominant position in the TV market with an average audience share of over 50%. It operates two terrestrial channels (TVP1 and TVP2), a regional network (12 channels), an information channel and an International channel TV Polonia. Polsat was the first private broadcaster in Poland. It is owned by Zygmunt Solorz, "a rare example of an Eastern European media mogul"[1021] and was established in 1992 as a satellite station broadcasting from Holland. It began terrestrial broadcasting in March 1994[1022] and currently has over 17% market share. Its satellite station Polsat 2 was launched in July 1997, and in November Polsat launched a digital platform. Polsat has interests in the Baltic countries, with shares in Latvian and Lithuanian TV stations. TVN is the second largest commercial television broadcaster in Poland, it covers almost 80% of the country and has an audience share of around 16%. It was established in 1997 by ITI, a Polish financial group set up by former TVP journalist Mariusz Walter and businessman Jan Wejchert, and US broadcasting investor Central European Media Enterprises.[1023] It is now 19% owned by ITI Holdings, a subsidiary of Luxembourg based company ITI International. Apart from its terrestrial operations, TVN provides six satellite television channels: TVN 7 (entertainment), TVN 24 (24-hour news), TVN Meteo (weather),

---

[1019] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1082.
[1020] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 113.
[1021] *Ibid.*, 114.
[1022] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1082.
[1023] *Ibid.*, 1082.

TVN Turbo (automotive), TVN International and TVN Style. The ITI Group is also active in multiplex cinema operations, home video and theatrical distribution, theatrical production, special events organisation and new media (it operates the largest internet portal in Poland, Onet.pl). The third commercial broadcaster, TV Puls is the successor of TV Familijna, which was launched in 2001 with a license granted to Franciscan fathers for a religious programme. However, this company filed for bankruptcy in 2002. In 2003 Zygmunt Solorz invested in TV Familijna's Antena 1 production company and began transmission through cable networks and on Polsat's digital platform. In June 2005, Polsat became a direct minority shareholder in TV Puls. In 2006 TV Puls was acquired by News Corporation.[1024]

Poland's cable market is the largest in Central Europe. There has been recent consolidation and the market is dominated by just four companies: UPC TK, Telewizja Kablowa Vectra, Aster City, and Multimedia Polska.[1025] UPC, a subsidiary of the American cable operator UPC Polska, which in turn belongs to the media conglomerate Liberty Global, is the largest cable operator in Poland. Aster City Cable is the most important cable operator within Warsaw with 525,000 subscribers.

Pay TV via terrestrial service, cable and satellite is also provided by Canal+ owned by Vivendi Universal. Canal+ launched pay TV in Poland in 1996. It also recently launched its digital platform Cyfra+ which competes with Polsat's digital platform called Polsat Cyfrowy (Digital Polsat).

Media concentration regulation in Poland

The regulation of the media sector in Poland is currently based on four pieces of legislation, namely, the Press Law (1984), the Broadcasting Act (1992), the Telecommunication Law (2000) and the Act on Competition and Consumer Protection (2000).[1026] There are three regulators involved, the National Broadcasting Council, which is responsible for issuing broadcasting licenses and content regulation, the Office for Telecommunications and Post

[1024] *Ibid.*, 1082.
[1025] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 158.
[1026] *Ibid.*, 155.

Regulation with competence to allocate broadcasting frequencies and thirdly, the Competition Authority, which is in charge of assessing mergers.

The Broadcasting Act, 1992, was amended several times, most recently in 2007. The Act was passed after three years of heated discussion and as a result, the State Radio and Television Committee was dissolved from 1 March 1993 and the National Broadcasting Council began operations in April 1993. Indeed, the Council was the first completely new institution in democratic Poland established after 1989. The role of the Council was further enhanced by the new Polish Constitution of 1997, which in Article 214, recognised the special role of the Council to "safeguard freedom of speech, the right to information, as well as safeguarding the public interest regarding radio and television broadcasting". Article 6(1) of the Broadcasting Act specifies that one of the main tasks of the Council is to "ensure the open and pluralistic nature of radio and television broadcasting". In fulfillment of its main duties, the Council issues broadcast licenses and binding legal regulations. It also appoints the Supervisory Board of TVP, supervises adherence by all broadcasters to the provisions of the Act, and, in the case of private broadcasters, the fulfillment of their license conditions.[1027]

Since the 2005 amendments of the Broadcasting Act, the Council consists of five members.[1028] Two are elected by the lower house of the Parliament (the Sejm), one by the Senate and two are appointed by the President.[1029] The Constitution requires that no Council member may belong to a political party or trade union or "perform public activities incompatible with the dignity of his/her function". The Broadcasting Act further specifies that the Council's members are to be chosen "from persons with a distinguished record of knowledge and experience in mass media". However, in practice, things have proven to be very different. Since its establishment, the majority of the members of the Council have been appointed on the basis of their political affiliation to the parties that control the Parliament and the Presidency.[1030] Since its establishment, there has only been one non-politically affiliated

---

[1027] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 155.

[1028] Until December 2005, the Council consisted of nine members; see http://www.krrit.gov.pl/angielska/index.htm (accessed 8 September 2007).

[1029] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1089.

[1030] *Ibid.*, 1092.

specialist appointed out of a total of 33 members of the Council.[1031] A prime example of this was Danuta Waniek who was appointed to the Council by President Aleksander Kwaśniewski in May 2001, and was its Chair between 2003 and 2005. Waniek had no media experience apart from serving for a number of years on the parliamentary Culture and Mass Media Committee. However, she has been a loyal ally of Kwasniewski serving as the chief of his electoral campaign staff in 1995 and subsequently as the Head of his Presidential Chancellery.[1032]

With regard to media concentration rules, the Broadcasting Act provides that a broadcasting license shall not be awarded if transmission of a programme service by the applicant could result in the applicant having a dominant position in mass communications in the given sector. And if the applicant does gain such a dominant position in mass communications in any given area, his license shall be withdrawn. However, the Act contains no specific definition of "dominant position in mass communications" and it provides no thresholds for measuring this dominance. Therefore, a dominant position must be measured, as in other sectors, in accordance with the general provisions of competition law.[1033] The Act on Competition and Consumer Protection defines a dominant position as being a share of more than 40% of the market. Nevertheless, no license has ever been revoked, even though the TVP has over 50% market share.

In January 2002, the Council proposed a draft amendment to the Act, which included a number of cross-media ownership restrictions. One of them was a ban on the joint ownership of national television and national radio stations as well as disqualification for publishers of national daily newspapers from holding broadcasting licences. The draft caused a great wave of criticism and debate. While the government was defending the proposals, claiming they would prevent the creation of media monopolies, the private media sector argued that the draft would "limit the development of electronic private media and would make national companies less competitive than foreign media investors entering the Polish market".[1034] There were also some unclear legislative movements surrounding the draft, which raised the temperature of the

[1031] *Ibid.*, 1091.
[1032] *Ibid.*, 1092.
[1033] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 162.
[1034] *Ibid.*, 156.

discussions somewhat. For instance, an earlier draft had disqualified the publishers of national dailies *or periodicals* from holding broadcasting licenses, but the phrase "or periodicals" mysteriously disappeared from the subsequent text. This implied that publishers of magazines would not be restricted from entering the broadcasting sector.[1035] All the commotion culminated in the end of 2003, when the greatest political scandal in the history of democratic Poland erupted. This will be dealt with in more detail in Chapter 6.2.2 below.

As a result of the controversy and scandal surrounding the adoption of the amendment, the provisions relating to media concentration and cross-media ownership were removed from the proposed draft. The amendment which came into effect in May 2004 included changes that would only bring Polish law into line with the TVWF directive, and concentrated mainly on the introduction of independent production and European production quotas.[1036] Therefore, there are virtually no restrictions on media concentration in the Polish legal system.

Meanwhile, there are open examples of excessive media concentration and dangerous cross-ownership. As mentioned above, TVP has over 50% of the market share. In addition, a company Agora, the owner of the leading daily *Gazeta Wyborcza* is also the owner of 29 local radio stations. Its radio network is the biggest in the market in terms of advertising revenue and audience. In addition, it can be expected that Agora will expand further. The company made no secret of its talks with Polsat about buying a stake in the broadcaster, and has campaigned consistently against planned restrictions on cross-ownership, arguing that "threats to media pluralism come from international media giants (particularly American ones) rather than from domestic cross-ownership".[1037]

6.2 Member States' weakness in the era of global media

The above outline of selected national legislations demonstrates that the EU Member States theoretically realise the dangers of excessive concentration in the media sector and have introduced at least some rules aimed at tackling the issue. However, Member States are

---

[1035] *Ibid.*, 156.

[1036] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 156.

[1037] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1135.

increasingly unable to secure media pluralism in their own territories, not to mention at the European level.

First of all, most Member States, with the UK in the lead, have embarked on an unprecedented liberalisation process. The UK government has succumbed to the ferocious lobbying of commercial media, the governments believed that the future lies not in safeguarding the public interest, but in fostering the growth of giant media conglomerates euphemistically called, the "national champions". Secondly, even the remaining national regulatory instruments used to protect media pluralism are increasingly subject to erosion by cross-border broadcasting.[1038] Global media conglomerates grow beyond the Member States' borders and national tools become increasingly inadequate to control them. In the pan-European media market, individual Member States can no longer ensure that "the various social and cultural functions traditionally performed by their radio and television services continue to be provided".[1039] What is at stake is media pluralism at the European level. As noted by the European Parliament:

> "Fragmentation of the European audiovisual markets into national markets does not reduce the risks of media concentration at European level. A violation of freedom of expression and respect for pluralism and diversity as a result of media concentration in a Member State also constitutes a risk factor for the Community institutional and democratic order".[1040]

This chapter analyses the above mentioned weaknesses of Member States, and highlights their inability to remain the only actors responsible for the control of media concentration in Europe. And this further proves that there is a need for EU action in this industry. With the Member States lacking strength, courage and the will to counteract concentration tendencies, the higher political authorities must be called upon to do so.[1041] Unfortunately, despite the proven inability of national legislations to effectively safeguard media pluralism in the era of

---

[1038] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 212.
[1039] Craufurd Smith, R., *Broadcasting Law and Fundamental Rights*, n. 406, 116.
[1040] European Parliament, Resolution on the application of Articles 4 and 5 of Directive 89/552/EEC ('Television without Frontiers'), as amended by Directive 97/36/EC, for the period 2001-2002, n. 169.
[1041] Comment by the President of the Bundeskartellamt during the Commission's proceedings on Deutsche Telekom/Betaresearch, see Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 53.

global media concentration, the EU continues to believe that the issue should be left to the Member States.

6.2.1 Liberalisation tendencies

Over the past decade most European countries, if not all, have liberalised and relaxed their media ownership legislations, or are in the process of doing so. There has been a noticeable shift in the principles guiding policy-making in the television sector. There is a distinct move from safeguarding public interests, to fostering competition, market effectiveness and, above all, to support" national champions".[1042] Just like the EU fights for "European champions" and argues for light touch regulation, "at the national level arguments in favour of a more liberal ownership regime are often expressed in terms of the need to match the competitiveness of European media rivals".[1043]

The European Union claims that its role is to fight for the open market, while it is the Member States' role to guard the public interest. However, in reality national governments tend to follow the EU example and increasingly perceive broadcasting as an industry "like any other",[1044] which should only be subject to competition regulations. In addition, firm faith in the benefits that can be derived through the new media, result in hastened adjustments to regulatory frameworks, in order to facilitate the progress of new technologies.[1045] Thus, the prevailing trend in Member States has, recently, been to radically overhaul their media ownership regulations in order to submit the sector to market conditions in order to facilitate the expansion strategies of giant media companies.[1046] The previously held beliefs surrounding the inadequacy of competition law to regulate on behalf of media pluralism seems to fade.[1047] Nowadays, competition policy is slowly becoming the most prominent, if not the only, instrument across Europe, used to counteract excessive media concentration.[1048]

[1042] Ward, D., 'Media Concentration and Pluralism: Regulation, Realities and the Council of Europe's Standards in the Television Sector', n. 9.
[1043] Doyle G., *Media Ownership*, n. 101, 94.
[1044] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.
[1045] Ward, D., 'Media Concentration and Pluralism: Regulation, Realities and the Council of Europe's Standards in the Television Sector', n. 9.
[1046] Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138.
[1047] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.
[1048] Ward, D., 'Media Concentration and Pluralism: Regulation, Realities and the Council of Europe's Standards in the Television Sector', n. 9.

It is worth noting that tendencies towards the de-regulation of media ownership rules, "can be taken as classic illustrations of the degree of political power exercised by powerful media corporations in capitalist democracies".[1049] National politicians have uncritically succumbed to the ferocious lobbying of commercial media companies arguing that "domestic ownership rules require extensive liberalisation in order to promote the new technologies and to provide indigenous media interests with a fair chance of competing in increasingly internationalised markets".[1050] For instance, in the UK, the British Media Industry Group was established by leading media companies, specifically to pressurise the government into liberalising media ownership rules.[1051] Similar trends have been observed in Germany, and other large European countries. As a result, British and German media concentration laws, which were previously one of the strictest in Europe, have since the late 1990s, been consistently liberalised.[1052] And, as the UK Communications Act, 2003 proves, there is not only no chance of reversing the trend, there is also no end to liberalisation in sight. On the contrary, judging by the recent OFCOM review of media concentration rules, further radical changes may well be introduced in the future.[1053]

I agree with Doyle, that growing media concentration accompanied by the "persistent march towards complete liberalisation of national media ownership policies across Europe in recent years is a profound cause for concern".[1054] It is all the more disheartening to realise that the current de-regulatory race, among the Member States, could have been prevented if the EU succeeded in achieving the harmonisation of media concentration rules. And although it may be too late to reverse some of the effects of de-regulation, there is still room for manoeuvre if only the EU was willed to act. As Humphreys observes:

[1049] Humphreys, P., 'Power and Control in the New Media', paper presented at the ECPR-Workshop 'New Media and political Communication', University of Manchester, 1997, see also Doyle, G., 'Regulation of media ownership and pluralism in Europe: n. 168; Doyle, G., 'Convergence: 'A unique opportunity to evolve in previously unthought-of ways or a hoax?', n. 181, 154.
[1050] Humphreys, P.,'Regulating for Pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138.
[1051] *Ibid.*.
[1052] Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', n. 106.
[1053] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1652.
[1054] Doyle, G., *Media Ownership*, n. 69, 179.

> "In view of the national trends towards the deregulation of media concentration controls, in the context of the diminishing scope for national regulation in the age of transfrontier media operations and the 'deregulatory competition' that has arisen between nations and regions for media investment, the EU presents itself as an obvious locus of harmonizing re-regulation".[1055]

However, given the fierce national lobbying against any EU involvement in this field the prospects for "restraining any such deregulatory race appear to be highly unpromising".[1056] The most vociferous defender of the Member States to do as they please is, not surprisingly, the United Kingdom – the leader of the liberalisation race. During the consultation on the revision of the TVWF Directive, the UK submitted a response to the Issues Paper No 6 on media pluralism,[1057] in which it declared that it *strongly shares the view* that no specific action is necessary at the EU level to protect media pluralism. And there is little surprise in that statement, given the enormous liberalisation wave which has recently swept through the UK, which sets a worrying example to follow for the rest of the EU members.

De-regulation in the UK began with the introduction of the Broadcasting Act 1996, which was a direct result of fierce lobbying from BSkyB. Although BSkyB physically broadcasts from a satellite registered in Luxembourg, it has its headquarters located in the UK. According to the definition of the country of origin principle in the TVWF directive, BSkyB is licensed and regulated by the UK. In 1996, apart from the general liberalization of permissible thresholds, the UK adopted various regulatory regimes for terrestrial and satellite broadcasters. While terrestrial broadcasters are subject to a set of ownership and content restrictions, satellite broadcasters (such as BSkyB) are virtually regulation-free. As a result, a great number of satellite broadcasters in Europe have either chosen the UK as the location for their headquarters or have relocated to the UK. Examples include Time Warner or Al Jazeera. This means that they are practically subject to no ownership or content restrictions in any country.

[1055] Humphreys, P., 'Regulating for Pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138.
[1056] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 16-17.
[1057] Government of the United Kingdom, Written contribution to the Public Consultation for the review of the 'Television without Frontiers' Directive, Observations on Issues Paper 6 'Media Pluralism', http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-uk.pdf (accessed 8 September 2007).

Further liberalisation brought by the Communications Act 2003 has created one of the most liberal media ownership regimes in the European Union. The policy document which accompanied the draft Communications Bill, openly confessed that: "across the economy, deregulation brings benefits for consumers and businesses ... unnecessary regulations need to be removed wherever possible".[1058] The same document declared that the existing ownership rules must necessarily be liberalised as "they are not flexible enough to respond to the rapid change we have seen in media markets" and that they appear "directed at particular media interests".[1059] Therefore, deregulation is a must in order to allow the UK media companies "to grow, to find new opportunities to reduce costs and attract new investment, if they are to bring better products to consumers".[1060] The competition, innovation and consumer terminology have replaced the main focus on culture, public interest, pluralism, common knowledge and citizens.

This, in my mind, causes a profound concern. As Petley notes, it is by no means true that the best way to "drive innovation" in broadcasting is to reduce regulation.[1061] One cannot simply replicate a strategy which worked well in the telecommunications sector in the broadcasting ecology. The two industries are entirely different. On the contrary, it is the positive forms of regulation in broadcasting that encourage innovation while deregulation almost inevitably leads to "relentless competition for the mass audience and a corresponding homogenisation of programming".[1062]

The progressive replacement of citizen with consumer, and culture with competition, is also visible in the establishment of the OFCOM. OFCOM is the result of the merger of several regulators with different regulatory goals therefore its remit is contradictory, to say the least.[1063] It is required to promote competition and market effectiveness in the television industry whilst at the same time safeguarding public interest and pluralism. Although both concepts should theoretically enjoy equal status in OFCOM's policy approach, the overall

---

[1058] Department of Trade and Industry/Department for Culture, Media and Sport (2002a), The Draft Communications Bill – The Policy, London, HMSO.
[1059] *Ibid.*
[1060] Petley, J., 'The re-regulation of broadcasting, or the mill owners' triumph', (2002) Journal of Media Practice 13-3.
[1061] *Ibid.*
[1062] *Ibid.*
[1063] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1653.

deregulatory function of OFCOM[1064] suggests that the notion of citizenship will be gradually downgraded and the interests of consumers will be promoted to first place.[1065] Petley suspects that what the UK legislators had in mind when establishing OFCOM, was the creation of the UK equivalent of the US Federal Communications Commission (FCC).[1066] And he asserts how detrimental this may be by recalling Edward Herman's definition of the FCC as:

> "a government agency regulating broadcasting, nominally responsible for protecting the public interest; in reality, serving to create the illusion of government protection, while managing the steady encroachment of advertising and the erosion of public interest programming".[1067]

The Communication Act, 2003 is the result of the "marketisation" of society, which is a characteristic not only of the UK, but for most European countries. In summary, and as the Communication Act 2003 clearly exemplifies, the marketisation of the broadcasting sector entails three processes. First of all, as Petley explains, the public interest requirements of regulation are relaxed or removed and public sector institutions are increasingly replaced by private companies operating according to market realities. Secondly, market effectiveness criteria such as cost-saving, commercial revenue generation and customer maximisation, become the primary yardsticks against which the performance of all organisations including those still formally in the public sector, are evaluated. Thirdly, audiences and users of communications facilities are addressed primarily as consumers with a sovereign right to have their personal needs met, "rather than as citizens whose right to full social participation carries with it an obligation to recognise and respect the needs and aspirations of others".[1068]

These processes continue to increasingly dominate European regulatory policies in the television sector and the consequences of this trend will be severe. O'Malley predicts that if nothing changes, regulation will be in the hands of bodies whose main purpose is to enable the industry to make money. Instead of documentaries, drama and valuable children's programmes, we will watch "more soaps, more quizzes, more fly on the wall", and the major

---

[1064] Petley, J, 'The re-regulation of broadcasting, or the mill owners' triumph', n. 1061.
[1065] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1657.
[1066] Petley, J, 'The re-regulation of broadcasting, or the mill owners' triumph', n. 1061.
[1067] Herman, E. S., *Beyond Hypocrisy: Decoding the News in an Age of Propaganda*, (South End Press, 1992).
[1068] Petley, J, 'The re-regulation of broadcasting, or the mill owners' triumph', n. 1061.

beneficiaries will be shareholders in large media companies, for whom this "brave new world" has been constructed.[1069] Even the extensive and empirically detailed literature on the negative consequences of the deregulation of broadcasting seems to fall on deaf ears. The now prevailing neo-liberal dogma and "market fundamentalism" tells the regulators to ignore publications such as the report by the Campaign for Quality Television which concluded that "the 'serious documentary' has become an endangered species" in commercial television.[1070]

To look for more concrete examples, in the UK, as a result of the changes brought by the Broadcasting Act 2003, the ITV network shrank from 15 owners to just one. This seems to be what the legislators wanted – to allow British companies to grow. But the quality of ITV's offering is continuously decreasing. While in the 1980s it had four regular, weekly, peak-time current affairs programming, it now only has one. Overall, its offering has transformed into "a tabloid-style, life-style oriented television programme".[1071] And things are set to only worsen. In 2005 OFCOM announced it would cut requirements for non-news regional programming in half. This means that ITV will be able to cut back on low-rated religious, children's and documentary programmes, and will pull in more advertising revenue with popular, but of doubtful quality, shows such as "I'm a Celebrity ... Get Me Out of Here".[1072] Europe is dangerously heading towards the US regulatory model where five giant media conglomerates control the market and the provision of news, current affairs and high quality programming is marginal.

The liberalisation wave that is rumbling through Europe results in legislation that pretends to serve the viewers by seemingly "giving them what they want". Whilst in reality, it is designed to "further the economic interests of vast global media corporations".[1073] A television system run primarily on market principles is like education or health service run solely on market principles – it just cannot work.[1074] O'Malley fears that the forces unleashed by the Communications Act, 2003, and its European equivalents, will commercialise the media in

---

[1069] O'Malley, T., 'The state of the media – Media Policy and the need for reform', The Campaign for Press and Broadcasting Freedom, 6 December 2001, http://keywords.dsvr.co.uk/freepress/body.phtml?category=&id=150 (accessed 8 September 2007).
[1070] Campaign for Quality Television, 'Serious Documentaries on ITV: an Endangered Species', 1999.
[1071] O'Malley, T., 'The state of the media – Media Policy and the need for reform', n. 1070.
[1072] 'OFCOM eases regional TV demands', *Reuter* ,8 February 2005.
[1073] Petley, J., 'The re-regulation of broadcasting, or the mill owners' triumph', n. 1061.
[1074] O'Malley, T., 'The state of the media – Media Policy and the need for reform', n. 1070.

Europe "producing a deeply negative effect on their objectivity, range and quality and undermining public service values".[1075]

In summary, the continued support for the liberalisation of the television sector and the retreat from the full commitment to public service values is probably the biggest threat to the future of television broadcasting in Europe.[1076]

6.2.2 Media empires beyond national control

Berlusconi's Kingdom

The issue of an unprecedented mix of political and media power which plagued Italy during Silvio Berlusconi's term in the Prime Minister's Office, has already been touched upon in Chapter 6.1.3 above. It is worth recalling it here in more detail, the Italian situation may be repeated elsewhere in Europe if no supra-national rules on media concentration and conflicts of interest are adopted.

Berlusconi and his family own three major TV channels, one newspaper, a book and magazine publishing house (Mondadori) and a large slice of the advertising market (through the advertising agency Publitalia). As Prime Minister he has also exerted undue influence over the Italian public service broadcaster, RAI. Through Mediaset and RAI, Berlsuconi in effect controlled about 90% of Italian TV viewership.[1077] And with 82% of Italians relying solely on television for news, which is the highest percentage in Europe,[1078] Berlusconi's room for manipulation was indeed significant. The political use that Berlusconi has made of his channels is widely known. For instance, in 1995 Berlusconi's Fininvest used its networks to conduct an aggressive campaign before the referendum that was aimed at forbidding a private entrepreneur from owning more than one TV channel. Fininvest carried 520 spots for the campaign against the changes as compared with only 42 for the "Vote Yes" campaign.[1079] As

---

[1075] *Ibid.*
[1076] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1657.
[1077] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 83.
[1078] Mastrolonardo, R., 'Media concentration: the Italian case-study', Open Democracy 14 March 2002, http://www.opendemocracy.net/media-globalmediaownership/article_54.jsp (accessed 8 September 2007).
[1079] Graham, A., Davies, G., *Broadcasting, Society and Policy in the Multimedia Age*, n. 58, 32.

a result, on 11 June 1995, 57% of Italians voted against the proposed changes.[1080] Moreover, it was calculated that during the 2001 election campaign, Berlusconi was on the screen of Mediaset channels for 1427 minutes, compared to just 887 minutes of Francesco Rutelli, his centre-left opponent.[1081] Similarly, Berlusconi's judicial problems received little coverage both on Mediaset and RAI. Also, in November 2004 Berlusconi sacked Enrico Mentana, the editor of Mediaset's most popular news bulletin Tg5, following Mentana's comment in Corriere della Sera newspaper, that "after the passing of the Gasparri Law, there was no need for a news bulletin to guard Mediaset's borders".[1082]

In no other settled democracies in the world, has such a situation has ever existed.[1083] The international community including the European Parliament, the Council of Europe and other influential international institutions and advocacy groups, have issued formal warnings and recommendations for Italy to resolve the anomalies of its media system.[1084] However, just like all of the previous political administrations of the last 20 years Berlusconi's government failed to carry out any reforms "that would ensure a framework for independent media that protects the values of independent journalism and access to information as a cornerstone of democracy".[1085]

On the contrary, the reforms that the government did carry out, as a result of international pressure, were nothing more than a "fig leaf".[1086] The Gasparri and Frattini laws, although proclaiming to safeguard diversity and media pluralism as their main goals, were in fact enacted to sanction and foster the development of Berlusconi's media empire. As mentioned above, by introducing "integrated communications system" as a base for measuring the acceptable 20% market share, the Gasparri law allowed Berlusconi's Fininvest, which owns

---

[1080] European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', n. 984, 9.
[1081] Mastrolonardo, R., 'Media concentration: the Italian case-study', n. 1079.
[1082] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 941.
[1083] European Federation of Journalists, 'Crisis in Italian Media: How poor politics and flawed legislation put journalism under pressure', Report of the IFJ/EFJ Mission to Italy , 6-8 November 2003, 2.
[1084] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 255.
[1085] European Federation of Journalists, 'Crisis in Italian Media: How poor politics and flawed legislation put journalism under pressure', n. 1084, 3.
[1086] 'In Italy's interests', *Financial Times*, 4 March 2002.

Mediaset, to potentially increase its annual turnover by almost 1,889 million Euro.[1087] Frattini law, on the other hand, apparently aimed at resolving the conflict of interest issue, in fact sanctioned the *status quo,* since the *ownership* of a company or of its shares was not enough disqualify anyone from holding a public office. Therefore, the only thing Berlusconi had to relinquish was his honorary chairmanship of AC Milan soccer club, which he owns anyway. He was able to keep his controlling stake in Mediaset and Mondadori.[1088] Indeed, the question arises, how can a government restrict media ownership if the head of the government owns the majority of the media?[1089]

After Berlusconi's defeat in the 2006 elections, the Gentiloni reforms were set to rectify the chaotic and unacceptable legislative situation. All of the recommendations issued by international bodies and institutions have been included in the proposed reforms. The Gasparri Law was to be amended to establish clear definitions of the separate markets. RAI reforms were also under way, which are aimed at ensuring that the PSB becomes a truly independent institution. The law on conflict of interests was also being changed to introduce an incompatibility test between the holding of governmental positions and the *ownership* of media outlets.[1090]

However, many claim that to fully solve the Italian crisis actions must be taken at supra-national level. The European Federation of Journalists (EFJ) warns that while much can be done within one country, the issues at the heart of the crisis must be also addressed at European level. The EFJ explains that:

> "Problems of media concentration, dominant market positions, media globalisation, pluralism, the conflict between commercial and political interests concern all democratic governments, both within Europe and around the world. The Italian experience is potentially dangerous in Europe, because it sets standards that may be followed by new

[1087] Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', n. 898, 106.
[1088] Mastrolonardo, R., 'Media concentration: the Italian case-study', n. 1079.
[1089] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192.
[1090] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 262.

and emerging European democracies that have still not been able to successfully regulate their own public and private media landscape".[1091]

And indeed, with Berlusconi's recent return to the role of Italian prime minister, the reforms in Italy will most likely be abandoned.

Murdoch's invasion

In 1999, BusinessWeek posed the question, "Can Murdoch invade Europe?"[1092] It had already then observed that Murdoch desperately wanted to extend his reach to the continent. Having led BSkyB to a dominant position on the British pay-TV market, he saw "the next media bonanza" taking shape across the English Channel. And although he did not manage to link with Canal Plus, which would create a company dominant in the UK, France, Spain, Portugal, The Netherlands and Italy, it is fair to say that by 2007 he still very much *has invaded* Europe.

Apart from BSkyB in the UK and Sky Italia in Italy, Murdoch's NewsCorporation owns bTV, a broadcast television network in Bulgaria, reportedly a television channel with the largest audience in Bulgaria. NewsCorporation also owns b1TV, a broadcast television network in Romania, Fox Televizija, a broadcast television network in Serbia and Fox Turkey, a Turkish terrestrial channel. It also has a 30% share in Imedi Media Holding, a Georgian radio and TV broadcaster. Finally, NewsCorporation has a 49% share in TV Puls, a terrestrial channel in Poland, partial ownership, held through a 50% stake in TV Investycje. Murdoch's recent acquisitions are two television companies in Latvia (Latvijas Neatkariga Televizija (LNT) he owns entirely and 70% of the Riga-based TV 5 network). Most recent moves by NewsCorp in Europe include application fo a licence for a new German language pay-TV channel, Fox International Channel Germany, and increasing stake in the leading German pay-TV group Premiere to 19.9% making NewsCorp the single largest shareholder.[1093] NewsCorporation is, therefore, creating significant broadcast outposts in continental Europe.

[1091] European Federation of Journalists, 'Crisis in Italian Media: How poor politics and flawed legislation put journalism under pressure', n. 1084, 14.

[1092] Reed, S., Resch, I., 'Can Murdoch Invade Europe?', *Business Week*, 15 March 1999, http://www.businessweek.com/1999/99_11/b3620157.htm (accessed 8 September 2007).

[1093] Roxborough, S., 'NewsCorp. Plans German pay-TV outlet', *The Reporter*, 12 March 2008.

Due to the lack of pan-European media ownership data and the overall lack of transparency, it is difficult to say for what part of the overall media ownership and audience share in Europe News Corporation already accounts. One can only suspect it is a substantial one.

It is also a well known fact that Murdoch's success is, to a large extent, the effect of fierce lobbying of governments, both at national and European levels, for liberal media ownership regulations. The liberal regime for non-domestic satellite broadcasters, introduced by the UK Broadcasting Act 1990, is the prime example. The Act differentiated between domestic and non-domestic satellite broadcasters. Non-domestic satellite companies, that is those whose headquarters were in the UK, but were broadcasting from abroad (i.e. BSkyB), were exempt from media ownership restrictions and a range of other domestic media rules. This legitimised BSkyB's operations even though its parent company, News International (now News Corporation), controlled a substantial proportion of the UK press market. The 1990 Act also legitimised further expansion of BSkyB, which due to its growing market share, would otherwise be banned under UK media ownership law.[1094] The European Commission instituted infringement proceedings against the UK for an incorrect implementation of the TVWF directive. The Court ruled in favour of the Commission and stated that the fact of a less stringent regime applicable to non-domestic satellite broadcasters than to domestic satellite broadcasters was incompatible with the TVWF directive.[1095] According to the Court,

> "While a Member State may, under (...) the Directive, lay down stricter rules in the areas covered by the Directive, the fact remains that, (...), all broadcasts transmitted by broadcasters under the jurisdiction of that Member State or over which it is required to exercise jurisdiction (...) must comply with the law applicable to broadcasts intended for the public in that Member State".[1096]

However, again falling under BSkyB's pressure and without clear directions from the Court, the UK reworded the Act and applied non-domestic rules to domestic licenses.[1097] This meant that after the amendment, no satellite broadcaster in the UK had to comply with media

---

[1094] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 27-28.
[1095] Case C-222/94, *European Communities v. United Kingdom of Great Britain and Northern Ireland*, (1996) ECR, I-04025.
[1096] *Ibid*, para 74.
[1097] Statutory Instrument 1997 No. 1682The Satellite Television Service Regulations 1997.

ownership and other restrictions that applied to UK terrestrial broadcasters. The UK subsequently lobbied the Commission to legitimise its domestic policy.[1098] The revised 1997 TVWF stated in Article 2 that, "for the purposes of this Directive the broadcasters under the jurisdiction of a Member State are those established in that Member State". And a broadcaster shall be deemed to be established in a Member State if it "has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State". Or, if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, "it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates".

In the 1996 Broadcasting Act, the UK applied a different regulatory regime to satellite broadcasters in general, than to terrestrial broadcasters. From then on, satellite broadcasters in the UK were immune from basically any media ownership and other restrictions. The Communications Act 2003 maintained the *status quo*.

The exceptionally liberal regulatory regime for satellite broadcasters in the UK has created "a situation of regulatory arbitrage in Europe".[1099] As already mentioned several times before, a significant number of satellite broadcasters have relocated their headquarters to the UK. And this migration was sanctioned by the European Court of Justice in the *VT4 Ltd v. Vlaamse Gemeenschap* case.[1100] In 1995, the Belgian channel VT4 relocated to London and obtained a non-domestic satellite licence. Under the Broadcasting Act 1990 this meant that VT4 was immune from any restrictions in the UK and could also broadcast to Flanders in Belgium where it "blatantly evaded Flemish media law".[1101] The decision of the Flemish Minister for Culture, which prohibited the retransmission of VT4 programming by cable network operators in Flanders, was overturned by the ECJ which found it incompatible with the TVWF Directive. This meant that the ECJ legitimised the right of media companies to bypass national laws by moving their headquarters abroad.

[1098] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 28.
[1099] *Ibid.*, 28.
[1100] Case C-56/96, *VT4 Ltd v. Vlaamse Gemeenschap*, ECR 1997 I-03143.
[1101] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 29.

Therefore, the skilful lobbying both at the UK national and European levels resulted in TVWF Directive, and this allowed Murdoch to find himself above any media ownership regulations in Europe. BSkyB can broadcast to any EU Member State without being subject to regulation there. For instance, it is currently becoming increasingly strong in Ireland. However, if it exceeds the permissible 25% upper threshold of market share, the BCI won't be able to do anything about it. By lobbying at European level and achieving the favourable wording of the TVWF directive, Murdoch has also paved the way for other commercial broadcasters to circumvent national media ownership rules. All in all, national regulatory instruments used to protect media pluralism and other vital public interests are being eroded by cross-border broadcasting and global media companies lobbying for ever more lenient regulations.

"Rywingate" – political scandal around media ownership legislation in Poland

As already mentioned in Chapter 6.1.4 above, in January 2002 Polish National Broadcasting Council proposed a draft amendment to the Broadcasting Act 1992. The amendment would introduce a number of cross-media ownership restrictions including a ban on ownership of national television and national radio stations as well as disqualifications for publishers of national daily newspapers, which hold broadcasting licenses. The draft caused a great wave of criticism and debate and resulted in the greatest political scandal in the post-1989 Polish history.[1102] This scandal, nicknamed *Rywingate* after its main actor, was exposed on 27 December 2002 by Gazeta Wyborcza, the biggest Polish daily newspaper, and ultimately led to the resignation of Leszek Miller's government in 2004.

In July 2002, a well-known Polish film producer Lew Rywin[1103] informed Wanda Rapaczynska, the chief executive of Agora publishing house which is the owner of *Gazeta Wyborcza,* that the government would be prepared to remove the anti-concentration provisions from the Draft Amendment in exchange for 17.5 million dollars. This would have allowed Agora to purchase commercial broadcaster Polsat, the plans for which have never been a secret of Agora's. 17.5 million dollars constituted 5% of the value of Polsat at the time

[1102] Smolenski, P., 'The Law for a Bribe, that is Rywin comes to Michnik', *Gazeta Wyborcza*, 27 December 2002; The *Rywingate* story is retold in this Chapter based on the original Gazeta Wyborcza article; for English language accounts see also BBC News, 'Polish Hollywood producer jailed', 26 April 2004; New York Times, World Briefing: Europe: Poland: 'Lawmakers Start Corruption Inquiry', 11 January 2003; New York Times, World Briefing: Europe: Poland: 'Charges In Corruption Inquiry', 16 January 2003.

[1103] He participated in producing such films as Steven Spielberg's *Schindler's List*, Roman Polanski's *The Pianist.*

estimated at 350 million dollars. Rywin claimed he acted on behalf of an unidentified "group in power", but provided a hint that Leszek Miller, the Prime Minister at the time, was the main power behind him. The money was to be transferred to the bank account of Heritage Films – Rywin's production company and used by the then governing party SLD (Democratic Left Alliance). 30% of the sum was to be paid right after the entry of the new Law into force, and the remaining 70% after the purchase of Polsat by Agora. Additional conditions included no further criticism of the Prime Minister by *Gazeta Wyborcza* and making Rywin the head of Polsat after the acquisition. Rywin informed Rapaczynska that he expected Agora's answer in writing.

Rapaczynska replied that she would now pass the case to *Gazeta Wyborcza*'s editor-in-chief, Adam Michnik who would decide on further action. After long talks, Rapaczynska and Michnik decided that Michnik would meet with Rywin and tape-record the entire conversation to expose what would become the greatest corruption scandal in Poland's post-communist history. On 27 December 2002, in an article "The Law for a Bribe, that is Rywin comes to Michnik",[1104] *Gazeta Wyborcza* published the written record of the conversation between Michnik and Rywin. The story raised an immediate and immense public outrage.

On 10 January 2003, Sejm established a special commission to investigate *Gazeta's* allegations, and the public prosecutor started a separate investigation. The work of the parliamentary Culture and Mass Media Committee on amendments to the Broadcasting Act was frozen. The investigation committee's hearings, which were transmitted live by public television, disclosed several serious irregularities concerning legislative procedures. The media pointed to Deputy Culture Minister Aleksandra Jakubowska, the Broadcasting Council's Secretary Włodzimierz Czarzasty, TVP's President Robert Kwiatkowski, Prime Minister Leszek Miller and his chief aide, Lech Nikolski, as the "group in power" referred to by Rywin.[1105] All five consistently denied any involvement. There were two contradictory reports published by the Commission, by two separate authors. Sejm finally adopted the report claiming that the group in power did indeed exist. This, however, remains controversial to this day. Meanwhile, Rywin was sentenced to two years in prison for bribery and Miller and his government resigned in May 2004 after Poland's accession to the EU was complete.

[1104] Smolenski, P., 'The Law for a Bribe, that is Rywin comes to Michnik', n. 1103.
[1105] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1097.

In June 2003, and as a direct result of the Rywingate affair, the Government decided to withdraw the draft amendment of the Broadcasting Act from the Parliament.[1106] Instead, in March 2004 "a small amendment" was enacted. However, it lacks any anti-concentration clauses and it does not regulate the control of the transparency of media ownership. It focuses primarily on provisions implementing the TVWF directive (mainly the independent production and European production quotas).[1107] Poland remains without any specific legislative media concentration restrictions.

Rywingate illustrates the influence of political and economic interests when it comes to regulating media market structure.[1108] It serves as the best example that, when faced with such powerful and vested interests, Member States cannot cope on their own. Had there been EU level media concentration restrictions in place, there would have been nothing to bribe anyone for. Poland would simply not be able to introduce or remove media concentration rules as it pleased. It would have to comply with EU law. This is only one of the problems with media pluralism in Poland brought to light by *Rywingate*, which cannot be solved at the national level.

At the forefront of these concerns is editorial independence from owners, advertisers and politicians, which still remains a major issue in Poland.[1109] Although, in theory, the independence of broadcasters from the State is guaranteed by the Constitution and the Broadcasting Act, in practice, public broadcasting has been subject to systematic political influence and pressure. Management positions in TVP have been assigned on the basis of political loyalty and patronage, and news and public affairs coverage have suffered from serious and systematic bias.[1110] The rules established by the 2001 TVP Journalists' Code of Ethics[1111] do not appear to have been followed in practice. One of the most recent examples of this is the dismissal of TVP's president Bronisław Wildstein in February 2007. The

---

[1106] *Ibid.*, 1097.
[1107] Klimkiewicz, B., 'Media Pluralism: European Regulatory policies and the Case of Central Europe', n. 189, 11-12.
[1108] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 156.
[1109] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 113.
[1110] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1082.
[1111] TVP Journalists' Code of Ethics, http://tvp.pl/5465,20060106287625.strona (accessed 5 September 2007).

controversy arose after *The News,* the main news programme of TVP, ordered material on the upcoming divorce of the daughter of President Lech Kaczyński. Although the material was never shown, Wildstein was replaced by former Kaczyński aide Andrzej Urbański. This will most probably end Kaczyński brothers' concerns that TVP has become "too independent".[1112]

An example of the new order under Urbanski, is the recent TVP news coverage of the nurses' protest outside the government buildings in June 2007. *The News'* journalists were told to show the upcoming EU summit as the first news item, even though the news programmes of all the other broadcasters featured the nurse's protest at the start. Obviously, showing the summit where the Kaczyński brothers presented a tough stance on the new Constitutional Treaty and the voting system in the Council would put the government in a much better light than a report on nurses' protest against low wages. The nurses' protest was finally shown as the first news item, but only after *The News'* journalists firmly insisted on their right to editorial independence.[1113] However, the anchor of *The News*, Marcin Leśkiewicz, who was the main force behind the protests against attempts at censorship, was recently fired from TVP. There is a suspicion that the reason behind his dismissal is his harsh and open criticism of the way TVP has attempted to censor certain news that would be detrimental to the Kaczyński government.[1114]

The situation is not much better in the commercial television sector. There are no specific instruments to help to guarantee the editorial independence of private broadcasters. In the absence of written codes, "the personality and professional authority of the leading journalists has been of key importance in mapping the boundaries of editorial independence".[1115] General laws protecting journalists are also weak. Large commercial media groups take advantage of this situation and use the legislative limbo to secure their place in the market and develop strategies for the future.[1116] This inevitably leads to a growing concentration of media

---

[1112] Hedges, M, 'Polish President puts new spin on Polish plumber jokes', www.followthemedia.com, 10 April 2007.
[1113] Kublik, A., 'The rebellion of *The News'* reporters', *Gazeta Wyborcza*, 17 June 2007.
[1114] Knysz, W., 'TVP fires rebel journalist', *Gazeta Wyborcza*, 17 July 2007.
[1115] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1135.
[1116] European Federation of Journalists, 'Media power in Europe: the big picture of ownership', n. 905, 118.

ownership in the commercial sector.[1117] There is also evidence that private television channels have tended to avoid highly sensitive political issues.[1118]

The lack of independence from the Government and political parties is also troubling the National Broadcasting Council. The Council was created as a mechanism of democratic control over public broadcasting and an impartial regulator of private broadcasting, but has, paradoxically, morphed into a very different institution. As already mentioned in Chapter 6.1.4, the composition of the Council has been systematically politicised.[1119]

Changes in Polish media legislation are, therefore, inevitable. The procedure for the appointment of members of the National Broadcasting Council must be altered to ensure its independence from political parties. One suggestion is that the majority of members of the Council should be representatives of civil society organisations and non-state media organisations, with nominees of the Parliament and President constituting a minority.[1120] The existing provisions requiring members to be experienced media professionals should be rigidly observed. The supervisory and management boards of TVP should be appointed subject to clear rules, conditional on professional experience and subject to effective conflict of interest provisions.[1121] Finally, private broadcasters should support the development of codes of ethics and professional standards for journalists and other media employees.[1122]

However, just like Italy, Poland is unlikely to apply the above suggestions without organised pressure coming from supra-national level. As it is now clear, the virtually unrestricted media concentration and the confusion created by the collusion between the media and political establishments are not just "Italian anomalies".[1123] They will continue to arise in more and more Member States as more and more governments succumb to the lobbying of commercial media groups. If no action at the EU level is taken, these problems, which represent imminent threats to any democratic system, will not only fail to be resolved by the Member States, but they will be exacerbated.

[1117] *Ibid.*, 119.
[1118] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1082.
[1119] *Ibid.*, 1144.
[1120] *Ibid.*, 1146.
[1121] Open Society Institute, 'Television across Europe: regulation, policy and independence' , n. 51, 1146.
[1122] *Ibid.* 1147.
[1123] *Ibid.* 255.

7 Failure to safeguard pluralism. The need for action at European level

7.1 The ideal: Media pluralism regulation

The above outline of the flaws of currently available tools supporting media pluralism can lead to only one conclusion: there is a need for positive action at the EU level aimed at preventing the growth of media empires in Europe. Contrary to the European Commission's apparent conviction, digitalisation and multichannel television not only failed to solve the problem of media concentration, but rather increased the power of powerful media corporations which have expanded their interests into other channels and gained control over bottlenecks such as CAS, EPGs and APIs.[1124] As Tongue summarises, "it has been argued that, in the digital age, a combination of open competition and consumer reflexes will guarantee quality, diversity and pluralism. Experience shows us that this is not the case".[1125] Notwithstanding the apparent and spectacular progress in media technology in the recent years, broadcasting (point-to-multipoint communication) is still very much alive despite the recent trend to proclaim the death of television as we know it. The tendency towards the concentration of media markets will continue, as will the need to secure public interest in broadcasting. Fairbairn rightly observes that these "two of the most compelling reasons for regulation of the traditional broadcast markets are likely to continue into the new media era".[1126] Gibbons corroborates that "open market conditions will not necessarily provide a sufficient supply of programming to enable pluralism so that regulation to encourage diversity of source will still be required, even in a fully converged media market".[1127]

The current situation where the public interest regulation of concentrating media is left entirely in the hands of the Member States is unworkable. National regulators are less and less capable of dealing with cross-national and cross-sectoral developments in the media sector and they "are finding it difficult to maintain pluralism in their domestic markets. This is especially

---

[1124] Ward, D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', n. 11.

[1125] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 106.

[1126] Fairbairn, C., 'Serving the public good in the digital age: implications for UK media regulation', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', November 2006, http://www.ofcom.org.uk/research/commsdecade/comms10full.pdf (accessed 8 September 2007), 86.

[1127] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 173.

so when they deal with international media conglomerates whose national affiliations are weak".[1128] On top of that, the Member States are engaged in deregulation and the relaxation of media concentration rules, leading to a regulatory race to the bottom. "Light touch" regulation has been the leitmotif of the national fight for media investment, which has been led by the United Kingdom. Meanwhile the commercial media empires of News Corporation, Vivendi, Bertelsmann and the like, continue to grow beyond national borders escaping the already relaxing regulatory grip.

All these trends point to the ever closer European Union, as being best placed for "harmonising re-regulation"[1129] of the media sector. Member States have to jointly address the issue of media pluralism which currently transcends national borders.[1130] As Harcourt noted in 1998, "the transformation of national mono-media markets into one European multimedia market has been documented by economic analyses... Thus the regulation of media ownership has become a European issue".[1131] Media concentration regulation must therefore necessarily shift to the supranational level or it is in danger of being left behind by current trends. And indeed, the European Union must recognise public policy interests in media regulation by placing citizens' interests over the interests of commercial media. As E. Varney poignantly observes:

> "We are faced with the choice of either allowing unaccountable market players to make the rules of the game, or opting for a coordinated response at the supranational level to deal with these challenges. While the former option would pose significant threats to the interest of citizens, the latter approach provides a democratic framework in which the public is perceived as both consumers and citizens".[1132]

[1128] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 124.
[1129] Humphreys, P., 'Regulating for Pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138, 10.
[1130] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 124.
[1131] Harcourt, A., 'The European Commission and Regulation of Media Industry', n. , 425.
[1132] Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', n. 713, 240.

Therefore, not only is the EU better suited to deal with media empires growing beyond national borders, as "big companies require big regulators",[1133] but it is also potentially more resistant to lobbying that is so prevalent in the media sector.[1134] Admittedly, this fact bears characteristics of a paradox, since in theory the EC machinery of decision-making "provides an almost infinite number of access points through which to lobby EC authorities".[1135]

However, as Doyle observes, "EU policy-making is not immune to industrial lobbying but, because of the diversity of national interests represented at the European level, there may be less opportunity for individual media suppliers to dictate their own policy requirements".[1136] In addition the plurality of actors and the complexity of the decision-making process is in itself a serious obstacle for private interest groups which are used to lobbying a central-decision making body at national level. In the EU such a body does not exist and decision-making power is dispersed among a large number of "autonomous and interdependent" bodies.[1137] This weakens the bargaining position of lobby groups and changes the access conditions to public decision-making.[1138] This means that the EU institutions, which are "integrated into multi-level systems of joint decision-making",[1139] have greater power than national bodies to stand firm against lobbying of powerful interest groups. Therefore, the development of a multi-level system of decision making in the European Union has brought about "substantial changes in the logic of influence in European policy-making".[1140] As noted by Van Heffen et al., "the complicated web of formal rules in the European Union has created many different types of policy arenas" and "formal rules for each type of policy arena define who is admitted as a player in the arena".[1141]

[1133] Ward, D., *The European Union Democratic Deficit and the Public Sphere; An Evaluation of EU Media Policy*, n. 12, 131.
[1134] For the account of lobbying in the media sector at national level, see for instance Stone, P., 'Why do British Prime Ministers insist on keepmg their meetings and discussions with Rupert Murdoch Private?', www.followthemedia.com, 8 February 2008.
[1135] Grande, E., 'The state and interest groups in a framework of multi-level decision-making: the case of the European Union', (1996) Journal of European Public Policy, 3:3, 322.
[1136] Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181.
[1137] Grande, E., 'The state and interest groups in a framework of multi-level decision-making: the case of the European Union', n. 1136, 325.
[1138] *Ibid.*, 329.
[1139] *Ibid.*, 329.
[1140] *Ibid.*, 321.
[1141] Van Heffen, O., Kickert, W.J.M., Thomassen, J.J.A. (Eds.), *Governance in Modern Society: Effects, Change and Formation of Government Institutions*, n. 1142, 46.

Thus, a preliminary phase, the decision-making process is fairly open to interest groups as in the process of preparing a piece of legislation, the European Commission may need information, technical or other, from the industry players. However, the Council meetings are not accessible to interest groups. As Grande notes, provided that national representatives have not been 'captured' in advance by the interest groups, "the complex process of bargaining and the complicated trade-offs behind the closed doors of a Council meeting may trigger inherent political dynamics which the interest groups can neither anticipate nor influence".[1142] In fact, this insulation of one of the levels of legislative deliberations against influence of lobby groups is deliberate and it is an important characteristic of the EU decision-making process. Therefore, even if the Commission may, or rather was, fairly easy to lobby, the Council is believed to be significantly difficult to influence.[1143]

The past tense with regard to lobbing of the European Commission is justified by the fact that, even though the preliminary phase of legislative process is fairly open to private actors, over the years it has become more and more difficult to lobby the Commission. As Coen notes, this is due to "the changing institutional balance at the EU level, expansion of policy areas, and technical nature of functionaries". As it now requires less and less technical information, the Commission has gradually restricted private actors' access to its committees and issue forums.[1144] Moreover, the Commission's recently announced Transparency Initiative[1145] aims at exposing private interest groups which lobby the EU institutions. In March 2007 the Commission opened a voluntary public register for all interest representatives working to influence decisions taken in EU institutions.[1146] After one year of operation of the register, the Commission will evaluate the voluntary participation in the system. If it proves unsatisfactory, compulsory registration and reporting will be considered.

[1142] Grande, E., 'The state and interest groups in a framework of multi-level decision-making: the case of the European Union', n. 1136, 330.

[1143] Van Heffen, O., Kickert, W.J.M., Thomassen, J.J.A. (Eds.), *Governance in Modern Society: Effects, Change and Formation of Government Institutions*, n. 1142, 46.

[1144] Coen, D., 'The European Business Interest and the Nation State: Large-firm Lobbying in the European Union and Member States', (1998) Journal of Public Policy 18, 79; see also Coen, D., 'Business-Regulatory Relations: Learning to Play Regulatory Games in European Utility Markets', (2005) Governance 18(3).

[1145] The Commission launched its Transparency Initiative in late 2005 (see Communication to the Commission from the President, Ms Wallström, Mr Kallas, Ms Hübner and Ms Fischer Boel Proposing the launch of a european transparency initiative, available at: http://ec.europa.eu/commission_barroso/kallas/doc/etik-communication_en.pdf) and, the 2006 Green Paper on the European Transparency Initiative (COM(2006)194), opened the consultation process.

[1146] European Commission, Press release, 'European Transparency Initiative: Commission invites lobbyists and interest groups to subscribe to public register', 21 March 2007, IP/07/367.

Therefore, only by shifting the responsibility for the formulation of media concentration policy to the supra-national level, can the big commercial media firms be deprived of their power to exert pressure on national governments. And only this way can we achieve "media ownership regulation throughout Europe that is genuinely based on public interest goals such as pluralism",[1147] and the one that is not shaped by individual corporate media interests.

In the ideal world, any positive action taken by the EU should take the form of a regulation on media pluralism, which would include safeguards for both the external and internal faces of media pluralism.

Since as noted by OFCOM, "ownership plurality remains the best proxy for viewpoint plurality",[1148] the regulation should first and foremost provide for a minimum harmonisation of national laws that govern the concentration of media ownership. The combination of audience share thresholds suggested already back in the 1990s could be used. It is on the end not unreasonable to expect in general four players in the broadcasting market at the local level (25% audience share), three players at the national level (30% audience share), and ten players at the EU level (10% audience share). There would obviously be a need for a "tiered" approach suggested by Doyle, to take account of different sizes of national markets. There could be groups of countries where different thresholds would apply. For instance in the group of small countries (e.g. Ireland, Finland) the national level threshold could be raised to 35-40% and in the group of large countries (e.g. United Kingdom, Germany) it could be lowered to 25%. Higher audience share thresholds could also apply to public service broadcasters (for instance 40%). Therefore, in a small country like Ireland, which can arguably maintain only two broadcasters, this would allow for one PSB with an audience share of up to 40% and a second broadcaster with an audience share of minimum 10%. In a large country like United Kingdom, this would mean a PSB and two other players. There should be a mutual recognition of the national and regional thresholds and their enforcement could be done similarly to the enforcement of the lists of events of major importance. For instance, just like in the *TV*

[1147] Doyle, G., 'Convergence: 'A unique opportunity to evolve in previously unthought-of ways or a hoax?', n. 181, 154.
[1148] OFCOM, 'Review of Media Ownership rules', n. 918.

Danmark case[1149] in the UK mentioned above in Chapter 5.2.2, the United Kingdom would oversee that broadcasters under its jurisdiction do not exceed the audience share thresholds established by other Member States. It would be up to each Member State to monitor audience shares in its territory and, if need arised, inform the Member State having jurisdiction over a broadcaster exceeding the thresholds to take appropriate measures against that broadcaster (e.g. order divestment of part of the business, free up some airspace etc).

In addition, European legislation should oblige media companies to disclose the full extent of their global holdings in each of the countries in which they operate and should prohibit politicians or political candidates from having substantial commercial interests in the media.[1150]

Admittedly, a regulation is the most intrusive of all EU legislative instruments, and it is difficult to adopt. However, thresholds for European audience share could not be introduced by a directive. In particular, the 10% EU-level threshold would have to be enforced by an EU level body, such as European Media Council or European Media Concentration Observatory, which could only be established by a regulation. In fact, the 1992 Green Paper on "Pluralism and media concentration in the Internal Market"[1151] and its follow-up have suggested a regulation as one of the options. The stated argument in favour of this was that harmonisation would be more effective, given the direct applicability in all Member States and the horizontal and vertical direct effects of media concentrations.[1152]

Contrary to what the commercial media say, regulation of an ever-changing environment is not a bad solution. All in all, as Lord Puttnam explains, "regulation has to keep up with technology, [but] *ex post facto* law is invariably bad law".[1153] A directive or a regulation would provide a comprehensive and readily accessible legal framework for minimum levels of protection of media pluralism across the EU, in an era of rapidly changing and ever

---

[1149] *R. v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd*, [2001] UKHL 42.
[1150] European Federation of Journalists, 'Crisis in Italian Media: How poor politics and flawed legislation put journalism under pressure', n. 1084, 16.
[1151] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n. 171.
[1152] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n. 171, 117.
[1153] Puttnam, D., 'The continuing need to advance the public interest', in 'Communications. The next decade' – a collection of essays prepared for the UK Office of Communications', n. 1127, 131.

concentrating broadcast media markets. This could have been done during the current process of the revision of the TVWF Directive.[1154] It is, after all, possible to distinguish between linear broadcasting services to which the regulation on concentration should apply, and the non-linear communications/media services which could be "left alone" until the market reaches a more mature stage. Gibbons opts for behaviour-based competition regulation, which would impose "a threshold for media domination that differs from, but complements notions of economic dominance" with the aim of ensuring that "major media players, do not control more than a significant share of audience's experience".[1155] The answer to the many of the voices is that say it is impossible to find a common denominator for media concentration rules for all 27 Member States, could be a "tiered" approach to the EU level regulation of media concentration, as suggested by Doyle.[1156] A tiered regulation would introduce different levels of diversity of ownership for markets of different sizes.

It has already been noted that the European Parliament insisted on such an outcome of the revision process of the Television Without Frontiers Directive. Unfortunately, media concentration was not on the revision agenda and even more so, almost all of the Parliament's insertions of the words "media pluralism" after the second reading were duly deleted from the draft. Unfortunately therefore, the European Union *de facto* follows the first policy option with regard to media concentration, suggested in the 1992 Green Paper on media concentrations and pluralism, i.e. it takes no regulatory action at all. Ten years after the last draft of the media concentration directive was presented in 1997, we are still lacking any specific European regulation on media concentration. The failure to adopt positive EU-level rules against media concentration left "a fissure between national regulation and European regulation that technically allows companies to bypass stringent regulatory demands".[1157] The result is that the internationalising commercial media sector is increasingly enjoying minimal

---

[1154] Bibby, A., 'Global Concentration in the Media', UNI-MEI World General Assembly, Los Angeles, 1-3 October 2003, http://www.andrewbibby.com/pdf/Media%20Concentration.pdf, (accessed 8 September 2007), 16.
[1155] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 173.
[1156] Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', n. 181.
[1157] Ward, D., *The European Union Democratic Deficit and the Public Sphere; An Evaluation of EU Media Policy*, n. 12, 131.

regulation.[1158] The EU would apparently want to follow the formula that regulation should be "predictable, minimalist, consistent and simple".[1159]

However, the current EU regulation of media concentration fulfils only one of the above conditions – it is minimalist. Yes, the regulation of media should generally be "light touch", but media will not regulate themselves as far as limiting concentration is concerned. Thus, regulators in this field must exercise a much "heavier touch" than they do now. Instead of presenting a "de-regulatory bias"[1160] and leading the way in liberalisation tendencies, the EU should moderate de-regulatory competition, between its Member States. The current Commission's "three-step plan" on media pluralism does not fulfil this demand. Again, it is not much more than pulling the wool over the European Parliament's eyes and pretending that the Commission is finally responding to the Parliament's decade of calls for positive action.

One of the EU's mantras is that it cannot regulate the media sector any more stringently than it does now, because the market is at a too early stage of development and regulatory intervention would halt innovation and progress. This in turn would be tragic since the gains from technical advances far outweigh "temporary market imperfection" which is exactly excessive concentration actually is. However, as Humphreys observes, this Schumpeterian logic "may weigh against over-restrictive ownership rules, [but] it hardly provides a reason to absolve powerful private market players in the media sector from public-service regulations".[1161]

It is important to note that asking for positive action on media concentration is not asking for a common EU media policy. The EU's strength is in being united in diversity, in being enriched by bringing varying national cultures under one roof. However, the EU should have a common *policy* towards media concentration, because it is exactly this trend which potentially endangers the current diversity of cultures and media policies. I agree that "it is unrealistic to consider the current regulatory framework as a common policy towards media

---

[1158] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 20.
[1159] Clinton administration's policy document 'A Framework for Global Electronic Commerce', see Samuelson , P., 'Five challenges for regulating the Global Information Society', in Marsden, C.T., (Ed.) *Regulating the Global Information Society*, (Routledge, 2000), 320.
[1160] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 1.
[1161] Humphreys, P.,'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', n. 87.

concentration".[1162] It is no longer workable for the EU to concentrate on promises of technological revolution and convergence while empowering Member States to rectify all the dangers this brings to media pluralism. As Tongue notes:

> "The argument that a development in technology has effectively ended history and handed the spoils to the extremes of market determinism is one that has been allowed to travel too far already. It must end here". [1163]

Considering the above, a specific European regulation on media concentrations is desirable. However, the next important question to ask is the one about the legal basis. As will be discussed in greater detail in Chapter 7.3 below, the Council of Europe and the European Parliament believe there is a legal basis for a specific regulation on media concentration and they point at the obligation to give effect to the protection of human rights that is imposed on the European Union, by Articles 6 of the Treaty on the European Union and the adoption of the Charter of Fundamental Rights proclaimed in Nice in December 2000. The institutions of the European Union undertook to bring all the legislation in line with these rights. The European Parliament emphasises that the lack of specific regulation on media concentrations aimed at the protection of pluralism means that this commitment has not been fulfilled.[1164]

Notwithstanding the weight and importance of these arguments, it is true that nowhere in the EC Treaty is there a firm legal basis for Community action aimed specifically at protecting media pluralism. The Lisbon Treaty, if ratified, will not be of help either. Article II-11 of the incorporated Charter of Fundamental Rights, which states only that "the freedom and pluralism of the media shall be respected", cannot be seen as a legal basis for harmonisation action.

The previous attempt of the European Commission to base regulation on media concentrations on Internal Market considerations remains the only option. However, the political momentum for this kind of intervention seems to have passed. Post 1998 the European Commission has

---

[1162] Albarran, A.B., Mierzejewska, B, I., 'Media Concentration in the US and European Union: A Comparative Analysis', n. 56.
[1163] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 132.
[1164] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192, 29.

consistently used the "no legal basis" argument as the answer to every call from the European Parliament to return to discussion on the anti-concentration directive. Therefore, as the next chapter concludes, harmonisation legislation on media concentration in the near future is unfeasible due to the lack of legal basis and the lack of political will to introduce it. However, since doing nothing is not an option, chapter 10 discusses the possible alternative solutions "for now".

7.2 Lack of political will

As the previous chapters attempt to demonstrate, the current regulatory framework for media concentration in Europe is painfully inadequate. However, notwithstanding the burning need for positive EU action in this field, the chances for this to happen are bleak, for two main reasons. First of all, the political momentum for the introduction of anti-concentration legislation seems to have faded. Internal Market considerations and the need to level the playing field no longer seem to have any appeal. The media industry realised that what DG Internal Market was actually trying to achieve in mid 1990s, was to slip the aim of safeguarding pluralism through the backdoor of seemingly economically oriented regulation. Thus, with the feeling of deception, big commercial media companies fiercely objected to any form of EU-level legislative intervention. Moreover, they are quite content with the current situation of almost no supranational regulatory control at all.

The current European Commission for its part, not wanting to "lose friends in the media",[1165] rejects the recurring calls from the European Parliament to return to the discussion on the media concentration regulation. Indeed, as has been discussed above the recent "three step plan" for media pluralism serves no more than to pull the wool over the Parliament's eyes. Secondly, the "no legal basis" answer is vehemently used by the Commission as a shield from the Parliament's frequent calls to provide a media concentration directive. Admittedly, there is no firm legal basis in the EC Treaty for legislation aimed specifically at safeguarding media pluralism. However, it is remarkable that there is also no political will to introduce one.

[1165] White, A., of International Federation of Journalists, quoted in 'Brussels reluctant to end political media ownership', *MaltaToday*, 15 April 1007, http://www.maltatoday.com.mt/2007/04/15/t15.html (accessed 8 September 2007).

As already explained in great detail in Chapter 2.2.2 above, the current political climate in the European Commission does not favour firm action on media concentration in Europe. And as the Commission enjoys the exclusive right of any legislative initiative in the European Union, deliberating about the need for a regulation may, on the face of things, seem futile and purely academic.

The Commission seems to have succumbed to the arguments of the commercial media industry, that EU-level regulation of media concentration is a bad solution. Their opinion is that the developing and unpredictable nature of an industry such as the media should not be bound by red tape. In this constantly changing environment, concentration should be allowed in order for technologies to develop and progress to take place. Market failures should be corrected by competition law and pluralism safeguarded with other means, preferably at the national level. This trend was best illustrated during the recent consultation on the revision of the TVWF Directive. In the Issues Paper No 6 for the Liverpool Audiovisual Conference in 2005,[1166] the Commission asked the stakeholders for their opinions on what should be the European Union's role in fostering media pluralism. The Issues Paper was constructed in a somewhat guiding manner. It mentioned some of the EU legislative measures which apparently already do promote pluralism actively. It selectively highlighted only those findings of some of the reports prepared for the European Parliament, which concluded that it would be "difficult to propose any kind of harmonisation of rules between the EU Member States",[1167] it expressed fear that too restrictive ownership rules in Europe might hinder European companies to compete globally. Lastly, it pointed at the Council of Europe as the proper forum to deal at pan-European level with the human and democratic dimension of communication. It is, therefore, little wonder that the majority of respondents found little added value in additional EU action in the media concentration field. The general tenet of answers, in particular by the representatives of the commercial media, was along the lines of the ACT submission:

> "we share both the Commission analysis that over-restrictive rules will be damaging in a global context, as well as the position of EU Member States that ownership regulation is

[1166] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253.
[1167] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391.

best left at national level, where tools can be devised to cater for the heterogeneity of European media market".[1168]

Such an approach of the European Commission is not surprising given the two leitmotifs of the current Barroso Commission's tenure: the realisation of the Lisbon Agenda, and the closely related, race to cut the red tape.[1169] As already mentioned on several occasions before, media in general, and the audiovisual sector in particular, play a substantial role in realising the Lisbon Strategy of making Europe the most competitive, knowledge-based economic area in the world by 2010.[1170] As explained by Commissioner Reding:

> "This European Commission under President Barroso strives for *better regulation.* This implies careful political and economical impact assessment of key proposals, screening of proposals to check their compatibility with the Lisbon Strategy and the roll-back of unnecessary or outdated legislation if not in line with our competitiveness and jobs goals. Co- or self-regulation has an important part to play especially in [the media] field".[1171]

What this inevitably means is that the Commission would rather allow the European-based media companies to grow into "European champions", than curb this growth by adopting EU-level media concentration laws. Therefore, there is currently no place for democratic concerns in the current environment which is directed at building "the most competitive economy in the world by 2010". EU politicians seem so desperate to achieve this goal that boosting the media industry could be done at the cost of public policy concerns. The race to cut the red tape therefore excludes the possibility of advocating for another layer of EU-wide media specific anti-concentration regulation.

[1168] Association of Commercial Television in Europe (ACT), 'Comments to 'Media Pluralism – what should be the European Union's role?, Issues Paper'',
http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-act.pdf (accessed 8 September 2007).

[1169] European Commission, 'Cutting red tape: What does the European Commission do to deliver?', 12 July 2005, MEMO/05.249.

[1170] European Parliament, Draft report on the application of Directive 89/552/EEC Television Without Frontiers, 2003, 2003/2033(INI).

[1171] Reding, V., 'Europe, the media and European media policy', n. 336.

It should be noted however, that when the existing Commission changes, so too might the principles.[1172] The history of changing the authority over the media concentration portfolio (Bangemann-d'Archirafi-Monti-Reding) shows that whether a particular initiative is taken up or not, very much depends on the political beliefs of the person in charge. So it is not at all impossible that the new Commission may bring a change in the approach.

7.3 Question of a legal basis

The "lack of legal basis" has been repeated almost like a mantra by the European Commission when it is urged for positive action in the media concentration field. Now obviously, the European Union is not a state and it has no sovereignty independent from its Member States. The Treaties attempt, therefore, to strike a delicate balance between the legislative powers of the Union and its Member States. The solution adopted is that the European Union has no general law-making power, the *kompetenz-kompetenz*, as Germans call it,[1173] but it operates on the principle of conferred or attributed powers. Article 5 of the EC Treaty makes it clear that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein". This means that it can only act if there is a specific Treaty provision authorising it to make a law,[1174] and this requirement is strictly monitored by the European Court of Justice.[1175]

Article 2 of the EC Treaty lists the "objectives" of the European Community. They include, the promotion of a harmonious, balanced and sustainable development of economic activities; a high level of employment and of social protection, equality between men and women; sustainable and non-inflationary growth; a high degree of competitiveness and convergence of economic performance; a high level of protection and improvement of the quality of the environment; raising standards of living and quality of life, and economic and social cohesion and solidarity among Member States. These objectives are to be attained through the establishment of a common market and an economic and monetary union and by

---

[1172] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 84.
[1173] Westphal, D., 'Media Pluralism and European Regulation', n. 69; Piris, J.-C., 'Does the European Union have a Constitution ? Does it need one?' Harvard Jean Monnet Working Paper 5/00, http://www.jeanmonnetprogram.org/papers/00/000501.rtf (accessed 8 September 2007).
[1174] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* n. 471, 131.
[1175] Piris, J.-C., 'Does the European Union have a Constitution ? Does it need one?', n. 1174.

implementing common policies that are enumerated in a closed list in Article 3. The list has developed significantly since the beginning of European integration and, therefore, "as the Treaty has expanded ... so the number of legal bases [for the EU legislative action] has become ever more voluminous".[1176]

In a small number of common policies[1177] the European Union enjoys exclusive competence, which means that the Member States gave up all sovereignty in these areas.[1178] On the other side of the EU competence spectrum are the areas of industry (Article 157), culture (Article 151), employment (Article 129), education, youth and vocational training (Article 149), economic policy coordination (Article 99) and general public health measures (Article 152).[1179] In these areas the role of the European Union is limited to supporting, coordinating and complementing the actions of the Member States.

However, in the majority of the common policies, the competence is shared between the Union and the States and any EU action must comply with the principles of subsidiarity and proportionality that are enshrined in Article 5 of the EC Treaty. Article 5(2) prescribes the dual-aspect[1180] test of subsidiarity and provides that "in areas which do not fall within its exclusive competence, the Community shall take action ... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

Subsidiarity was added as a general principle of Community law by the Treaty of Maastricht in 1993. Protocol 30 annexed to the Treaty of Amsterdam in 1997 further clarified that for Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in

---

[1176] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials*, n. 471, 131.

[1177] The EU has exclusive competence in the following areas: Common commercial policy (EC Treaty Article 133), common transport policy (EC Treaty Article 76), common customs tariff (EC Treaty Article 26), and common agriculture policy (EC Treaty Article 34).

[1178] Orebech, P., 'The EU competency confusion: limits, 'extension mechanisms,' split power, subsidiarity, and 'institutional clashes'', (1999) Journal of Transnational Law & Policy 13:1.

[1179] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials*, n. 471, 193.

[1180] Arnull, A.M., Dashwood, A.A., Ross, M.G., Wyatt, D.A., *European Union Law* (Sweet&Maxwell, 2000), 159.

the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

The Protocol also provided guidelines which should be used in examining whether the the subsidiarity test is passed with regard to a Community measure: (i) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; (ii) actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty; and (iii) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States. Further, Protocol 30 orders the European Commission to provide a justification as regards subsidiarity, in the Explanatory Memorandum accompanying a legislative proposal on a matter for which the Community does not have exclusive competence.

In addition to the principle of subsidiarity, Article 5(3) of the EC Treaty provides that any action by the Community must be proportionate that is, it "shall not go beyond what is necessary to achieve the objectives of this Treaty". Legislative action at the EU level is, therefore, limited not only by the attribution of powers principle, but also, in the area of shared competencies which means that the EU has to first check whether the aim it is trying to achieve could not be equally effectively achieved by national legislation.[1181]

De Búrca has, therefore, suggested that the subsidiarity principle embraces three related ideas – the first two entail a "test of comparative efficiency" and the third one is a proportionality test.[1182] Thus, firstly, the Community can only take action only if the objectives of that action cannot be sufficiently achieved by the Member States. Secondly, due to the action's scale and effects, the Community can better achieve the action. And thirdly, if it is the Community that takes the action then this should not go beyond what is necessary to achieve the Treaty objectives. De Búrca has also suggested elsewhere that the most important feature brought by

[1181] Alston, P., Weiler, J.H.H., 'An 'Ever Closer Union' in Need of Human Rights Policy', (1998) European Journal of International Law 9, 683.
[1182] Craig, P., de Búrca, G., *EU Law. Text, cases, and materials*, 3rd edition, (Oxford University Press, 2003), 135.

the principle of subsidiarity is "the imposition of a certain onus of justification – a kind of public reason requirement – on the various EU institutions when they act".[1183]

The principle of subsidiarity therefore places a burden on the Community institutions to carefully consider whether a particular action is indeed necessary to take at the Community level. However, it is worth noting that once the action is taken by the Community it is very difficult to argue before the European Court of Justice that it is in breach of Article 5. The Court has been persistently reluctant to annul a Community measure for breach of the principle of subsidiarity.[1184] As proven by the case *Germany v. European Parliament and Council,*[1185] the European Court of Justice will generally interpret EU legislation as compatible with the principle of subsidiarity. In this case the Court held that there is no requirement that Community measures contain an express reference to the subsidiarity principle. It is sufficient that the recitals to the measure made clear why the Community institutions believe that the aims of the measure could be best attained by Community action.

Having now established when the European Union can act, the next question must necessarily be: does it have any legal competence to regulate for media pluralism? Nowhere in the EC Treaty are the words "media" or "pluralism" even mentioned.[1186] The European Union does not have a common media policy and media pluralism is not listed as one of the Community's objectives. Still, the Commission and the Parliament, as well academic literature have discussed several possible "candidates" for the legal basis for EU action in the media pluralism field. There have even been attempts to base legislation in this area on some of them (e.g. Articles 49 and 95). Others have only been suggested but never relied on in practice (e.g. Article 151, 308). It is worthwhile analysing in greater detail the chances of success of the EU-level media concentration legislation given the current scope of EU competence.

[1183] De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', Harvard Jean Monnet Working Paper 7/99, http://www.jeanmonnetprogram.org/papers/99/990701.html.

[1184] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials*, n. 471, 220.

[1185] Case C-233/94 *Germany v. European Parliament and Council* [1997] ECR I-2405, paras. 26-28.

[1186] Apart from the Protocol 32 on the system of public broadcasting in the Member States.

(i) Legal bases used

Article 49 EC Treaty – broadcasting as a service?

Article 49 reads as follows:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

In the already mentioned *Sacchi*[1187] judgment back in the 1970s the European Court of Justice expressed its seminal view that:

> "in the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as *provision of services*"[1188] and "trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods".[1189]

This and a later judgment in *Debauve*[1190] paved the way for the adoption of the Television Without Frontiers Directive in 1989. The Directive mentions Articles 47(2) and 55 of the EC Treaty as legal bases for its adoption. Article 47(2) allows the Council to issue directives for the coordination of national laws concerning the taking-up and pursuit of activities as self-employed persons, and Article 55 extends this permission to the area of services. Now, as Westphal rightly points out, "even if one follows the generally accepted approach of EU competence to regulate broadcasting in principle, this does not automatically mean that the EU is also competent to regulate for media pluralism".[1191] Admittedly, the TVWF directive, by establishing the "country of origin principle", harmonises first and foremost, the economic aspects of providing broadcasting services. However, the EU has managed to slip into the

[1187] Case C-155/73 *Sacchi*, [1974] ECR 409.
[1188] *Ibid.*, para 6 (emphasis added).
[1189] *Ibid.*, para 7.
[1190] Case C-52/79 *Procureur du Roi v. Debauve*, [1980) ECR 833.
[1191] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 481.

Directive some rules safeguarding relevant public interests, such as rules on protection of minors, rule against incitement to racial hatred and against surreptitious advertising. What is even more interesting is that it is difficult to perceive the rules on European and independent production quotas as being dictated by economic considerations. On the contrary, I have already analysed them in the context of existing EU legislative measures that are aimed at the protection of internal media pluralism.

Moreover, the Commission itself admits that they fall into the category of legislative tools introduced by the EU to safeguard pluralism actively.[1192] Therefore, not only can Article 49 *potentially* be used to introduce measures protecting pluralism, in fact in practice, has already happened. In this situation, one cannot agree with Westphal's diagnosis that "the EU has no regulatory competence in the area of media pluralism on the basis of the articles 49 ff EC Treaty",[1193] since it has already *relied on* this article to introduce measures promoting media pluralism. Westphal explains his findings by highlighting the ECJ judgments in *Gouda*[1194] and in the *Commission v. Netherlands.*[1195] In these cases, the Court held that a national cultural policy aimed at the maintenance of media pluralism may constitute "an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services".[1196] From this, Westphal arrives at the conclusion that the EU cannot regulate for media pluralism on the basis of Article 49, because national laws are doing this.

What, therefore, of the production quotas in the TVWF Directive? I see them as necessarily aimed at fostering internal media pluralism. They, therefore, constitute a public interest-dictated fissure in the general economically driven orientation of the Directive. Therefore, the EU *has acted* on the basis of Article 49 to introduce measures contributing to internal pluralism and there has been no protest either from the Member States' side, nor the European Court of Justice. There is, therefore, a precedent and, thus, the European Parliament's calls to include anti-concentration provisions in the new AVMS Directive don't seem merely idealistic anymore. In fact, one of the suggestions of the 1992 Green Paper on "Pluralism and media

---

[1192] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253.
[1193] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 482.
[1194] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, [1991] ECR I-4007.
[1195] Case C-353/89, *Commission v. The Netherlands,* 25 July 1991, [1991] ECR I-4069.
[1196] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, n. 1090, *para.*23; Case C-353/89, *Commission v. The Netherlands,* n. 1091, *para.* 30.

concentration in the Internal Market"[1197] was to adopt a directive based on, what is now, Article 47(2), that is the legal basis for the harmonisation of national rules on services.[1198]

Still, however, the Commission did not answer the call to include media concentration in the discussions on the revision of the TVWF directive. Understandably, while the production quotas seem fairly harmless and demand much less than some Member States have already been doing, the fierce dispute in the mid 1990s leaves no doubt that the rules on structural pluralism would probably cause a much greater stir and therefore they require a much stronger legal basis. Moreover, independent or European production requirements are more similar to the rules on advertising or the rules on protection of minors and prohibiting incitement to racial hatred, since they can be seen as closely related to the provision of the broadcasting service itself. Rules on structural pluralism on the other hand, do not relate to the provision of a service but regulate the size and number of the providers of services. Therefore, they could probably not be that easily introduced via the backdoor of the services provision.

Article 95 EC Treaty – pluralism via backdoor of the Internal Market?

If the backdoor of Article 49 seems closed and has not been used for regulation on structural pluralism, it is interesting to try the backdoor of the Internal Market which was actually opened back in the 1990s. Indeed, the Commission almost succeeded in squeezing media concentration legislation through this unlikely opening.

Article 95 is the main legal basis for the harmonisation of national measures in order to achieve a properly functioning Internal Market. It allows the Council to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the Internal Market". The Article is used in situations when, in the absence of action at Community level, the development of the laws and practices of the different Member States would impede the proper functioning of the Internal Market.[1199] However, as de Búrca points out, the EU has

[1197] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n. 171.
[1198] Article 47(2) applies to self-employed persons. Article 55 makes it applicable to services.
[1199] See, for instance, Case C-377/98 *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, ECR 2001 I-07079, *para.* 33.

also in the past relied on Article 95 to propose legislation in "borderline" areas such as culture or public health.[1200] For instance, the Directive on tobacco advertising,[1201] was adopted under Article 95 EC, because it claims that the differences between the Member States' laws on the advertising and sponsorship of tobacco products are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and the freedom to provide services in this area, as well as to distort competition, thereby impeding the functioning of the Internal Market. Therefore, the Directive declares in Article 1 that its objective is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products and their promotion. However, the main outcome of the harmonization exercise is the general ban of tobacco advertising and promotion (Articles 3 and 4). And this can only be seen as a measure aimed at the reduction of smoking, and thus – at protection of public health.

It is easy to presume why the Commission chose to base the legislation on the Internal Market rationale rather than a public health provision (article 152 of the EC Treaty). As de Búrca explains, Internal Market measures are part of the Community's exclusive competence in which the subsidiarity principle is inapplicable, whereas Community competence in the field of public health can only *complement* national policies, and thus, it is considerably more limited.[1202]

This explains why in the mid 1990s the Commission made an attempt to adopt a media concentration directive, which would lie on the border between the Internal Market and cultural considerations, on the basis of Article 95. As has been already discussed at length in Chapter 2.2.1, the first Green Paper released in December 1992 entitled "Pluralism and media concentration in the Internal Market"[1203] suggested that media pluralism could be achieved through the realisation of the Internal Market, by creating opportunities for media

---

[1200] De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', n. 1184.
[1201] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products OJ (2003) L 152/16, repealing Directive 98/43/ec of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ (1998) L 213/9.
[1202] De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', n. 1184.
[1203] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper)', n 171.

companies.[1204] Hence, the promotion of pluralism at the EU level was treated by the Green Paper as a positive "side effect" of the realisation of the Internal Market. The Green Paper suggested that the need for a harmonising directive arose from the existing "patchwork" of media ownership rules across Europe, which causes legal uncertainty and, therefore, is an impediment to cross-border investment and constricts the growth of the Information Society within the Internal Market. Given all that, one of the solutions suggested by the Green Paper was to base the legislation on Article 95 of the EC Treaty. Although the European Parliament supported by the European Economic and Social Committee and DG Culture voiced serious concerns about basing Community action on the Internal Market and industry arguments and treating protection of pluralism on the EU level as a mere "side effect",[1205] the tenet of the whole debate until the ultimate failure in 1997 was not altered.

The failure of the attempt to base media concentration legislation solely on the Internal Market considerations was, however, quite edifying. I believe it was one of the main reasons for the collapse of the whole debate. While it is undeniably true that "Article 95 ... confers powers upon the European Union in extraordinarily wide and undefined terms [and] it has been of central importance in the making of the Internal Market",[1206] there simply was no chance of fooling everyone involved to believe that the need for EU-level measures for structural pluralism is by no means dictated by cultural concerns, but is a purely Internal Market issue. The failure of the directive in the mid 1990s actually excludes any future possibility of basing EU potential media concentration legislation on Article 95. The discussions and tensions surrounding the debate back then, made it clear that you cannot use the Internal Market as the legal basis if the "dominant purpose" of the legislation is to protect the cultural issue of structural media pluralism. As Chalmers explains "in determining the predominant purpose of a measure, the Court will look at the principles on which it is based and its ideological content rather than its effects".[1207] He gives an example of the *Framework Directive on Waste*[1208] case, in which the ECJ ruled that the Directive should be based on Article 175(1) EC (the environmental base) rather than Article 95 EC (the Internal Market provision). It noted that the

---

[1204] Hitchens, L.P., 'Media Ownership and Control: A European Approach', n. 264, 591.
[1205] European Parliament, Resolution on Pluralism and Media Concentration, n. 272; The Economic and Social and Committee 'Opinion on Commission Green Paper', 93/C304/07.
[1206] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials*, n. 471, 212.
[1207] *Ibid.*, 143.
[1208] Case C-155/91 *Commission v. Council*, [1993] ECR I-939.

central tenets of the Directive were those of environmental management rather than securing the Internal Market objectives of free movement of waste.

Similarly, as de Búrca explains, a measure aimed at the regulation of media concentration, although it may be in part responsible for facilitating the Internal Market in media services, is mainly a measure "of cultural import in the sense of attempting to ensure media pluralism, the quality of programming and the provision of information".[1209] Therefore, even if it was labelled as an "Internal Market" measure there is no hiding the fact that it would have a predominantly cultural dimension. Under Article 151, the Member States retain considerable autonomy in cultural matters, while the Community's role is purely supportive and complementary. It follows that, since the area is so much more sensitive than tobacco advertising and there is no widespread agreement between Member States as to the necessity of legislation, it would be much more difficult to convince the stakeholders once again that Internal Market considerations underlie the need for a media concentration directive.

Therefore, any future proposal to adopt a media concentration directive on the basis of Article 95 runs a serious risk of being flawed on the basis of the "dominant purpose" principle. As Westphal rightly observes, a media concentration directive based on Article 95 would aim to harmonise national media concentration laws "with the objective of protecting the Internal Market, whereas the national laws it seeks to harmonise will have been primarily initiated to protect the non-economic objective of media pluralism".[1210] This intrinsic tension and disparity of purposes makes Article 95 an unsuitable legal basis for media concentration legislation.

(ii) Legal bases suggested

Article 151 EC Treaty – pluralism as a cultural matter

Since it has been established that legislation on media concentration is mainly concerned with the cultural issue of protecting structural media pluralism, rather than the realisation of the

[1209] De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', n. 1184
[1210] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 484.

Internal Market, I now turn to consider to what extent is the EU is empowered to act on cultural matters.

The only Treaty provision dealing with culture is Article 151. It was added to the Treaty by the Amsterdam amendment, together with Article 3(q) which allowed a Community activity aimed at a contribution to "the flowering of cultures of the Member States". Article 151 clarifies, however, that Community action in cultural matters may be aimed only at *encouraging cooperation* between Member States and, if necessary, *supporting and supplementing* their action in four, strictly delineated areas: (i) the improvement of knowledge and dissemination of the culture and history of the European peoples; (ii) the conservation and safeguarding of cultural the heritage of European significance; (iii) non-commercial cultural exchanges; and (iv) artistic and literary creation, including in the audiovisual sector. In addition, paragraph 5 of Article 151 limits Community legislative action to *incentive measures* and *recommendations* and it expressly excludes any harmonisation of the laws and regulations of the Member States.

Therefore, culture is not even in the area of "shared competencies" of the European Union. In this field, the subsidiarity principle requires the EU to opt for Member State level decisions.[1211] The only power of incentive measures, recommendations or guidelines which may be adopted under Article 151 lies in their potential interpretative force. As Chalmers explains, national courts are to have regard to these measures "when interpreting national legislation, implementing them, or when interpreting binding EU measures which supplement them".[1212]

The scope of Article 151 is therefore, strictly limited.[1213] This means that it cannot provide a strong legal basis for EU legislation on media concentration. Harcourt suggests that a ruling by the European Court of Justice on Article 151 could provide a legitimate basis for legislation, without a revision of the EC Treaty.[1214] However, as Harcourt herself is quick to admit, it is unlikely that the Court would go as far as to interpret Article 151 as providing an

[1211] Orebech, P., 'The EU competency confusion: limits, 'extension mechanisms,' split power, subsidiarity, and 'institutional clashes'', n. 1179.
[1212] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* n. 471, 193.
[1213] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 482.
[1214] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 72.

appropriate legal basis for media concentration legislation without an explicit Treaty statement from EU Member States.[1215]

Article 83 – pluralism as a side-effect of effective competition?

For the sake of completeness, following Westphal's analysis,[1216] I will now only briefly mention Article 83 as a possible legal basis for EU legislation on media concentration. Article 83 gives the EU the right to adopt appropriate regulations or directives to give effect to the principles set out in Articles 81 (anticompetitive agreements) and 82 (abuse of a dominant position). The EC Merger Regulation[1217] is based on this Article, and as has already been explained in Chapter 4, it explicitly rules out its applicability to regulation on media pluralism matters. Article 21(4) leaves the media pluralism concerns of media mergers to the exclusive competence of the Member States. Competition legislation necessarily deals with market efficiency and the competitiveness of the industry. It is also an *ex post* regulation of market failures. Media concentration legislation, on the other hand, should aim at *preventing* significant positions being built preferably through the introduction of acceptable thresholds of audience share. This can by no means be achieved on the basis of Article 83. Westphal quotes, and I applaud, Commissioner Monti who said that "plurality and diversity – fundamental to the health of an open, democratic society – may not be assured by a simple free market approach".[1218]

Article 308 EC Treaty – a "rubber provision"?

Article 308 of the EC Treaty is designed to come to the rescue when there is no other clear legal basis for intended legislation. And as it seems that this is the situation with the legal basis for media concentration legislation, it is worth considering the usefulness of this Article in greater detail. It allows the Council to act (unanimously) on a proposal from the Commission and after consulting the European Parliament, "if action by the Community should prove

---

[1215] *Ibid.*, 72.
[1216] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 482-483.
[1217] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), n. 291.
[1218] Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', n. 60.

necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers".

Article 308 allows EU action only to attain a Community *objective*. As has already been mentioned earlier, Community objectives are listed in Article 2 and they are to be attained by common policies that are enumerated in a closed list in Article 3. The Community action on the basis of Article 308 is therefore limited. However, since the formulation of this Article is not very precise,[1219] Craig and de Búrca pose the statement that "the breadth of the Treaty objectives and ... the ECJ's purposive mode of interpreting Community aims" mean that the Article has been used very extensively. In fact, it is often called a "rubber paragraph" because the EU has stretched it in order to allow for the creeping jurisdiction of the EU.[1220] Piris even refers to the "great period of Article 308" which lasted between 1972 and 1998. At the 1972 Paris European Council, the Heads of Government "agreed that in order to accomplish the tasks laid out in different action programmes, it was advisable to use *as widely as possible* all the provisions of the Treaties including Article 235 [now 308] of the EEC Treaty".[1221] The golden era ended in 1988 with the adoption of Single European Act, and it was further frustrated by the ECJ's Opinion 2/94 (see below).

The example of the use of Article 308 is the already mentioned EC Merger Regulation itself. It is based on Article 83 in conjunction with Article 308. Article 83 allows for regulations and directives in order to give effect to the principles set out in Articles 81 and 82. None of these Articles deals with mergers. However, it is clear that one of the common policies mentioned in Article 3 is "ensuring that competition in the Internal Market is not distorted" and regulating mergers clearly falls under this description. There is, therefore, a Community objective, supported by a common policy, but the Treaty has not provided a clear-cut legal basis for the regulation of all its aspects.

However, it is not that simple with media concentration, or speaking in even wider terms – with media policy. However far Article 308 may be stretched, it is not entirely "devoid of

[1219] Piris, J.-C., 'Does the European Union have a Constitution? Does it need one?' n. 1174.
[1220] Orebech, P., 'The EU competency confusion: limits, 'extension mechanisms,' split power, subsidiarity, and 'institutional clashes'', n. 1179.
[1221] Piris, J.-C., 'Does the European Union have a Constitution? Does it need one?' n. 1174.

meaning"[1222] and its use to achieve goals which fall outside the scope of the Treaty is not possible either politically or legally.[1223] The area of human rights provides a telling example. It has been argued in the past that since media pluralism is a cultural issue, it is closely related to a human right of freedom of expression guarded by Article 10 of the European Convention on Human Rights. Based on that assumption, some authors have drawn an analogy with the protection of equality between men and women, which is not only protected by Article 14 the European Convention on Human Rights, but also by EU law.[1224] The Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[1225] was adopted in 1976. This was at the time when the equality objective was not yet expressed in Article 2 of the Treaty itself. It was added in 1997 by the Treaty of Amsterdam. Therefore, by analogy, there could possibly be room for a media concentration directive on the basis of Article 308.

Nevertheless, this argument seems weak. First of all, even if the broad equality objective was not directly mentioned in Article 2, Article 131 (then Article 119) already then provided for the more limited equal pay principle. There was, therefore, a starting point. However, as regards media pluralism, the Treaty has always been silent. There is not one use of the word *pluralism* or *media* in the Treaty. There is, therefore, no point of departure. Secondly, one must not forget that the Equal Treatment Directive was adopted in 1976 – in the "golden era" of Article 308 when there was a wide consensus between the EU institutions and the Member States as to the need to progress European integration at whatever cost. The same cannot be said about the current mood in the European Union.

As already mentioned, the last nail in the coffin of the "golden era" of Article 308 and the symbol of the changing mood, was the ECJ's *Opinion 2/94* regarding the Accession of the Community to the European Convention on Human Rights.[1226] The Opinion was rendered after the Council had asked the European Court of Justice for advice on the legality of using Article 308 to facilitate the European Union's possible accession to the European Convention

[1222] Craig, P., de Búrca, G., *EU Law. Text, cases, and materials*, 3rd edition, n.1183, 125.
[1223] Piris, J.-C., 'Does the European Union have a Constitution ? Does it need one?', n. 1174.
[1224] De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', n. 1184.
[1225] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L/39, amended by Directive 2002/73/EC.
[1226] European Court of Justice, Opinion 2/94 regarding the Accession of the Community to the European Human Rights Convention (Opinion 2/94), [1996] ECR I-1759.

on Human Rights. The ECJ observed that the Treaty confers no specific powers on the Community in the field of human rights. Such rights are protected only by way of general principles of Community law. The Court, therefore, proceeded to consider Article 308 as the possible legal basis for the EU's accession to the European Convention on Human Rights. It provided a useful definition of Article 308 by saying that the Article

> "is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty".[1227]

However, the ECJ was still adamant that Article 308 could not serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty. Furthermore in no circumstances could it be used as a basis for the adoption of provisions, the effect of which would be to amend the Treaty without following the procedure which it specifically provides for that purpose.[1228] As the Court noted, the accession of the EU to the Convention would "entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order".[1229] Such an outcome would be of constitutional significance and would therefore go beyond the scope of Article 308. The ECJ's conclusion was that the EU could only lawfully accede to the Convention after the Treaty had been amended.[1230]

Notwithstanding the fact that the ECJ "was probably content to reach this conclusion in the instant case, thereby avoiding subjecting itself to the ultimate authority of the European Court of Human Rights",[1231] the result of this is telling. Following Opinion 2/94, I see very little chance of a successful adoption of media concentration legislation on the basis of Article 308. Despite the fact that it would in theory be possible to stretch one's imagination to conclude that the protection of media pluralism is *in principle* and in very general terms the objective of

---

[1227] Opinion 2/94, n. 1122 para 29.
[1228] *Ibid.*, *para.* 30.
[1229] *Ibid.*, *para.* 34.
[1230] *Ibid.*, *para.* 35.
[1231] Craig, P., de Búrca, G., *EU Law. Text, cases, and materials*, n. 1183, 125.

the European Union[1232] (especially given Article II-11 paragraph 2 European Charter of Fundamental Rights – see below), this is not an option anymore. As Orebech concludes that subsequent to Opinion 2/94, defining the objectives of the Community, "not only should substantial issues be examined, but organization, form, and procedural issues should be examined as well".[1233] Therefore, the result of the Opinion 2/94 was that the European Union took a much more restrictive approach to the use of Article 308 than it did in the past[1234] and this excludes any chances of it serving as a legal basis for EU-level media concentration legislation.

Human rights provisions?

The pivotal piece of legislation on human rights in Europe is the European Convention on Human Rights. As already discussed in greater detail in Chapters 2.1 and 3, its Article 10 protects freedom of expression for which the pluralist and free media market is indispensable. Article 6(2) of the Treaty on European Union (TEU) declares that the Union respects "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ..., as general principles of Community law". And finally, Article II-11 paragraph 2 of the Charter of Fundamental Rights of the European Union signed and proclaimed in Nice in December 2000, declares solemnly that "the freedom and pluralism of the media shall be *respected*". The Charter was incorporated in the failed Constitutional Treaty and it is now part of the Lisbon Treaty (which is still in the process of ratification by the Member States).

Based on that legal framework, in 2004 the European Parliament drew a conclusion that EU-level legislation on media concentration could be adopted on the basis of Article 6(2) TEU.[1235] The Parliament noted that following the adoption of the Charter of Fundamental Rights, the approval of the Copenhagen criteria for the accession countries, the strengthening of the provisions on European citizenship, the development of an area of freedom, security and

[1232] As Westphal observes, the Legal Affairs Committee suggested Article 308 as legal basis to attain pluralism which the Committee considered to be a proper Community objective, see Westphal, D., 'Media Pluralism and European Regulation', n. 69, 485.
[1233] Orebech, P., 'The EU competency confusion: limits, 'extension mechanisms,' split power, subsidiarity, and 'institutional clashes'', n. 1179.
[1234] Piris, J.-C., 'Does the European Union have a Constitution? Does it need one?', n. 1174.
[1235] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192.

justice, the promotion of transparency and privacy, and the prevention of discrimination, the protection of human rights all became *priority objectives* of the European Union.[1236] The Parliament further concluded that even if the issue of pluralism in the media could at that time only be dealt with indirectly, as there was no specific provision in the Treaties, the situation changed after Amsterdam and Nice Treaties were incorporated which elevated the protection of fundamental rights to "one of the defining elements and priority objectives of both the Union and the Community".[1237] There is consequently a need to review the existing competencies and legislation of the Union in the light of the obligation of the EU to ensure the respect of fundamental rights within its internal legal system. In fact, the 1992 Green Paper on "Pluralism and media concentration in the Internal Market"[1238] had already considered in Part IV, Chapter I (IV) the respect of fundamental rights as a Community objective and recognised the close links between the question of protecting pluralism, and freedom of expression.

Unfortunately, despite the Parliament's great courage and persistence, the human rights provisions of EU law cannot serve as a legal basis for EU media concentration legislation. Firstly, the Charter of Fundamental Rights continues to be simply a declaration without any binding force on the Member States or the European institutions.[1239] It only requires that all EU legislation must be adopted with fundamental rights in mind, but Article II-11 of the Charter does not serve as a legal basis, *per se.* Even if the Lisbon Treaty is eventually adopted and the Charter becomes binding it will still not be adequate. Admittedly, the Lisbon Treaty in Articles 2 and 3 of Part I, mentions pluralism in general as one of the Union's values, and respect for cultural diversity as one of the Union's objectives. However, the wording of Article II-11 of the Charter is very weak. It just declares that pluralism of the media shall be *respected.* It is worth noting that initially the word was *guaranteed.* However, it was weakened following "concerns that this formulation could become the basis of a "creeping" EU competence".[1240] Thus, the history of the drafting process itself provides an answer on whether Article II-11 could be a legal basis for media concentration legislation. Moreover, Article 1(8) of the Lisbon Treaty states clearly that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". In summary,

---

[1236] *Ibid.*, 8.
[1237] *Ibid* , 25.
[1238] European Commission, 'Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper), n. 171.
[1239] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 486.
[1240] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 486.

therefore, I agree with Westphal, that Article II-11, even if it eventually becomes binding, "will not play a new, significant role for the interpretation of the various freedoms of communication".[1241]

However, it is worth noting the pending case before the ECJ, in which the Italian Ministry of Communications asked for a preliminary ruling on the following question:

> "Does Article 10 of the ECHR, as referred to in Article 6 of the TEU, guarantee pluralism in the broadcasting sector, thus requiring the Member States to secure pluralism and competition in the sector based on an antitrust system which, in relation to technological development, secures network access and multiplicity of operators and renders duopolistic market behaviours unlawful?"[1242]

It was very interesting to anticipate whether the approach of the European Court of Justice changed and what is its current approach to the burning issue of media pluralism in Europe. While there have always been serious doubts that the judgment will be revolutionary, there was a glimmer of hope for some further guidance on the question of a legal basis for EU-level legislation on media pluralism. Unfortunately, the Court refused to answer this question by saying that since Italy was in breach of other provisions of the EU law (notably Article 49 EC Treaty and the E-Communications framework, there was no need to answer the question on Article 10 ECHR.[1243]

(iii) Conclusions on the question of a legal basis

The above analysis of potential legal bases for EU action on media concentration can lead to only one conclusion: there is no *obvious,* clear-cut, legal basis in either the EC Treaty or the Treaty of the European Union, for EU legislative action aimed solely at the protection of pluralism and diversity in the media.[1244]

[1241] *Ibid.*, 486.
[1242] Case C-380/05 *Centro Europa 7*, Reference for a preliminary ruling from the Consiglio di Stato by order of that court of 19 April 2005 in Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni, Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni.
[1243] *Ibid.*, paras. 121-122.
[1244] Westphal, D., 'Media Pluralism and European Regulation', n. 69, 481.

And as Chapters 3-6 have proven that there is a need for further and stronger EU action in this field, this can only mean that there is also a need for a Treaty amendment in order to extend EU competencies in the media industry[1245] and to introduce the legal basis for legislation on media concentration. Arino rightly points out that with the shift of the competence balance which was originally drafted in 1950s, the Community competence has gradually widened and EU law "has gradually restricted the capacity of MS to regulate their media".[1246] Therefore, the introduction of a legal basis for media concentration legislation would be simply taking "one step forward" in a journey that has already started. And with the broadcast media industry becoming increasingly pan-European, "the question of the European competence for broadcasting regulation needs to be addressed sooner rather than later".[1247] The Commission can no longer silence the calls for a regulation by simply stating that it is wrong to regulate an unpredictable sector such as this. *Unpredictable* does not mean *ungovernable.*[1248] And as E. Varney warns, "a preservation of the *status quo* would leave citizenship values vulnerable to commercial interests".[1249]

However, would the principle of subsidiarity not stand in the way of the Community action on media pluralism? As already mentioned above in Chapter 7.3, Article 5(2) of the EC Treaty provides that "Community level action is warranted if the objective in question can't be adequately achieved by Member State action alone. Or if the scale or effects of the proposed measures favour Community action".[1250] One may indeed wonder - if the Member States are broadly content to develop media concentration regulation regimes with differing levels of regulatory stringency, what is the case that this is something requiring EC level activity? Nevertheless, as shown in Chapter 6 above, in the current situation of media concentration crossing national borders, the Member States are simply unable to tackle the issue by national measures. The guidelines recommended by the Protocol 30 on the application of the principles

---

[1245] Varney, E. 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', n. 713, 240; Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 124; Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', n. 472.

[1246] *Ibid.*

[1247] Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', n. 170, 124.

[1248] Longstaff, P.H, 'Competition in the communications sector: can unpredictable systems be regulated?', http://sai.syr.edu/facultypapers/ITS%20Helsinki%20paper1.pdf (accessed 8 September 2007).

[1249] Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship interests?', n. 713, 241.

[1250] Alston, P., Weiler, J.H.H., 'An 'Ever Closer Union' in Need of Human Rights Policy', n. 1182, 683.

of subsidiarity and proportionality annexed to the Treaty of Amsterdam are clearly fulfilled here: (i) the media concentration issue has transnational aspects which cannot be satisfactorily regulated by action by Member States; and (ii) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States. I would, therefore, chance saying that if the EU competence to act on media concentration was introduced, the subsidiarity principle would not stand in the way of any EU-level action.

However, there is obviously the problem of no political will to introduce the legal basis. Practical difficulties associated with the Treaty amendment should not be underestimated. It took a very long tome to negotiate the Constitution and it was rejected by France and The Netherlands who felt that it was taking European integration too far. The more cautious Lisbon Treaty is still in the process of ratification and, at the time of writing, it is not yet certain whether Irish people will say "Yes" in the referendum in June 2008. It is, therefore, clear that it is not the best time to suggest further changes to the Treaty leading to expanding EU powers to the area which has traditionally been left in the exclusive competence of the Member States. And if the Lisbon Treaty is ratified, there may even be no opportunity for that any time soon.

Nevertheless, if we accept that pluralism is best served only if a significant number of providers are present, no half-measures, no alternatives for media concentration regulation will suffice. Even if the political climate is unfavourable now, the topic should not be abandoned. Moreover, awareness raising should continue in order to keep the matter on the agenda and pave the way for a regulation in the future. I see this as one of the tasks for academic lawyers – if there is a valuable interest that needs the protection of the law and politicians currently in power are reluctant to do so, lawyers should work towards changing the prevailing attitude. Being a lawyer is not only about mechanically executing law which is adopted by politicians. It is also about influencing what *should* be the law. My thesis is an academic lawyer's voice calling for regulation in an area which is currently suffering from a lack of rules to the detriment of European citizens. The next chapter discusses possible alternative solutions that might employed "for now", that would be directed at awareness raising and keeping this important matter on the European Union's political agenda.

8 What else can be done now?

The need for EU level regulation on media concentration has now, hopefully, been proven. Similarly, there can be no doubt that the EC Treaty has to be amended in order to introduce the necessary legal basis for such a regulation. It is true that there is currently no political will in the EU to engage in a more serious debate on the effects of progressing media concentration and the lack of legal basis is used as a convenient excuse rather than an incentive for a positive action. This, however, does not mean that the subject should be dropped altogether. On the contrary, academic advocacy for positive action should continue with increased vigour. In addition, given the EU's current competencies, it is possible to suggest some solutions which could be introduced *now* to complement what the EU is currently doing. Although not as powerful as a regulation, these measures could at least result in changing the political agenda with regard to EU action on media concentration.

As Gibbons points out,

> "convergence has already revealed the inadequacy of European Commission initiatives to harmonise sectoral ownership regulation; the industry has already moved too far ahead. But that does not mean that pluralism concerns are irrelevant; rather *different techniques* are needed to deal with the control of material received by the audience, to ensure that a sufficient diversity of material is available".[1251]

There can be little doubt that it is a pluralistic rather than a consolidated media market that still stands as the key priority for Europe. Therefore, it is worth considering several different approaches. As always, it was the European Parliament who pioneered solutions which can supplement current EU measures on media concentration and, hopefully only temporarily, substitute a regulation. By 2004 the Parliament had already recommended that the European Commission should consider adopting an "action plan" on media pluralism.[1252] In this chapter,

---

[1251] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17, 170,171 (emphasis added).

[1252] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192.

I take on board, discuss and develop some of the suggestions which I consider particularly noteworthy. They include:

(i) Strengthening **transparency and the monitoring** of media concentrations. The Parliament suggested introducing rules requiring the transparency of ownership in the media, in particular, in relation to cross-border ownership and for the publication of information on significant interests in the media industry. A Europe-wide media concentration monitoring body, such as European Media Ownership Observatory or a European Media Council, should also be established.

(ii) A communication on the status of media pluralism in Member States, including proposals of actions to be taken at the national and Community level with a view to protecting and enhancing media pluralism. The EU may begin with developing recommendations and then move on to the adoption of binding regulations as the subsequent step. I refer to this solution as developing **soft law with hard statements,** which could pave the way for a regulation.

(iii) An examination of the need to introduce a "pluralism test" into the EU Merger Regulation and to establish a European Media Council to assist DG Competition in the analysis of media merger cases. I have named this measure: **media specific merger review.**

(iv) The **promotion of public service broadcasting ("PSB") as a counterweight to consumerism.** The Parliament has, *inter alia,* recommended the Commission to consider the establishment of EU-wide minimum conditions to ensure that the public service broadcaster is independent and free from interference by the government. I propose to discuss additional support measures for PSB that could be adopted.

In addition, I suggest strengthening of two existing EU measures: the promotion of **media literacy**, and **subsidising European media production.**

Considering the above suggestions, one finds it difficult to resist the feeling that the sometimes underestimated Council of Europe actually plays a much more important part in controlling media concentrations in Europe than is usually predicted. Almost all of the above measures have been continuously suggested by the Council of Europe and this has been

acknowledged by the European Parliament. Although not as powerful as the harmonisation legislation, the 1994 Recommendation on measures to promote media transparency,[1253] the 1996 Recommendation on the guarantee of the independence of public service broadcasting,[1254] or the system of exchange of information between the Council's Member States should, therefore, be seen as effective sources of inspiration for the EU.

8.1 Transparency requirements and constant monitoring

Before any discussion on the ways to combat excessive media concentration can start, it is important to establish at what point levels of media concentration actually cross the "excessive" threshold. The examination of the full picture of media ownership should, therefore, be the first step before *any* measures are taken to regulate it, be it by regulation or soft law. And this step has not been taken either at the national, or the EU level. There is a frightening lack of transparency in media ownership patterns across Europe. In many Member States only public companies are required to report changes in shareholding. There is no such requirement at the EU level. Moreover, there is no central data collection of audience share, which should be collected not only at the national level, but also at the European level. The result is that companies in the media sector are not used to complying with transparency requirements and this, therefore, inevitably hinders the application of media concentration laws.[1255]

Meanwhile, Noveck is right that transparency of media ownership

> "assumes greater significance with the proliferation of media outlets and concentration of ownership. The globalisation of the media business makes it more difficult for consumers to know who their providers are and to secure a means of communication and redress". [1256]

[1253] Council of Europe, Recommendation No R(94) 13 on Measures to promote media transparency, 22 November 1994.
[1254] Council of Europe, Recommendation No R(96) 10 on the guarantee of the independence of public service broadcasting, 11 September 1996.
[1255] Sanchez-Tabernero, A., Carvajal, M., *Media Concentration in the European Market. New Trends and Challenges*, n. 37, 131.
[1256] Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', n. 31, 51.

International media giants like News Corporation are expanding in Europe. As already mentioned, apart from BSkyB and Sky Italia, it owns Bulgarian bTV, Romanian b1TV, Serbian Fox Televizija and Fox Turkey. It also has a 30% share in Imedi Media Holding, a Georgian radio and TV broadcaster and a 49% share in TV Puls, a terrestrial channel in Poland and partial ownership, held through a 50% stake, in TV Investycje. It is difficult to say for what share in terms of media ownership and audience in Europe, News Corporation already accounts. One can only suspect it is a substantial one. But with no central data collection, nobody really knows what the picture of European media ownership actually is. And many vital developments in the media world, which are potentially very harmful for pluralism, happen in the shadow. As McChesney poignantly notes, "what is tragic that this entire process of global media concentration has taken place with little public debate".[1257]

The example of the recent merger between the only two cable operators in Ireland, Chorus and NTL, illustrates how difficult it is for regulators to navigate media mergers given the complicated, intertwined, transnational and not always transparent ownership structures. As described above in Chapter 6.1.2, in 2005 NTL Ireland was sold to Liberty Media, which owns Chorus Communications. The deal was duly notified to the Irish Competition Authority. After the merger, Ireland has only two pay-TV platforms – NTL/Chorus, which will soon be known as UPC Ireland (cable) and BSkyB (satellite). At the time of the investigation, Liberty Media had a 16% stake in News Corporation – a parent company of BSkyB. The Competition Authority investigated the NTL/Chorus merger and noticed the link between News Corporation and Liberty Media. The Authority was concerned that this relationship could result in limiting competition between the combined NTL/Chorus cable network and BSkyB's satellite network. The Authority had cleared the deal, subject to the appointment of an independent director to the board of UPC Ireland and certain restrictions on the influence of John Malone, chairman of Liberty Media, on the running of the Irish business. In December 2006 the risk of restricting competition between BSkyB and NTL/Chorus was officially removed after John Malone and Rupert Murdoch reached a share-swap agreement. News Corporation agreed to exchange its 38.4% stake in DirecTV Group and three regional sports networks for Liberty Media's 16.3% stake in News Corporation. However, the unofficial, "behind-the-scenes", friendship and business bonds between Murdoch and Malone remain. In

[1257] McChesney, R.W., 'The nine firms that dominate the world', n. 29.

their 2004 Annual Report, Liberty Media Corporation claims openly that "We have been long-time supporters of both News Corp. and the Murdoch family".[1258] In the recent revamp of the Chorus' offer in April 2007, a very popular channel UKTV Style was mysteriously dropped from Chorus' basic package. UKTV channels are owned by Virgin Media which is currently involved in a bitter battle with BSkyB in the UK. It could be just one of my own media conspiracy theories, but it is possible that dropping UKTV Style from Chorus' offer was an example of Malone bowing down to Murdoch.

In any event, as explained by Albarran and Mierzejewska:

> "The situation in Europe is confusing. Each nation treats concentration differently, and follows different guidelines. Even though regulators hope to position Europe as a common market, the reality is there is no effective way to measure concentration across European Union. Data is hard to find, and in some cases, does not even exist".[1259]

This makes monitoring and regulating media concentration at European level a near impossible task. Without official and centralised data collection, "researchers can only provide an anecdotal picture of media concentration in Europe".[1260] There is, therefore, a need for an up-to-date European level collection of data on European media firms, their ownership and audience share. It is also necessary for the EU to join forces and collaborate on a greater scale with the US, given the fact that giant media conglomerates, such as Time Warner, Viacom, NBC, News Corporation and Disney, increasingly invest in European media[1261] (see Table 7 below illustrating the ownership of major commercial channels available in Ireland).

[1258] Liberty Media Corporation Annual Report 2004, http://www.libertymedia.com/ir/pdfs/AnnualReport2004.pdf (accessed 8 September 2007), 4.
[1259] Albarran, A.B., Mierzejewska, B, I., 'Media Concentration in the US and European Union: A Comparative Analysis', n. 65.
[1260] *Ibid.*
[1261] *Ibid.*

Table 7. Ownership of major commercial channels in Ireland available on the Chorus/NTL cable network:

Channel	Owner	Audience share[1262]
Channel4, E4, More4, Film4	**Channel 4 Corporation**	Ch4 - 4.3% E4 - 1.3%
Sky Channels (Sky One, Sky Two, Sky News, Sky Movies, Sky Sports)	**British Sky Broadcasting** Group plc (BSkyB), which is in app. 30-50%[1263] owned by News Corporation	Sky One - 1.9% Sky News - 1.4% Sky Sports1 - 1.1%
UKTV (Style, Food, Garden, People, etc)	**BBC Worldwide** (commercial subsidiary of BBC) and **Virgin Media Television** (largest cable television provider in the UK, which was formed after the merger of the UK cable providers NTL and Telewest)	N/A
Living TV, Bravo, Trouble	**Virgin Media Television**	Living TV - 0.3%
Discovery, Animal Planet	**Discovery Communications Inc.**	N/A
Biography, History	**A&E Television Networks** (owned by Disney: 37.5%, Hearst: 37.5% and NBC Universal: 25%)	N/A
National Geographic,	**National Geographic Television and Film** (50%) + **News Corporation** (50%)	N/A
MTV, VH1	MTV Networks (**Viacom**)	MTV - 0.8%
CNN, Cartoon Network	**Time Warner**	N/A

Only after a precise and up-to-date picture of media ownership in Europe is available, can proper mechanisms for regulation and control of media concentration be developed. The Council of Europe has for several years raised the issue of the need to increase media ownership transparency in Europe. In the 1994 Recommendation on measures to promote media transparency,[1264] the Committee of Ministers noted that the current development of media concentration is likely to create difficulties for media transparency, given that:

> "the growing internationalisation of the capital and activities of firms in the media sector, the development of multimedia groups and the appearance in the media sector of new actors from other branches of economic activity, and the gradual integration of the media into much bigger entities covering the whole of the media production and distribution process from beginning to end".[1265]

The Council then identified a two-fold problem that the growing media concentration poses for transparency. Firstly, the public will find it increasingly difficult to identify who are the

[1262] Source: www.medialive.ie.
[1263] News Corp's precise shareholding fluctuates due to share options and buy-backs.
[1264] Council of Europe, Recommendation R(94) 13 on .
[1265] *Ibid.*, *para.* 2.

owners of the media. This is particularly vital as viewers have the right to know the identity and the motives of the owners of the media and of those who may be behind them. This is because with that knowledge it is easier to form an opinion on the value of the news and programmes broadcast by these media players. Secondly, growing media concentration complicates the activities of the authorities responsible for implementing legislation relating to the control of media concentrations.

In light of the above, the Council of Europe recommended the governments of its Member States to consider the inclusion in their domestic legislation of provisions intended to guarantee or promote media transparency, as well as to facilitate exchanges of information between Member States on this issue. The Committee of Ministers provided the Member States with a set of guidelines from which Member States may choose those measures which they feel necessary and appropriate in light of their own specific context. With regard to the broadcasting sector, the Council of Europe suggests introducing provisions obliging applicants for broadcasting licenses to provide the regulator with wide-ranging information on the ownership structure. Furthermore, information should also be provided on the interests held by the owners in other media companies, as well as information on other persons or bodies likely to exercise a significant influence on the programming policy of the applicant, by the provision of certain kinds of resources. Any subsequent changes to the above information should also be notified to the regulator. The regulator should then make this information accessible to the public, as well as be prepared to exchange it with regulators from other Member States.

Since 1994, when the Council of Europe's Recommendation was adopted, levels of media concentration have increased significantly with a correlating decrease in the transparency of ownership structures. As a result of the internationalisation of the broadcasting industry, individual states are incapable of securing transparency in the media sector. There is a need for European-level action. The European Audiovisual Observatory, which operates within the legal framework of the Council of Europe, could play a role of a central European body responsible for monitoring media concentration. According to the Observatory's Statute:

> "The aim of the European Audiovisual Observatory shall be to improve the transfer of information within the audiovisual industry, to promote a clearer view of the market and

greater transparency. In doing so, the Observatory shall pay particular attention to ensuring reliability, compatibility and comparability of information".[1266]

The Observatory has, therefore, a clearly defined task, that is, to create transparency in the European audiovisual sector by improving the transfer of and access to information. The tasks could be broadened to include the collection of data on media ownership and audience share and the monitoring media concentration.

However, one could also envisage the creation of a separate body under the auspices of the European Union, which would specialise only in the collection of media ownership and audience share data and monitor media concentration levels in Europe. The European Parliament has consistently called on the European Commission to consider structured monitoring of media concentration as one of its main tasks in the audiovisual field, in view of the trend towards concentration of media ownership, both "horizontally" and "vertically". The Parliament further warned the Commission that "in the absence of such monitoring and without a strengthening of national rules, this development risks undermining media diversity, freedom of expression and free access to information".[1267]

During recent consultation on the revision of the TVWF directive a suggestion was made to establish a European Media Concentration Observatory. In its 2004 Report for the European Parliament,[1268] the European Institute for the Media (EIM), debates the ways in which to increase media ownership transparency in Europe and concludes that:

"the establishment of an Observatory focusing on media markets and concentration, with the provision of a data-base of information on EU Member States, would go a long way towards providing such transparency and enhancing national systems of regulation".[1269]

[1266] European Audiovisual Observatory, Mission Statement, http://www.obs.coe.int/about/oea/org/mission.html.en (accessed 8 September 2007).
[1267] European Parliament, Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the 'TV without Frontiers' Directive), as amended by Directive 97/36/EC, for the period 2001-2002, 21 June 2005, Final A6-0202/2005 ('Weber Report'), 14.
[1268] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391.
[1269] *Ibid.*, 251.

During the consultation that took place before the Liverpool Audiovisual Conference, EBU agreed with EIM and added that for the Observatory "to work successfully it might be necessary, as a complementary measure, to ensure that Member States make the requisite data available".[1270] The creation of the Observatory could, therefore, be a good starting point for the Commission. Once it starts monitoring the situation in an organised way, it could realise what exactly the level of concentration is. This could possibly lead the Commission to conclude that media concentration in Europe has reached dangerous levels and that the time has come for positive action at the EU level. As Wallis explains:

> "by making both decision-makers and the general public aware of a decreased range of choice, pressure could be brought to bear on media channels and their management to increase diversity, maybe even to convince decision-makers that 'diversity is a profit-making strategy'".[1271]

The European Commission has more recently been keen to increase transparency in the way it operates,[1272] as well as in other possible areas. For instance, in the European Transparency Green Paper it proposed measures to lift the veil on lobby groups who influence European politics, and to force the mandatory disclosure of information about the beneficiaries of EU funds.[1273] It believes that the public has the right to know who lobby groups represent, what their mission is and how they are funded. The same can be said about media companies and this gives hope that it should not be too difficult to convince the Commission that more transparency in the media sector is needed.

In fact, the Commission has not openly opposed the proposal to establish the European Media Concentration Observatory. On the contrary, in the final report from the 2005 Liverpool Audiovisual Conference, the Working Group on Media Pluralism declares that the idea to

---

[1270] European Broadcasting Union, 'Position on Issues Papers for the Liverpool Audiovisual Conference, 5 September 2005', http://www.ebu.ch/CMSimages/en/leg_pp_%20issuespapers_liverpool_050905_tcm6-39736.pdf (accessed 8 September 2007), 18.

[1271] Wallis, R. 'Diversity in media - pluralism through privatisation or?', Conference on Cultural Diversity, Copenhagen, 2002, http://www.hanoi.dccd.dk/DCCD/cultdiv.nsf/5a522743b22349c8c1256bc1004b9ebd/d6d1d04d6ec38762c1256c86004b4165?OpenDocument (accessed 8 September 2007).

[1272] See European Commission, Transparency Initiative: http://ec.Europa.eu/commission_barroso/kallas/transparency_en.htm (accessed 8 September 2007).

[1273] 'Brussels aims to lift cover on EU lobby groups', *EU Business*, 15 August 2006 .

create European Observatory was in theory, supported.[1274] Through the creation of the Observatory, the postulated enhancement of the Commission' role in monitoring, exchanging information and comparing legislation on media concentration could be achieved. Furthermore, having a supra-national monitoring body, would guarantee transparency, independence and neutrality of the data collection exercise. The Observatory could work with the Council of Europe to draw up a minimum set of standards for media pluralism which would be observed by all Member States.[1275] In addition, the European Parliament has tabled an interesting suggestion, which is to organise a European Year of Television with the aim of drafting a European Audiovisual Pact to ensure a balance between competition, innovation, quality, culture and plurality.[1276] These tasks could, in theory all fall within the competence of the European Media Concentration Observatory.

8.2 Soft law with "hard" statements

As already mentioned on numerous occasions before, the leitmotif of the current Commission's tenure is the realisation of the Lisbon Strategy. Economic growth, job creation and being overall "most competitive economy in the world by 2010" are to be achieved, *inter alia*, via "better regulation". What this ultimately translates to however, is "cutting the red tape". According to the Secretariat General's website on better regulation,[1277] the EU's Better Regulation Strategy officially aims to simplify and improve the existing regulation in order to "reinforce the respect and the effectiveness" of EU law. In practice, however, this means that there is a race towards the reduction of administrative burdens on businesses. In this political climate the suggested recourse to a regulation on media concentration – the "hardest" of possible legislative instruments – is simply unattainable.

[1274] European Commission, Liverpool Audiovisual Conference, 22 September 2005, 'Final Report', http://ec.Europa.eu/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf (accessed 8 September 2007), 26.

[1275] Commission of the Bishops' Conferences of the European Community, 'Comments on 'Media Pluralism – what should be the European Union's role?', Issues Paper, http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-comece.pdf (accessed 8 September 2007), 1.

[1276] European Parliament, Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the 'TV without Frontiers' Directive), as amended by Directive 97/36/EC, for the period 2001-2002, 21 June 2005, Final A6-0202/2005 ('Weber Report'), 15.

[1277] European Commission, Better Regulation Initiative, http://ec.Europa.eu/governance/better_regulation/index_en.htm (accessed 8 September 2007).

Nevertheless, it is undeniable that only the EU is powerful enough to take a stand against pan-European multimedia empires, and it needs to act soon. I argue that, even with the current negative attitude towards adding to the EU's legislative omnipresence, resorting to soft law would be acceptable. In fact, the adoption of soft law may be welcome as part of the new 'better regulation' paradigm.[1278] The European Parliament suggests that the EU should begin a journey towards comprehensive EU policy on media concentration with developing recommendations with a view to paving the way for the adoption of binding regulations in the future. Moreover, Commissioner Reding herself emphasised in one of the speeches, that the Commission "should explore all the possibilities of using 'soft law'".[1279]

In fact, in other policy areas this has already happened. For instance, the development of Community social regulation has been restricted by the Member States, which have constrained the expansion of the legislative competence of the Community in this area.[1280] The Commission, therefore, turned to soft law as an alternative to formal legislation. Soft law has been defined in the academic literature as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain - indirect - legal effects, and that are aimed at and may produce practical effects".[1281]

Senden has offered an interesting classification of EC soft law into three categories of instuments: (i) preparative and informative (e.g. Green Papers, White Papers, action programmes and informative communications); (ii) interpretative and decisional (e.g. communications, notices, guidelines, codes); and (iii) steering instruments (e.g. recommendations, declarations, conclusions).[1282]

It is the third category – steering instruments – which is of greatest interest for the purposes of this chapter. And of the instruments belonging to this category, the most valuable is a

---

[1278] Barani, L., 'Hard and Soft Law in the European Union: The Case of Social Policy and Open Method of Coordination', Webpapers on Consitutionalism & Governance beyond the State 2/2006.
[1279] Reding, V., 'The European Commission and media industry: The need for a new partnership', n. 332.
[1280] Snyder, F., 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) The Modern Law Review 56(1), 19-54, 32.
[1281] Senden, L.,'Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?', (2005) Electronic Journal of Comparative Law 9.1, 23; See also generally in soft law, Senden, L., *Soft Law in European Community Law* (Hart Publishing, 2004); see also Snyder, F., 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', n. 1281, 19-54, 32.
[1282] Senden, L.,'Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?', n. 1282, 23-24.

recommendation as it is a 'formal' steering instrument mentioned as one of the sources of Community law in Article 249 of the EC Treaty. The value of recommendations stems from the fact that, as observed by Senden, they may fulfil a dual function: (i) a *para-law* function, when they are used as temporary or permanent alternatives to legislation, or (ii) the *pre-law* function when they pave the way for the adoption of future legislation "by providing or increasing the basis of support for the rules contained therein".[1283]

There are a number of advantages soft law offers over formal legislation. First of all, it provides for lower 'contracting' costs as it lowers the stakes for the negotiating parties.[1284] Secondly, it also lowers 'sovereignty' costs. As noted by Abbott et al., "even the most powerful states recognise that legalisation will circumscribe their autonomy".[1285] By opting for soft law, states can reduce sovereignty concerns by "opting for escape closes, imprecise commitments or 'political' forms of delegation that allow them to maintain future control if adverse circumstances arise".[1286] Thirdly, soft law is better equipped than hard law to cope with diversity between the states. It may serve as a tool for compromise when it would be impossible to adopt a formal piece of legislation due to overly divergent national interests.[1287] Fourthly, soft law offers flexibility as it allows for easier modification if circumstances change. And finally, the stated advantage of soft law over hard law is the simplicity and speed – to a large extent it allows to avoid formal and cumbersome legislative procedures.[1288]

Turning now to how soft law can support regulation of media concentration at the EU level, it is interesting to observe that what we can currently observe in the EU in the area is the existence of a relatively hard law (Merger Regulation, TVWF directive, E-Communications framework directives), but with weak statements. In all public statements and in the majority of legislative measures, the EU limits itself to at best *accepting, tolerating or allowing* national measures to prevent excessive media concentration or otherwise supporting media pluralism. Given the lack of a legal basis for EU action on media pluralism, EU law *allows*

[1283] Senden, L.,'Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?', n. 1282, 24.
[1284] Case C-322/88, Grimaldi v Fonds des Maladies Professionnelles [1991] ECR 4402.
[1285] Abbott, K.W., Snidal, D., 'Hard and Soft Law in International Governance' (2000) International Organization, 54(3), 421-456, 435.
[1286] *Ibid.*, 435.
[1287] *Ibid.*, 444.
[1288] Trubek, D.M, Cottrell, P., Nance, M., 'Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity', Jean Monnet Working Paper 02/05, 15-16.

Member States to keep their media concentration rules, but does not require the introduction of such rules if they are lacking (like in Poland) or does not do anything if these laws are liberalised or, indeed, done away with altogether. Protocol 23 on public service broadcasting which was added to the EC Treaty by the 1997 Amsterdam Treaty Amendment, incidentally, is the only place in the EC Treaty where the phrase "media pluralism" is used. The Treaty also allows Member States to provide for the funding of public service broadcasting, but only insofar as such funding is granted to for the fulfillment of the public service remit, and insofar as such funding does not affect trading conditions and competition in the Community. Further, it is only up to the Member States to avail themselves of Article 21(4) of the Merger Regulation. It is also up to them to designate network operators with significant market power, and those companies may, but do not have to, be subject to access remedies. Article 31 of the Universal Service Directive merely *allows* Member States to introduce reasonable must-carry rules, and only within strictly delineated limits. Similarly, according to the TVWF Directive, lists of events of major importance are not compulsory, and production quotas are required only "where practicable".

The result is that the Member States are not making an extensive use of the measures *allowed under* EU law. Many Member States have not introduced any control measures for media concentration. After the *Newspaper Publishing* case there has been no further instances of the use of Article 21(4) of the Merger Regulation. Not all Member States have introduced must-carry rules and production quotas and only very few have submitted lists of events of major importance to the society, to be broadcast on free TV. One cannot help but think, what the outcome would be if the situation was reversed: if we had "soft" law with "hard" statements. Is it not worth trying to adopt recommendations, notices, reports etc. using statements such as "*we would recommend*", "*we would welcome*" or "*we would encourage*".

For instance, Article 151 of the EC Treaty requires the Community to "contribute to the flowering of the cultures of the Member States", and to encourage cooperation between Member States *inter alia* in the field of "artistic and literary creation, including in the audiovisual sector". Paragraph 5 of Article 151 allows the Council to adopt *recommendations* to achieve this aim. I would perceive a recommendation that emphasises the importance of maintaining or introducing national anti-concentration laws, as contributing to facilitating diversity of media content, and hence, encouraging artistic creation in the audiovisual sector.

Similarly, a recommendation on the need to preserve public service broadcasting or to standardize CAS, EPGs and APIs could fit into this category. Moreover, as proven by the recent Recommendation on the protection of minors and human dignity,[1289] one does not have to resort to a cumbersome Article 151 which requires unanimity in the Council. It appears that Article 157, which deals with the competitiveness of the Community's industry and only requires qualified majority voting in the Council, can serve as a legal basis for a recommendation on the protection of minors.

The Recommendation declares, at the outset, that because Article 1 of the Charter of Fundamental Rights of the European Union provides that human dignity must be respected and protected, the European Union should gear its political action to preventing any form of violation of that principle. Therefore, the Member States are recommended, in the interests of promoting the development of the audiovisual and on-line information services *industry*, to take the necessary measures to ensure the protection of minors and human dignity in all audiovisual and on-line information services. Let us paraphrase this now:

"Article 11 of the Charter of Fundamental Rights of the European Union provides that the freedom and pluralism of the media shall be respected. The European Union should, therefore, gear its political action to preventing any form of violation of that principle. Therefore, Member States are recommended, in the interests of promoting the development of the audiovisual and on-line information services *industry*, to take the necessary measures to ensure the protection of media pluralism and diversity, in particular by maintaining or introducing anti-concentration legislation, actively supporting public service broadcasting and promoting open CAS".

Just like there is no legal basis in EU law allowing EU action on media pluralism other than the Charter, there is equally no legal basis for EU action on human dignity other than the Charter. And yet, the EU chose to stretch the EC Treaty so as to protect the minors and human dignity as necessary preconditions for the proper development of the European broadcasting industry, however, it continually refuses to do the same for media pluralism. As proven by the

[1289] European Parliament and the Council, Recommendation of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ(2006) L 378/72.

above paraphrase, the arguments used in the Recommendation on measures to promote media pluralism could be almost identical as the arguments of the Recommendation on the protection of minors and human dignity. Why then, does the "three step plan" for media pluralism promise nothing more than another working paper or another study on the level of media concentration in national markets and a communication on the indicators for media pluralism in the EU Member States. We have already seen this, there is now a need for a step forward. There is a need for a firm voice from the EU.

"Soft law with hard statements" may serve as a perfect means for such a firm voice. It can raise public awareness of the problem and build political momentum for binding action. And EU law knows a precedent in the form of sex equality legislation. As G. Monti reminds us:

> "The pace of sex equality legislation stalled in the 1980s and 1990s, in part because of the reluctance of Member States to take equality further. The Commission responded to this hiatus by drafting a range of soft law measures to encourage Member States' action [e.g. Recommendation 84/635 on the promotion of positive action for women]. It has been suggested that the increased legislative output in the 1980s and 1990s was in part motivated by the need for the EC to show that it was not merely about achieving economic goals".[1290]

Moreover, which is particularly helpful, the European Court of Justice has offered support for recommendations in the *Grimaldi* judgment.[1291] The Court held that the national courts "are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".[1292]

Nevertheless, one must not overlook the weaknesses of soft law which lacks features such as "obligation, uniformity, justiciability (and) sanctions".[1293] In addition, as noted by Trubek et al., soft law lacks clarity and precision needed to provide predictability and a reliable

---

[1290] Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials*, n. 471, 886.
[1291] Case C-322/88, Grimaldi v Fonds des Maladies Professionnelles [1991] ECR 4402.
[1292] *Ibid.*, para. 18.
[1293] Trubek, D.M, Cottrell, P., Nance, M., 'Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity', n. 1289, 5.

framework for action, it bypasses normal systems of accountability and "undermines EU legitimacy because it creates expectations, but cannot bring about change".[1294] Therefore, "soft law with hard statements" suggested here may only serve its pre-law function. In fact, the European Parliament has suggested that the EU may begin its journey towards binding measures on media pluralism by developing recommendations and it may move on to the adoption of *binding regulations* in the future. The majority of the points of the Action Plan proposed by the Parliament, and examined in detail below, could initially be tackled by adopting "soft law". A proposal for a Recommendation on the measures to promote media pluralism is annexed to this thesis as an illustration of this statement. However, this solution may necessarily be only temporary.

8.3 Media specific merger review

In its 2004 Report for the European Parliament,[1295] the European Institute for the Media (EIM) suggested that

> "competition policy should recognise the specific cultural and democratic importance of the media industries as opposed to other industries when examining merger and acquisitions. An assessment of the UK 'public interest test' and its application, or the assessment of other systems dealing with the impact of ownership changes on pluralism, would be useful as a step in this direction".[1296]

The public interest test used in the UK was already described in detail in Chapter 6.1.1. One of the ways of transplanting it to EU level would be to require DG Competition to take pluralism and diversity concerns into account while examining the impact of media mergers. Even if DG Competition is ultimately not empowered to make binding decisions concerning media pluralism, the effect of using the public interest test in competition analysis could be an obligation on DG Competition that would suggest to a Member State concerned, to use Article

---

[1294] Trubek, D.M, Cottrell, P., Nance, M., 'Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity', n. 1289, 6; see also Klabbers, J., 'The Undesirability of Soft Law' (1998) 1 Nordic Journal of International Law 36, 3810291.

[1295] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391.

[1296] *Ibid.*, 251.

21(4) of the Merger Regulation. This solution is, however, rather unfeasible. Media pluralism issues of a pan-European dimension are very complex and the European competition authority probably lacks the requisite expertise and furthermore is not adequately resourced to deal with them.

Therefore, a better method would be to implement the British and Irish solution of shared competencies coupled with the European Parliament's suggestion from its 1992 Resolution[1297] to create an independent European Media Council responsible for safeguarding diversity of opinion. The "division of labour" between DG Competition and the Member States, which characterises current EC merger control in the media sector, would thus be shifted to the European level. DG Competition would continue examining the economic effects of media mergers with a Community dimension, while the European Media Council, with the support of the national regulatory bodies, would assess the impact the merger would have on pluralism and diversity on the European media market, and produce a possibly binding report or an opinion.[1298] Not to multiply institutions dealing with media concentration and pluralism issues, the European Media Council could also perform the tasks of the Media Concentration Observatory mentioned above (transparency issues and drafting European Audiovisual Pact). As Scheuer and Strothmann argue, "in view of the numerous media companies currently being formed, the need for Europe-wide measures is obvious", and in this regard "the idea of a European media concentration authority with comprehensive powers is highly topical".[1299]

They are, however, quick to point out two arguments against this idea. First of all, the well-known lack of legal basis argument that is, the fact that "the Community has no specific power to set objectives or requirements to guarantee diversity of opinion". Secondly, since there is no obligation to protect Europe-wide pluralism or diversity, the establishment of a European Media Council would contravene the principles of subsidiarity and proportionality.[1300]

I dare to disagree. Firstly, the European Media Council, or whatever else the body would be called, would not have to posses decision making powers. It could be composed of the

---

[1297] European Parliament, Resolution on media concentration and diversity of opinions, n. 260.
[1298] Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', n. 472.
[1299] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663, 7.
[1300] *Ibid.*, 7.

representatives of the Member States and initially it could act as a kind of "advisory committee" to DG Competition. It could only analyse cases of transnational media concentration, for instances "when a large media network strongly present in one or more European countries enters the market of another Member State",[1301] and it would therefore suggest DG Competition to, in turn advise a Member State concerned to use Article 21(4). This would not be anything that DG Competition is not able to do itself today, and it is simply not doing it due to merger review time pressures and the lack of adequate resources. Although a body with no decision making powers may seem somewhat toothless, the fact that there was actually a case where Article 21(4) was suggested,[1302] proves that such a recommendation mechanism can indeed be effective.

The introduction of an EU-level media specific merger review would ensure that in the application of competition law to media mergers, full account would be taken of the public interest of maintaining sufficient levels of media pluralism in Europe. And this is notwithstanding the fact that the Commission has never acted or commented on this suggestion and, thus, it largely remains on the European Parliament's "wish list". It is still worth highlighting that to the Commission with a hope that it may one day catch on.

8.4 Active promotion of public service broadcasting as a counterweight for consumerism

Why is PSB indispensable for media pluralism?

Structural pluralism which can be achieved *via* media concentration legislation cannot guarantee that viewers will enjoy a wide range of views, opinions and programmes. It may well be that even if there is a plurality of broadcasters they will still present more of the same, low quality content which promises the greatest profits. Without content diversity, i.e. without *internal* media pluralism, there will be no media pluralism in the full meaning of this concept, no matter how many broadcasters are present on the market. Therefore, for media pluralism to flourish, content regulation seems indispensable. Broadcasters need to be burdened with certain content requirements in order to guarantee internal pluralism. As Gibbons notes,

[1301] European Broadcasting Union, 'Position on Issues Papers for the Liverpool Audiovisual Conference, 5 September 2005', n. 1271.
[1302] Case No IV/M.423 *Newspaper Publishing*, 14 March 1994.

"public service broadcasting, with its objective of universality"[1303] has been the European answer to this need. Indeed Tongue corroborates by highlighting that the democratic objectives, to provide a society with a full range of information, debate and expression, is the mission and the *raison d'être* of public service broadcasting.[1304]

It is, therefore, little wonder that a large number of EU Member States have established their own public service broadcasters and imposed on them a set of obligations, known as a public service remit, which "technically guarantee that a wide range of programmes are available to the public and these programmes are of sufficient quality and diversity so as to be representative of the views and needs of a democratic state".[1305]

The 2001 Commission Communication on the application of state aid rules to public service broadcasting,[1306] which will be discussed in more detail below, explains that in general definition of the public service remit falls within the competence of the Member States, which can decide at national, regional or local level. The Communication further clarifies that it is possible to adopt a wide definition of the PSB remit, entrusting a broadcaster with the task of providing *balanced and varied programming* to fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.[1307] Further guidance as to the understanding of the public service remit has been provided by the Committee of Minsters of the Council of Europe. The 2007 Recommendation on the remit of public service media in the information society[1308] explains the Council's understanding of the remit of public service broadcasting as consisting of five elements: (i) a reference point for all members of the public, offering universal access; ii) a factor of social cohesion and integration for all individuals, groups and communities; iii) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards; iv) a forum for pluralistic public discussion

---

[1303] Gibbons, T., 'Pluralism, guidance and the new media', in Marsden, C. (Ed.), *Regulating the Global Information Society*, (Routledge, London 2000), 307.
[1304] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 135.
[1305] Ward, D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector' n. 11.
[1306] European Commission, 'Application of state aid rules to public service broadcasting (Communication)', n. 360.
[1307] *Ibid.*, para. 33.
[1308] Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

and a means of promoting broader democratic participation for individuals; and v) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

In summary, therefore, public service broadcasters in Europe, regardless of their "nationality", should posses several key common features. They should provide universal access to programmes that are free at the point of use; present accurate and independent news, education and entertainment; express the full range of political views and cultural values; be independent from political and economic pressures; compete for good programming not for audience share; and be publicly financed.[1309]

Given all of the above, several authors have suggested that relying on strong public service broadcasters, who act as a "counterweight"[1310] to the large commercial profit-oriented media conglomerates, may be a way to ensure internal media pluralism in Europe.[1311] As noted by Ward, while the commercial sector may provide a diversity of outlets, the public broadcasters provide the backbone of pluralism by offering a diversity of programmes that serve the whole of the public.[1312] And the provision of a wide range of quality programmes is not only a feature of public service broadcasters, but it is also their *obligation.*

For instance, Section 28(2) of the Irish Broadcasting Act 2001 requires RTE to

> "ensure that the programme schedules of the broadcasting service... (a) provide a comprehensive range of programmes in the Irish and English language that reflect the cultural diversity of the whole island of Ireland and include, ... programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater

---

[1309] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 135; O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches', paper presented to the Irish Media Research Network Conference, 16 June 2006; Rumphorst, W., 'Public Service Broadcasting in an Enlarging Europe: Contributing to European Policy Objectives', Amsterdam, 2 September 2004, http://www.ebu.ch/CMSimages/en/leg_p_psb_wr_300804_tcm6-15161.pdf (accessed 8 September 2007)

[1310] Cavallin, J., European Policies and Regulations on Media Concentration', n. 13, 13.

[1311] Gibbons, T., 'Concentrations of Ownership and Control in a Converging Media Industry', n. 17; Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79.

[1312] Ward, D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', n. 9.

for the expectations of the community generally, as well as members of the community with special or minority interests and which, in every case respect human dignity".

The "quality" obligation has resulted in public service broadcasters providing significant investment in European media creativity, impartial information, more European-originated content and overall – very high quality programmes for the society as a whole. [1313] For these reasons, in its 2004 Report for the European Parliament,[1314] the European Institute for the Media (EIM) recommends that strong, independent and financially secured public service broadcasting should be supported in all EU Member States, *in particular* in the new digital age. This may be a little surprising given the fact that the new Information Age brings with it countless channels and websites which should in theory satisfy the thirst for a wide range of information, news, opinions and views of the world we live in. In this context, public service broadcasting may seem old-fashioned, obsolete or even reminiscent of totalitarianism where everybody has access to the same information. In fact, however, in the current digital environment, public services broadcasters are not becoming obsolete, but they add a new role to their portfolio. They help to build bridges over the divide between the "information rich" and the "information poor", which is deepened by the multiplying sources of communication.

As Tambini explains:

> "in the current context, fragmentation is a greater danger than totalitarianism... If some groups of citizens are extremely well-informed and have access to the means to co-ordinate and mobilise around their shared interests, and communicate in a timely and strategic way, and others simply do not, then democracy is a step closer to being a sham".[1315]

In the technological chaos and information noise which characterises today's media world, a well constructed PSB should, thus, serve not only as a guardian of internal media pluralism,

---

[1313] Tongue, C., 'Public service broadcasting and European Community policy', n. 354.

[1314] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391, 252.

[1315] Tambini, D., 'What citizens need to know. Digital exclusion, information inequality and rights', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', n. 1127, 123.

but also as a quiet haven for common knowledge – "what everyone knows that everyone knows" – which is "the foundation of social interaction and social processes of decision making".[1316]

The European Union and PSB – from affection, through a secret affair to a cold war?

The romance between the European Union and PSB started in September 1995 when the then Competition Commissioner Karel van Miert, appeared before the Culture Committee of the European Parliament and declared public service broadcasting to be an essential tool in preserving pluralism. He also proclaimed the need to ensure that the conditions for its continued existence were maintained at Community level.[1317] The next step was taken in 1996 when during a meeting in Galway, the EU Culture Ministers expressed "considerable and strong" support for the concept of a public service, and that funding of public broadcasters should be "adequate and guaranteed, and not subject to review under competition and state aid regime".[1318] This led to an official engagement in 1996 when the EP's Committee on Culture, Youth, Education and the Media, led by the UK socialist MEP Carole Tongue, drafted a Report on public service broadcasting, known as the Tongue report.[1319] The Report resulted in the Resolution which then formed the basis for the subsequent inclusions of the Protocol on public service broadcasting to the 1997 Treaty of Amsterdam".[1320] The fate of the EU-PSB relationship, seemed sealed.

The Tongue report was nothing less than a song of praise for PSB. Its self proclaimed core was to answer the question as to why PSB is so crucial for democracy and to explain the rationale behind the continued support from national governments for PSB.[1321] The report noted that television is still the dominant mass medium and the main source influencing thought and imagination in the Member States of the EU. It also acknowledged the changes brought about by the digital technology and rejected the claim that the multiplication of

---

[1316] Kuhne, H., 'Critical Examination of the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation', cited in Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 112.
[1317] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 13.
[1318] Levy, D., *Europe's Digital Revolution: Broadcasting regulation, the EU and the nation state,* n. 640, 48.
[1319] European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age (Tongue Report)', 11 July 1996, A4-0243/96.
[1320] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 13.
[1321] European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age (Tongue Report)', n.1320, Explanatory statement, p.1.

television channels would render PSBs obsolete. On the contrary, it praised PSB as "an aid to informed citizenship and an agency of representative pluralism bringing together different groups in society in a common conversation that shapes public opinion".[1322] It enumerated the virtues of PSB, for example, offering a wide range of quality production in all genres to the whole population, setting quality standards in popular programmes followed by mass audiences, serving minority interests, providing unbiased and fully independent information, pioneering innovative programme types, genres and services, etc. Indeed, given all of the above, the report called on the Commission to propose adjustments in the Treaty allowing the Union to develop a positive policy on PSB "recognising its crucial importance in building national and European citizenship rather than a policy which is based exclusively on exceptions to provisions on competition and Internal Market policy".[1323]

The Commission's response to this call was to append a Protocol on PSB to the EC Treaty during the 1997 Amsterdam Treaty amendment. In comparison to the Tongue Report, the Protocol is short and concise. Yet, it is the only place in the EC Treaty where media pluralism is mentioned expressly, which in itself is astonishing. It declares that "the system of public broadcasting in the Member States is directly related to the need to preserve media pluralism", and that "the provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State".

It follows that, even though the Protocol seems to praise the PSB in principle, what it in fact requires is that the Member States spell out clearly the remit of public service broadcasting, that they provide funding *only* in support of that remit and that they introduce adequate monitoring and control mechanisms to ensure the fulfilment of the public service remit.[1324] If Member States fail to meet these demands, they render their PSBs vulnerable to an adverse ruling on competition grounds, that is a finding that a public service broadcaster is making inappropriate use of state aid and needs to pay back the public money it received.[1325] This is

---

[1322] European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age (Tongue Report)', n.1320, Motion for a Resolution, para. B.
[1323] *Ibid.*, para. 11.
[1324] Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', n. 97, 14.
[1325] *Ibid.*, 14.

clearly against the Tongue Report's appeal not to form a European policy on PSB as an exception to state aid rules.

Therefore, the Amsterdam Protocol which, in theory, should be an official marriage ceremony between the EU and PSB, in fact became the beginning of the end of the "official" love affair. With the dawn of neo-liberal sentiments in the late 1990s and in the beginning of 21st century, the EU started to feel somewhat embarrassed about its affection towards PSB. Now it was all about effective markets, deregulation and competition and the concept of PSB does not neatly fit into this new regime. Commercial broadcasters started to complain to the European Commission alleging infringements of Article 87 of the EC Treaty in relation to the public funding schemes established in favour of public service broadcasters.

Complaints surfaced in France, Spain, Portugal, Germany, the UK and Italy. Initially the Commission tried to avoid taking decisions by ordering studies on PSB funding in the Member States. However, under pressure, the Commission eventually decided on several of the pending PSB cases.[1326] Surprisingly, the decisions were all in favour of the PSBs.[1327] The Commission seemed to have hidden its affection towards PSB – a *secret* affair with PSB had thus begun. The *News 24* case is probably the most interesting in this regard and can serve as an example of the new policy towards PSB, an application of state aid rules with "a wink of the eye".

In 1997, BSkyB accused the UK government of granting illegal state aid to BBC News 24 – the BBC's new special interest channel. Preliminary consent was granted by the Secretary of State in March 1997 to offer BBC News 24 on the digital platforms, in particular the BSkyB's satellite platform, which was at the time being developed. However, given the delay of the launch of the digital satellite network, the BBC asked for a second consent, this time to launch News 24 on the existing analogue cable infrastructure. BSkyB's complaint relates to this second consent granted by the Secretary of State in October 1997. BSkyB alleged that financing the News 24 channel by the use of part of the licence fee constituted state aid, which was not notified, and thus unlawful. Furthermore, BskyB alleged that it could not be justified by any of the conditions listed in Article 87(2), 87(3) or 86(2).

[1326] For instance Case NN-70/98 *Kinderkanal/Phoenix*; Case NN-88/98 *News 24.*
[1327] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 55.

Having established that the measures in question could indeed constitute state aid, and they could not be justified by any of the provisions in Article 87(2) or (3), the Commission turned to examine whether they could benefit from the derogation provided for in Article 86(2) in cases of companies entrusted with the provision of "services of general economic interest". The Commission analysed all four conditions for the derogation and concluded that funding of BBC News 24 could be justified on the basis of Article 86(2).

Firstly, the Commission rejected BSkyB's argument that BBC News 24 was considered a commercial channel and must, therefore, be financed only with market revenues. The Commission concluded that the News 24 service is a service of general economic interest, since it addresses the democratic and social needs of society by ensuring a wider coverage of news topics and providing a greater degree of depth in the analysis of events.[1328] Moreover, when giving consent to the launching of this service, the Secretary of State explicitly stated that the provision of BBC News 24 is a public service, provided it is financed solely by the license fee. The Commission also rejected BSkyB's claim that BBC News 24 cannot be considered a public service as it is not available to the whole UK population, but instead only to a limited number of viewers (those connected to the analogue cable services, i.e. roughly 10% of all households). The Commission noticed that the preliminary consent of 21 March, which was not contested by BSkyB, was also given for a limited distribution platform, i.e. the digital satellite platform, which would not have been available to the whole population for a number of years.[1329] In this regard, the Commission warned BSkyB about being too hypocritical. It pointed out that BSkyB started to contest the channel's nature of the public service only when the BBC decided to make the channel available on all possible platforms without awaiting the launch of the BSkyB's digital satellite platform.[1330]

Secondly, the Commission confirmed that the BBC had officially been entrusted by the UK with the provision of the service of general economic interest.[1331] Thirdly, the Commission determined that the application of the state aid ban would obstruct the performance of the News 24 service. In fact, without the public funds the provision of the service would be

[1328] Case NN-88/98 *News 24*, n. 1201, *para.* 50.
[1329] Case NN-88/98 *News 24*, n. 1201, *para.* 60.
[1330] *Ibid.*, *para.* 56.
[1331] *Ibid.*, *para.* 70.

impossible.[1332] Finally, the Commission was satisfied that the exemption from the state aid clause in this particular case, would not affect competition to the extent that it would be contrary to the interests of the Community. This was because, although the competitors of BBC News 24, such as SkyNews and CNN suffered a reduction in their market shares, they were still able to maintain a large part of their customer base.[1333]

The *News 24* case is an exemplification of what the Commission's approach was to PSB in the 1990s. On the face of things, the Commission proclaimed the need to strictly apply state aid rules to PSBs just like to any other undertakings. In practice, however, all the decisions were favourable towards PSB, even if it meant stretching the rules a bit. The Commission was challenged on its new attitude towards the funding of PSB in two cases brought before the CFI. In one of the cases the Court declared that the Commission took too long to take a decision and therefore "failed to act"[1334] and in the second case the Court annulled the Commission's decision declaring that funding of a Portuguese PSB did not constitute state aid, within the meaning of Community law.[1335] The Court, however, did not openly rule what kind of funding of PSB would be allowed under Community state aid rules. This called for clarification from the Commission.

The clarification, at least in theory, came in 2001 when the Commission issued a Communication on the application of state aid rules to public service broadcasting.[1336] This also marked the beginning of the third phase in the EU-PSB relations – the global cooling phase.

The Communication started off promisingly by stating that PSB is not comparable to a public service in any other economic sector, because there is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.[1337] This made the Commission issue a specific Communication on PSB in addition to its horizontal

---

[1332] *Ibid.*, *para.* 74.
[1333] *Ibid.*, *para.* 94.
[1334] Case T-17/96 *Télévision française 1 SA (TF1) v. European Commission,* [1999] ECR II-1757.
[1335] Case T-46/97 *SIC v. European Commission*, [2000] ECR II-2125.
[1336] European Commission, 'Application of state aid rules to public service broadcasting (Communication)', n. 360.
[1337] *Ibid.*, *para.* 6.

Communication on services of general interested adopted just one year earlier.[1338] However, the content of the Communication is less promising. The stated reason for the adoption of the Communication is not to foster the PSB, but to answer the concerns of private broadcasters about the level playing field.[1339] Then the Communication adopts a broad definition of state aid for PSB, stating that national financing of public service broadcasters will *normally* be regarded as state aid. This is followed by a very narrow definition of "culture" as a possible justification of state aid for PSB on the basis of Article 87(3)(d). The Commission believes that the educational and democratic needs of a Member State, which are to a large extent fulfilled by PSBs, have to be regarded as distinct from the promotion of culture which is a possible defense under Article 87(3)(d).[1340] Therefore, as state aid to PSBs often does not differentiate between the educational, democratic and cultural needs, state aid for PSB will in general not be approved under Article 87(3)(d). The only other possible way is Article 86(2), which provides for a derogation from a state aid ban for companies entrusted with the provision of services of general interest. The Commission reminds us of the four criteria necessary for the derogation to apply (as explained in the analysis of *News 24* case above) and further reminds that the finding for PSBs must also satisfy the proportionality test. Although, the Commission has clarified that any assessment under Article 86(2) of the compatibility of state aid to public broadcasters can only be made on a case by case basis, in general state financing of PSBs may be regarded as justified under three conditions: (i) a clear remit for public service broadcasting must be set out in a formal act; (ii) independent national monitoring of the fulfilment of the PSB remit must be ensured; and (iii) the funding of the PSB must be proportionate.[1341]

I agree in full with the EBU's criticism of the Communication.[1342] First of all, the broad definition of state aid for PSBs is unjustified and against established EU case-law. In the *Ferring*[1343] judgment, the European Court of Justice held that "only advantages which exceed

---

[1338] European Commission, Services of general interest in Europe (Communication), COM (2000) 580.
[1339] *Ibid., para.*3.
[1340] *Ibid., para.* 26.
[1341] European Commission, 'Public service broadcasting and state aid – frequently asked questions', 3 March 2005, MEMO/05/73.
[1342] European Broadcasting Union, 'Comments on the Communication from the Commission on the application of State aid rules to public service broadcasting', available at: http://www.ebu.ch/CMSimages/en/leg_p_comments_state_aid_rules_tcm6-4395.pdf (accessed 6 September 2007).
[1343] Case C-53/00 *Ferring SA v. Agence centrale des organismes de sécurité sociale (ACOSS)*, [2001] ECR I-9067.

the necessary cost for ensuring the public service obligation constitute state aid".[1344] Therefore, as EBU rightly points out, the funding necessary for the fulfillment of the public service remit of a broadcaster should not qualify as state aid. This is despite the Commission's belief that in none of the PSB cases, have the *Altmark*[1345] judgment's conditions been fulfilled.[1346] The ECJ established in the *Altmark* case that compensation for the costs incurred in the discharge of a public service obligation do not qualify as state aid if the following four conditions are cumulatively met: (i) clear public service obligations; (ii) pre-established parameters for determining the compensation; (iii) no overcompensation; and (iv) either selection of an operator through tender procedure or determination of compensation with reference to costs of a typical, well-run undertaking.[1347] The Commission justifies its belief that these conditions were not fulfilled in any of the PSB cases by saying that in none of the cases were there any objective pre-established parameters for determining the compensation, public service broadcasters were not been selected by way of a tender procedure, and the compensation was not determined on the basis of an analysis of the costs of a typical well-run undertaking.[1348] This is why the Commission claims that public financing of PSBs will *normally* be regarded as state aid. However, PSBs are a special class of public service companies and, therefore, some of the *Altmark* conditions should be interpreted more flexibly.

Secondly, a narrow definition of culture excluding the possibility of justifying aid for PSB on the basis of Article 87(3) is also unjustified. EBU observes that:

> "Cultural, democratic and social needs of society are closely interrelated, and the usual meaning of 'culture' includes public service broadcasting. In mentioning the cultural, democratic and social needs of society, the Amsterdam Protocol makes reference to the broad, dynamic character of the public service remit but in no way requires the three aspects of the remit to be separated".[1349]

[1344] *Ibid.*, *para.* 33.
[1345] Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747.
[1346] European Commission, 'Public service broadcasting and state aid – frequently asked questions', n. 1342.
[1347] Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, n. 1220, *paras.* 89-93.
[1348] European Commission, 'Public service broadcasting and state aid – frequently asked questions', n. 1342.
[1349] European Broadcasting Union, 'Comments on the Communication from the Commission on the application of State aid rules to public service broadcasting', n. 1343, 3.

In summary, therefore, the broad definition of state aid for PSBs combined with the narrow definition of culture as a possible justification, marks the changed approach of the Commission to PSB. Instead of full and active support, the EU policy towards PSB becomes a narrow exemption from the general ban on state aid. And this is definitely not the solution that Tongue MEP or even "the authors of the Amsterdam Protocol had in mind".[1350]

The new approach was tested very quickly. The Communication was followed by an investigation into the funding of PSB in Germany, Ireland, The Netherlands, France, Italy and Spain. The Commission's "sophisticated and sympathetic approach to the question of public service broadcasting"[1351] indeed had changed. The results of the investigations were considerably harsher than those of the pre-Communication era. France, Italy and Spain have accepted measures to introduce greater transparency and proportionality in their funding systems. This is supposed to help to guard against cross-subsidies for activities not related to public service broadcasting.[1352] Following complaints by commercial broadcasters in March 2005, Germany, Ireland and The Netherlands were requested by the Commission for clarification about the role and the financing of their PSBs. The Commission's preliminary view was that the current financing system in these countries was no longer in line with the EU rules on state aid. In order to remedy the situation, the Commission requested the three countries to implement the following principles: (i) a clear definition of the PSB remit; (ii) a separation of accounts distinguishing between public service and other activities and adequate mechanisms to prevent the overcompensation of public service activities; and (iii) the establishment of an independent authority that would check compliance with these rules.[1353]

In April 2007 the Commission closed the investigation into the financing of the German PSB following a number of commitments presented by the German government. The amendments included a more precise definition and a proper entrustment of the public service mission, in particular as regards new media activities, adequate safeguards against overcompensation and cross-subsidisation, the respect of market principles in commercial activities and more

---

[1350] *Ibid.*, 3.

[1351] Ward, D., 'State aid or band aid? An evaluation of European Commission's approach to public broadcasting', (2003) Media , Culture and Society 25, 233.

[1352] European Commission, 'Commission closes inquiries into French, Italian and Spanish public broadcasters following commitments to amend funding systems, 20 April 2005, IP/05/458.

[1353] European Commission, 'Commission requests Germany, Ireland and The Netherlands to clarify role and financing of public service broadcasters', 3 March 2005, IP/05/250.

transparency as regards the sublicensing of sports rights.[1354] Similarly, the Irish case was closed in February 2008 after the Irish government undertook to clarify the remit and financing of RTE in the upcoming Broadcasting Bill.[1355] Finally, the most severe sanction was applied to The Netherlands for the *ad hoc* financing of PSBs between 1994 and 2005. In addition to the regular financing through licence fees obligations, 19 Dutch PSBs received *ad hoc* payments from several funds held by the Dutch state. The Dutch government was ordered by the Commission to recover €76.3 million plus interest from NOS, the umbrella organisation of public broadcasters in The Netherlands.[1356]

This is most certainly not the end of the complaints. The pressure from the private sector is "bound only to mount with digital convergence".[1357] The increased activity of the European Commission after the 2001 Communication proves that there is a change in attitude towards PSBs. And this is despite the Commission's denial that it is now taking a tougher line towards the financing of PSBs.[1358] There is not even a hint of any meaningful support for PSBs from the current Commission's side, despite the pompous declarations that public service broadcasting will "remain a backbone of the European media scene".[1359] In the Media Pluralism Issues Paper on Media Pluralism prepared for the Liverpool Audiovisual Conference the Commission observes that:

> "PSB has an important role to play in ensuring media pluralism. The Commission's policy recognises the importance and special role of PSB as well as the Member States' freedom to define the public service tasks as stated in the Amsterdam protocol and spelled out in the Communication on PSB. This leaves the possibilities open for the Member States to support PSB in order to promote media pluralism actively".[1360]

[1354] European Commission, 'Commission closes investigation regarding the financing regime for German public service broadcasters', 24 April 2007, IP/07/543.
[1355] European Commission, 'Commission welcomes proposed changes to financing of Irish public service broadcasters and closes investigation'.27 february 2008, IP/08/317.
[1356] European Commission, 'Commission orders Dutch public service broadcaster NOS to pay back €76.3 million excess ad hoc funding', 22 June 2006, IP/06/822.
[1357] Humphreys, P., 'The EU and Audiovisunal Regulation: An Agency for De-regulation', n. 46, 22.
[1358] European Commission, 'Public service broadcasting and state aid – frequently asked questions', n. 1342.
[1359] Ungerer, H., 'Legal and Regulatory Aspects of Public Service Broadcasting – Panel Contribution', Conference on Public Service Broadcasting, International Press Institute and Romanian Radio Broadcasting Corporation, Bucharest, 19-20 September 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_020_en.pdf (accessed 8 September 2007).
[1360] European Commission, 'Media Pluralism – what should be the European Union's role?', Issues Paper, n. 253.

Similarly, in her recent speech on the role of public service broadcasters "in a vibrant and pluralist digital media landscape", Commissioner Reding emphasised that:

> "Public broadcasters have to be given stable resources such as those ensured by a licence fee regime. The need for public service broadcasters to remain strong players in the digital media landscape only reinforces this challenge of stable, predictable resources".[1361]

However, the reality is that "the status and independence of public service broadcasting is in no way secured in many of the countries in the EU".[1362] Moreover, in none of the "official" documents on the financing of PSB, is the need for securing such financing emphasized. As the European Parliament has noted, both the Commission Communication and the *Altmark* judgment provide criteria for the compatibility of public funding to public broadcasting, but they do not require Member States to *ensure* adequate funding for the public service broadcasters.[1363]

The situation may improve or worsen after the review the 2001 Communication on the application of State aid rules to public service broadcasting announced by the European Commission in January 2008. In the Explanatory memorandum regarding a questionnaire for public consultation,[1364] the Commission asks a series of questions as to the possible avenues of change. For instance, it inquires whether there is a need for an ex-ante EU-level definition of a PSB remit, whether there is a need for further guidance on entrustment, supervision and transparency, or should pay-services be part of the PSB remit. The revised Communication is expected in the early 2009.

[1361] Reding, V., 'The role of public service broadcasters in a vibrant and pluralist digital media landscape', speech at joint EBU-MTV's conference 'From secret service to public service', Budapest, 3 November 2006, http://ec.Europa.eu/commission_barroso/reding/docs/speeches/ebu_mtv_20061103.pdf (accessed 6 September 2007).

[1362] European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', n. 391.

[1363] European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information', n. 192.

[1364] European Commission, Explanatory memorandum regarding a questionnaire on the revision of the Communication from the Commission on the public service broadcasting, 10 January 2008 available at: http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_memorandum.pdf (accessed 2 May 2008).

Doomed future for PSB as we know it?

In 1996 the Tongue Report had already asked: "Will there still be a need for PSB when dozens of new channels are available to meet viewer's needs and interests?" However, it was quick to answer it in the affirmative:

> "commercial broadcasters, cable and satellite channels, competing with each other for revenue in an increasingly competitive environment are bound to follow the safest commercial strategy. Commercial TV is now almost entirely about profits. Their main duty is to the shareholders and to the advertisers. They can take few risks. This drives them towards popular programming which generates the highest viewing for every commercial break".[1365]

Therefore, it seems clear that public service broadcasters have a crucial function to perform in the digital age. Since they are free from commercial pressure they are "free to address the full range of audience interests, not just those which are commercially the most attractive".[1366] However, even if the need for the continuing existence of PSB is generally accepted, the hotly-contested question is: what kind of public-service broadcasting? The European Commission seems to be falling into a trap set by commercial broadcasters who try to convince the regulators that PSB as we know it – a single company with a public service remit – is the thing of the past. What we apparently need today, in the digital era, is public funding for public service *programmes* or *channels*, which may just as well be broadcast by commercial companies. The economists Motta and Polo observe:

> "Many private channels today offer the kind of news, cultural or scientific programmes which would have been considered as minority programmes some years ago. The range of programmes now considered as not profitable has been considerably reduced, further narrowing the scope of public television. However, there are types of programmes that serve the public interest (e.g. those with educational content, or those which defend the right of expression of certain minorities) would probably not exist without public

[1365] European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age' (Tongue Report), n. 1320.
[1366] *Ibid.*

intervention. The question is whether a public company should provide these programmes or whether instead private channels should be obliged to carry them".[1367]

Within the European Commission, DG Competition and DG Information Society have already posed and analysed this very question. In the 1997 Convergence Green Paper[1368] DG Information Society had already concluded that the PSB mission could be fulfilled purely by commercial operators. A year later, DG Competition came up with its "Discussion Paper on the application of Articles 90, paragraph 2, 92 and 93 of the Treaty in the broadcasting sector". The Paper confirmed the Member States' authority to decide on public service funding however, it endorsed the Convergence Green Paper's idea of competition between the private and the public sectors where public funding would only be used for those *programmes* clearly defined as being of general interest.[1369] The Discussion Paper suggested that DG Competition would not regard sports and entertainment shows as public service broadcasting, and that it would not necessarily so regard films and drama.[1370]

The virus of progressing disbelief in the PSB as we know it seems to have been passed from the European Commission to the Member States. Most surprisingly, the United Kingdom – home to BBC, an exemplary PSB – is leading the way. For instance, a report by the Broadcasting Policy Group in the UK released in 2004 and entitled "Beyond the Charter"[1371] suggested potential alternative approaches to funding public service television. One of the recommendations was to reserve public funding for a small number of channels and replace the rest with a voluntary subscription system. Furthermore, the report also suggested creating a Public Broadcasting Authority, that would be funded through the Treasury and would oversee the diminution of public service funding through television licence fees from 2007

[1367] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 323.

[1368] European Commission, 'Convergence of the Telecommunications, media and Information Technology, and the Implications for Regulations, towards an Information Society Approach (Green Paper)', n. 129, 28.

[1369] European Audiovisual Observatory, 'Developments of digital television in European Union', 4 December 1999, http://www.obs.coe.int/online_publication/expert/00002497.pdf.fr (accessed 8 September 2007), 42.

[1370] Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public service broadcasting', n. 138, 13-14.

[1371] Broadcasting Policy Group, 'Beyond the Charter', http://www.tvlicensing.biz/pdf/beyond_the_charter.pdf (accessed 8 September 2007); see also O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches', n. 1310.

onwards.[1372] Although these proposals were at the time, rebuffed and firmly rejected, they are gathering more momentum these days. In the more recent collection of essays entitled "Communications. The next decade",[1373] prepared in 2006 for OFCOM, Chris Giles examines the possible alternatives for BBC.[1374] He analyses six possible scenarios for the future of PSB in the UK: (i) an "Arts Council of the Air" which would fund individual *programmes* having public service value; BBC could apply for funding like any other broadcaster and it could seek additional funding through advertising or subscription; (ii) fully contestable funding at broadcaster level – broadcasters would compete for block funding for a specified period; (iii) fully contestable funding at the broadcaster level for a specific franchise – broadcasters would compete to run a PSB-style *channel*; (iv) the BBC competing with ITV/C4/C5 for public money; (v) the BBC alone as a commissioner without any production – BBC would act as the "Arts Council of the Air"; (vi) the BBC as it is.[1375] Giles then ranks the suggestions taking into account the following factors: competition in production, competition in commissioning, oversight of public money and brand awareness. Fully contestable funding at broadcaster level scored the highest of all options, with BBC "as it is" taking the last place in the ranking.

Given the fact that the "Communications. The Next Decade" was prepared for and by OFCOM, it has not been ruled out that the proposals put forward in the essays will be taken into account by the UK authorities. And this is despite the fact that the new BBC Charter has already been agreed for the period 2007-2016 and the licence fee already detailed for the period 2007-2013. After that, anything could happen. In its recent and ongoing review of public service broadcasting,[1376] OFCOM notes that the important feature of PSB following the digital switchover will be "competition for quality", which in essence means plurality of PSB commissioning and production. Currently, OFCOM still sees BBC as the cornerstone of PSB in the UK, with "plurality" relating to the existing broadcasters beyond BBC which are equipped with some form of PSB remit (Channels 4 and 5 and ITV1). However, OFCOM

[1372] O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches', n. 1310.
[1373] 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', n. 1127.
[1374] Giles, C., 'The public interest challenges for the communications sector over the next 10 years: contestable public service funding', in: 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', n. 1127, 101-111.
[1375] *Ibid.*, 109.
[1376] OFCOM, Review of Public Service Broadcasting (PSB) Television', http://www.OFCOM.org.uk/tv/psb_review/ (accessed 8 September 2007).

suggests that, especially after the current BBC Charter period expires and following the digital switchover the plurality of PSB provision may also begin to relate to other commercial broadcasters which could be provided with some kind of PSB status.[1377]

Therefore, we may be slowly witnessing the erosion of the PSB model as we know it. In the future, we may no longer be sure who, in addition to the likes of BBC or RTE have any public service obligations imposed on them. Advocates of this solution argue that this will result in television broadcasting as a whole becoming more public service oriented. However, such an outcome is truly doubtful. If we are no longer able to rely on a brand, we will find ourselves lost as to whatever types of programmes or channels have public service, and which have profit, at heart. The overall result will be a gradual decline of public service in television rather than a boosting of it.

Even economists agree that "public television is likely to ensure better quality for [public service] programme than commercial channel under obligation to produce and broadcast the programme".[1378] The most vociferous advocate of PSB in Europe, Carole Tongue, agrees. She observes that contrary to commercial operators whose first obligation is to advertisers and shareholders, PSB's obligations are towards citizens – to educate, inform and entertain them.[1379] Tongue believes that this independence from the interests of shareholders and advertisers puts PSBs in a unique position to take risks and schedule innovative programming. She also rejects the criticism that assigning only one company with the task to safeguard a statutorily pre-defined quality is "arbitrary", "elitist" and even "authoritarian".[1380] Tongue believes that given the degree of media interest in every decision on quality that is made by the BBC, such an imposition would be unsustainable for many years.[1381] Moreover, the comparison between the quality of American and European television – leads to only one

---

[1377] OFCOM, Review of public service television broadcasting, Phase 3 – 'Competition for quality', http://www.ofcom.org.uk/consult/condocs/psb3/psb3.pdf (accessed 8 September 2007), 8.
[1378] Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', n. 71, 323.
[1379] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 136.
[1380] Karppinen, K., 'Against naïve pluralism in media politics: some implications of the radical-pluralist approach to the public sphere', Public Spheres and Their Boundaries, Tampere 25-27 May 2006, http://www.uta.fi/laitokset/tacs/papers0506/karppinen.pdf (accessed 8 September 2007).
[1381] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 110.

conclusion – that the European broadcasting model having PSB as its cornerstone has been "an astonishing success in serving the needs of the *whole* population".[1382]

However, notwithstanding the above, the Commission seems to follow the liberal path as far as the future of PSB is concerned. The Barroso Commission's emphasis on competition and open markets represents "...an increasingly new-liberal European policy agenda on which services of general economic interest are often being seen as ... ineffectual and foreclosing private investment".[1383] This recent drive to de-regulate and to privatise public utilities, including public broadcasting, calls the concept of "public interest" itself into question.[1384] Therefore, the International Federation of Journalists sees the preservation the concept of "public" in broadcasting services as the main challenge.[1385] I agree that broadcasting run on purely commercial terms is unfeasible[1386] and that the PSB as we know it is "a European phenomenon that we lose at our peril".[1387]

The way it is. The way it should be

Among the frenzied criticism that forecasts a perilous future for PSB, coupled with complaints by commercial broadcasters and the Commission scrupulously watching to make sure PSB financing does not breach state aid rules, public service broadcasting in Europe is struggling and it is in decline. As the Council of Europe's Parliamentary Assembly noted with concern:

> "Public service broadcasting, a vital element of democracy in Europe, is under threat. It is challenged by political and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties. It is also faced with the challenge of adapting to globalisation and new technologies".[1388]

[1382] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 110.
[1383] Wiedermann, V., 'The future of Public Service Broadcasting in Europe and the Commonwealth', VLV's 10th International Conference, London, February 11th 2005, cited in O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches', n. 1310.
[1384] White, A., 'Public Media, Democratic Values: Challenges Facing Public Service Broadcasting in the Age of Transition', Regional Meeting on Public Broadcasting, 15-17 February 2002, Budapest, http://www.ifj.org/default.asp?index=885&Language=EN (accessed 8 September 2007).
[1385] *Ibid.*
[1386] *Ibid.*
[1387] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 111.
[1388] Council of Europe, Recommendation 1641 (2004) on Public Service Broadcasting.

The Assembly further observed that many European countries have so far failed to meet the commitment that their governments undertook, at the 4th Ministerial Conference on Mass Media Policy held in Prague in 1994, to maintain and develop a strong public broadcasting system. This is especially true for the new post-communist Member States, which had to transform state broadcasting into public service broadcasting in a relatively short space of time. The Council of Europe's Recommendation No. R(96)10,[1389] as well as the European Commission's Communication emphasise the need to ensure the absolute independence of PSB from political pressures. Meanwhile, Poland, Slovakia and Hungary have not complied with this mandate possibly realising that the EU's ability to enforce rules on public broadcasting independence is limited, once EU membership has been granted.[1390] The role of the EU in enforcing the independence requirement has been to an extent taken over by private organisations, such as EBU or IFJ, who try to appeal to governments and broadcasters themselves. However, such informal work without any political background or mandate has had little impact in countries like Poland or Italy, where irregularities are still present.

Moreover, governments across Europe, this time both the "post-communist" and "old-democratic", are in the process of liberalising their media policies in order to facilitate the development of digital technology and are "in danger of leaving public service broadcasting without enough support".[1391] Indeed, this is already happening. The European Audiovisual Observatory has analysed the accounts of public broadcasters and concluded that the financial situation of public service broadcasters in Europe is deteriorating.[1392] Obviously the situation varies from country to country, but in general public broadcasters in Europe are in "dire straits". It is particularly bad in Central European countries where public service broadcasters are struggling both from a financial perspective and in terms of audience share. Overall net losses of PSBs in Europe rose from 236 million Euro in 1999 to 1.5 billion Euro in 2002, and, although they fell slightly in 2003, they were still substantial at 366.4 million Euro. Even the

[1389] Council of Europe, Recommendation no. R (96) 10 on the guarantee of the independence of public service broadcasting.
[1390] 'Another Public Broadcaster Under Government Pressure – Nobody's Happy', www.followthemedia.com. 9 May 2007.
[1391] Council of Europe, Recommendation 1641 (2004) on Public Service Broadcasting.
[1392] European Audiovisual Observatory, 'The financial situation of television companies in the European Union (1999-2004)', n. 44.

BBC is struggling – the net deficit of the BBC Group for the year 2004-2005 was 273.7 million Euro.[1393]

Meanwhile, the existence of PSB is something that positively differentiates Europe from the United States, which is ruled by a cartel of five giant media companies. In the US there is a firm belief that prescriptions of quality assigned to PSB "reflect an arrogance of an obsolete patriarchy, and that the consumer is the only judge of quality".[1394] I agree with Tongue that this argument is intrinsically flawed. Public service broadcasting is a necessary pluralistic counter-balance to the unfettered media power of private corporations.[1395] Graham and Davies argue that the new technologies strengthen and do not weaken the case for public-service broadcasting. This is based on three main grounds: the danger of media concentration; the fact that commercial broadcasting cannot adequately meet all communication needs; and the fact that no set of rules, regulations or laws can entirely correct the deficiencies of a commercial system.[1396]

It should, therefore, be in the European Union's self-interest to change its policy and start actively supporting and promoting PSB. In the current situation where Member States decide what public service broadcasting is and how it is financed, public service broadcasting is struggling. That is not to say that Member States should be deprived of this prerogative, but the European Union should become more active in conveying the message to its members that PSB *must* be upheld and adequately supported and financed. Member States alone are unable to fight the systematic threat to PSB in Europe. As O'Malley warns:

> "The forces threatening public service broadcasting organise internationally and they organise in a disciplined and clear way, and we need to as well. We need to coordinate our activities on an international level. We need to share our experiences of the commercialisation of the media and work to combat it. We need to make the media a central issue in the politics of the struggle for a better world, because without so doing, the

[1393] European Audiovisual Observatory, 'The financial situation of television companies in the European Union (1999-2004)', n. 69.
[1394] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 113.
[1395] Graham, A., Davies, G., *Broadcasting, Society and Policy in the Multimedia Age,* n. 58, 63.
[1396] *Ibid.*, 63.

world will not become better. Interpretation of the world will remain in the hands of the privileged few".[1397]

Unfortunately, as noted earlier, the EU currently seems to be at war with PSBs, concentrating on watching every cent spent on PSB funding by the Member States. This is not, by any means, sending a positive signal to Member States. If they see the EU acting in a hostile manner towards the PSBs, why should they do any different? There is, therefore, a need to provide some "marriage counselling" for the EU and PSB. The current policy towards PSB must change from being an exception to state aid rules, into a comprehensive policy of active support for PSB. The EU "needs to consider, as a priority, how it might best contribute to supporting the status and independence of public broadcasting in Member States".[1398]

Perhaps there should be an EU-level set of minimum public service requirements. The European Union should lead the way in setting standards for PSB. Tongue suggests that BBC could serve as a model for "best practice":

> "If Britain can contribute one institution to the EU as a model for 'best practice', it is the BBC combined with special public service obligations that apply to ITV and Channel 4".[1399]

This could be done in the European Charter for Public Service Broadcasting – and idea which surfaced following the adoption of the EU Charter of Fundamental Rights at the 2000 European Council meeting in Nice, but has not yet been realised.[1400] This would provide a positive counterweight to the restrictive Communication on the application of state aid rules to PSB.

[1397] O'Malley, T., 'Defend the public service broadcasting values of TV and radio', 15 October 2004, http://www.indymedia.org.uk/en/2004/11/300387.html (accessed 8 September 2007).
[1398] Commission of the Bishops' Conferences of the European Community, 'Comments on 'Media Pluralism – what should be the European Union's role?'', Issues Paper, n. 1276.
[1399] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 112.
[1400] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 56.

In addition, the EU could also actively join an international campaign to save public broadcasting initiated by the IFJ called "Public Broadcasting For All".[1401] The aim of the campaign is to create a European-wide network of media professionals and public campaigners committed to changing, country by country, the conditions for broadcasting. The objectives of the campaign are to secure editorial independence, ensure quality content and the restoration of public service values in media policy.[1402]

The above actions could provide a first step in the long journey to restore respect and the position of PSB in Europe. The long European tradition of PSB based on the idea of providing the population as a whole with television "catering for the interests of all sections of the public, with a mandate to educate, inform and entertain"[1403] should be revived, maintained and cherished by the European Union. As Tongue notes, "public service broadcasting is a European model that the EU should strive to export",[1404] instead of treating it like the annoying ghost from the past.

8.5 Power to the viewers! Fostering media literacy

As poignantly put by Commissioner Reding, "today, media literacy is as central to active and full citizenship as literacy was at the beginning of 19th century".[1405] Unlike in the past, we are today awash with information. The problem is, however, as Naughton observes, we are not getting much wiser as a result, on the contrary, we are living in a state of "informed bewilderment".[1406] The way out of this information rut is to become media literate, that is, as the European Commission defines, to be able "to access, analyse and evaluate the power of images, sounds and messages ... and to communicate competently in media available on a personal basis".[1407] All in all, a media literate citizen is the one who is a master rather than a

---

[1401] International Federation of Journalists, 'Public Broadcasting For All. A Campaign for Reform of Public Service Broadcasting', http://www.ifj.org/default.asp?index=929&Language=EN (accessed 8 September 2007).
[1402] White, A., 'Public Media, Democratic Values: Challenges Facing Public Service Broadcasting in the Age of Transition', n. 1385, 10.
[1403] European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age (Tongue Report)', n. 1320.
[1404] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 112.
[1405] European Commission, 'Making sense of today's media content: Commission begins public media literacy consultation', 6 October 2006, IP/06/1326.
[1406] Naughton, J., 'Our changing media ecosystem', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', n. 1127, 41.
[1407] European Commission, Audiovisual and Media Policies, Media Literacy, http://ec.Europa.eu/avpolicy/media_literacy/index_en.htm (accessed 8 September 2007).

slave of technology, an active participant in democratic life and able to contribute to political debate.[1408]

Moreover, media literacy is not only about how to access the content in the multiplying media outlets and how to use the ever changing technology and find your way in the jungle of new services and gadgets. It is also and maybe even mainly, about how to understand the forces behind media industry. Lord Puttnam rightly observes that mainstream media "have the power to give meaning to our lives – sometimes a bewildering multiplicity of meanings".[1409] He gives an example of how headlines texted to mobiles or news updates sent by e-mails by Channel Four News, Google News and others, illustrate a well know fact that the media does neutrally report on the events, but they interpret them in accordance with their editorial line. Being media literate is to understand that process, be critical of the way the media "help to 'construct' our understanding of the world around us"[1410] and know how to look for an alternative sources of news in the Information Age. As the European Commission explains, media literacy:

> "should help citizens to recognise how the media filter their perceptions and beliefs, shape popular culture and influence personal choices. It should empower them with the critical thinking and creative problem-solving skills to make them judicious consumers and producers of information. Media Education is part of the basic entitlement of every citizen, in every country in the world, to freedom of expression and the right to information and it is instrumental in building and sustaining democracy".[1411]

Media literacy programmes are the way to make people more media savvy, more technology confident and more media aware. It is of vital importance to put those programmes in place as soon as possible. This is because, the new Internet era, called Web 2.0, is all about throwing our personal messages out there in the open with the use of blogs and websites like YouTube, MySpace and the multitude of similar. TIME magazine decided that the 2006 Person of the Year should be "You" – that is an ordinary person, who "controls the Information Age".[1412]

[1408] UK Film Council, 'Comments on 'Media Pluralism – what should be the European Union's role?' n. 860.
[1409] Puttnam, D., 'The continuing need to advance the public interest', n. 1154, 129.
[1410] *Ibid.*, 129.
[1411] European Commission, Audiovisual and Media Policies, Media Literacy, n. 1408.
[1412] Time Magazine, Person of the Year Complete List 1927-2004,

TIME anticipates that we will soon be less reliant on traditional media to get news and we will form our view about the events in the world. The power of mass media is thus predicted to be gradually diminishing and, therefore, the threat of concentrated media power is slowly becoming obsolete. While I do not agree that the new forms of communication will totally replace traditional broadcasting, it is true that they widen the horizons and contribute to pluralism of voices and diversity of opinions presented in the public.

At present the European Commission recognises that a higher degree of media literacy can significantly contribute to reaching the Lisbon objective of creating a competitive knowledge economy in Europe, and also that media literacy is "one of the key pre-requisites for active and full citizenship".[1413] However, the Commission did not start working on developing the EU-level media literacy initiative until it was specifically requested to do so by the European Parliament, during the hearings that were held by Commissioner Reding. Fulfilling the promise to the Parliament, DG Media and Information Society launched a dedicated media literacy programme. The Media Literacy Expert Group was established "with the aim to analyse and define media literacy objectives and trends, to highlight and promote good practices at European level and propose actions in the field".[1414] The Group is composed of a number of European media literacy experts and it met for the first time on 30 March 2006.

As announced, the Commission used the findings of the Group to formulate a Questionnaire[1415] for a public consultation on media literacy which was launched in October 2006. In the Questionnaire the Commission asked some general questions about media literacy. For example, What do you think should be the aim and the target audience of initiatives on media literacy? Should media literacy be addressed mostly by school-based educational environments? How should media literacy initiatives be supported financially? The questionnaire also enquired in more detail about initiatives in respondents' countries or regions aiming at encouraging media literacy. The Commission is currently analysing the 103 submissions it received from 23 EU Member States, as well as from China, Russia and the

---

www.time.com/time/personoftheyear/archive/stories/ (accessed 28 April 2008).

[1413] European Commission, Audiovisual and Media Policies, Media Literacy, n. 1408.

[1414] European Commission, Audiovisual and Media Policies, Media Literacy, Media Expert Group, http://ec.Europa.eu/avpolicy/media_literacy/expert_group/index_en.htm (accessed 8 September 2007).

[1415] European Commission, Audiovisual and Media Policies, Media Literacy, Media Literacy Questionnaire, http://ec.Europa.eu/avpolicy/media_literacy/docs/questionnaire_ml_en.pdf (accessed 8 September 2007).

USA. The discussions resulted in the adoption of a Media Literacy Communication in December 2007.[1416]

The Commission declares that the Communication provides a further building block to European audiovisual policy (the other being the AVMS directive and MEDIA 2007 programme). It provides a European definition of media literacy as "the ability to access the media, to understand and to critically evaluate different aspects of the media and media contents and to create communications in a variety of contexts".[1417] It then expand on it by saying that there are several 'aspects' to media literacy, including (i) feeling comfortable with all existing media; (ii) actively using media; (iii) having a critical approach to media as regards both quality and accuracy of content; (iv) using media creatively, and most importantly for this thesis, (v) understanding the economy of media and the *difference* between pluralism and media ownership.

Apart from the work of the Expert Group and the public consultation, the Commission has undertaken other activities aimed at fostering media literacy in Europe. It has organised three workshops on Media Literacy and, through the eLearning initiative, provided 3.5 million Euro of financial support to some thirty projects focusing on *inter alia* analysing media representations and media values in a multimedia perspective, stimulating the use of media in order to improve participation in social and community life or implementing media literacy initiatives.

The Member State so far most inspired by the Commission's work is the United Kingdom. Section 11 of the 2003 Communications Act imposes a duty on OFCOM to promote media literacy. In the Strategy and Priorities for the Promotion of Media Literacy published on its website,[1418] OFCOM lays down its priorities in the area. It declares that in an increasingly converged communications world, where people face constantly changing technology and greater media choice, it will work with stakeholders to help focus on the present and future media literacy needs of all members of society. In its work to promote media literacy in the

---

[1416] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European approach to media literacy in the digital environment', COM(2007)833 final.

[1417] *Ibid*, 3.

[1418] OFCOM, 'Strategy and Priorities for the Promotion of Media Literacy - A statement', http://www.OFCOM.org.uk/consult/condocs/strategymedialit/ml_statement/ (accessed 8 September 2007).

UK, OFCOM will focus on three key strands: (i) research; (ii) connecting, partnering and signposting; and (iii) labelling. The research is expected to drive OFCOM's agenda for action. Connecting, partnering and signposting means stimulating debate at conferences and debates as well as funding projects to foster media literacy. Finally, labelling will be used to ensure that viewers and listeners have "clear, accurate and timely information about the nature of content".[1419]

In addition to the official work of OFCOM, as a result of a private initiative in the UK, the European Charter for Media Literacy was drafted.[1420] It was the idea of the UK Film Council, the British Film Institute, Channel Four and the BBC, to establish a Steering Group which would prepare the Charter. The Group represents major institutions in several European countries[1421] who have committed to promoting the Charter within their own nations and, therefore, to spreading awareness of the Charter across Europe. The Charter may be signed by individuals, organisations, companies and regulators who are either supporters, sponsors or providers of media literacy initiatives. It is supposed to provide a framework for organisations to develop and deliver coherent media literacy strategies.[1422]

Initiatives such as these need to be more openly and actively supported by the European Commission. The Media Literacy Communication is a first step in this direction. The Commission called on the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions to support the objectives and priorities set out in this Communication and to organise in 2008 events devoted to the exchange of good practices on media literacy in the digital environment, *including on the economy of the media sector* in Europe.[1423] It also called on the Member States to (i) encourage the authorities in charge of audiovisual and electronic communication regulation to get more involved and to cooperate in the improvement of the various 'aspects' of media literacy; (ii) promote systematic research into and regular observation of and reporting on the different aspects and dimensions of media literacy; and (iii) develop and implement codes of conduct and co-regulatory frameworks in

[1419] *Ibid.*
[1420] European Charter for Media Literacy http://www.Euromedialiteracy.eu (accessed 8 September 2007).
[1421] Austria, Belgium, France, Germany, Portugal, Spain, Sweden, United Kingdom.
[1422] UK Film Council, 'Comments on 'Media Pluralism – what should be the European Union's role?' (Issues Paper)', n. 860.
[1423] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European approach to media literacy in the digital environment', COM(2007)833 final, 8.

conjunction with all interested parties at national level, and promote self-regulatory initiatives.[1424] In 2008 a study will be launched to assess media literacy levels in the Member States.

It is very important that the Media Literacy Communications recognises the phenomenon of media concentration and how it is shifting its focus in the Information Age. New media outlets, many of which are praised as sources of independent news and comment, are being bought by the existing giants (YouTube by Google, MySpace by NewsCorp, Yahoo by Microsoft). Therefore, the media concentration problem does not dissipate in the Web 2.0 era, it just gains a new dimension. This has been recognised in the UK and the above mentioned Section 11 of the 2003 Communications Act, which imposes on OFCOM the duty to bring about, or encourage others to bring about, a better public awareness of the nature and characteristics of material published by electronic media and of the processes by which such material is selected for publication. It is difficult to predict what effect it will have when all the grass-root, previously independent, new means of internet communication are acquired by the "old world" media conglomerates. Will the giants try to exert some pressure? Will the inconvenient films disappear from YouTube? Will personal profiles on MySpace be somehow controlled by News Corporation? It is hard to say at the moment. Hope remains that due to media literacy initiatives the users of those tools will by then be sufficiently media savvy to spot such practices and resist. McChesney reminds us that

> "after World War II, the Allies restricted media concentration in occupied Germany and Japan because they noted that such concentration promoted anti-democratic, even fascist, political cultures. It may be time ... to take a dose of that medicine. But for that to happen will require concerted effort to educate and organize people around media issues. That is the task before us".[1425]

In this context, it is worrying that the Media Literacy Communication views as one of the aspects of media literacy the ability to see only the *difference* between media pluralism and media ownership and not the *relationship* between the two.

[1424] *Ibid.*, 8-9.
[1425] McChesney, R.W., 'The nine firms that dominate the world', n. 29.

9 Conclusions

The history of European attempts to control media concentrations at supra-national level is a story of a lost battle for harmonising legislation. The Council of Europe and the European Parliament were defeated by the media industry, which was backed by the Member States, DG Competition and DG Information Society. DG Internal Market failed in its conciliation efforts and in the end fell victim to the high level political game. Any rigid interference into the Member States' media ownership rules proved a too ambitious task. Ten years after the last draft directive was presented, Europe still lacks any legislative instrument aimed specifically at controlling media concentrations.

Meanwhile, the technological change of the recent years, which brought about digitalisation and a blurring of national borders, has rendered media a global business. These days, media companies tend to consolidate more than ever and the growing number of media mergers is predicted for the coming years. The media empires of Silvio Berlusconi or Rupert Murdoch avoid the control of the national media ownership regulations. Benefits of consolidated media markets, so loudly praised by large media groups, are insignificant in comparison with the dangers they pose for pluralism, diversity and, in the end, for democracy. If nothing is done, we are facing a world where

> "few entrepreneurs control the media and they can wink and nod at each other, rather than cut prices and offer a diverse set of news and entertainment (...) The power of such companies to shape the views of the public would make Citizen Kane look like a pussycat".[1426]

All this calls for making the preservation of a pluralistic structure of the European media market a key priority for modern integrated Europe. Unfortunately, the political momentum for the introduction of anti-concentration legislation has long since passed. The Internal Market considerations and the need to level the playing field seem to have no appeal anymore. The media industry realised that DG Internal Market was actually trying to slip the aim of

[1426] 'Mega Media Mergers: How dangerous?', n. 62.

safeguarding pluralism through the backdoor of a seemingly economically oriented regulation. Thus, with the feeling of deception media companies will no longer support any form of legislative intervention. They are actually quite content with the current situation of almost no control at all. Realising this, the European Commission rejects the recurring calls of the European Parliament for returning to the discussion of a media concentration regulation. The "no legal basis" answer is used as a shield. Admittedly, there is no firm legal basis in the EC Treaty for legislation aimed specifically at safeguarding media pluralism. It is, however, remarkable that the Commission is not even trying to return to the Internal Market considerations as the underlying justification for intervention. In these circumstances, the European Parliament's perseverance in its efforts to safeguard media pluralism at the European level must be admired and honoured. Indeed, if it were not for the European Parliament the issue of safeguarding media pluralism at the European level would probably never appear at the European Union's agenda.

All in all, the fact remains that there is no specific EU-level legislation aimed specifically at counteracting growing media concentration in Europe. The existing tools in the form of competition law and scattered legislative measures are insufficient. Competition law *by definition* cannot be used to guarantee media pluralism. This is so, not only because media pluralism and diversity depend on more factors than access to key "gateways", but mainly because competition law and media concentration rules have fundamentally different focuses.[1427] As noted by the Commission, "competition rules alone may not be sufficient to ensure cultural diversity and media pluralism",[1428] because fighting a "dominant market position" on a relevant market differs from counteracting the development of a "dominant power of opinion" in the media sector.[1429]

[1427] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663.

[1428] European Commission, Media Concentration in the Internal Market: An Assessment of the Need for Community Action (Green Paper), n. 171; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Rec. 10.

[1429] Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', n. 663; Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level', European Audiovisual Observatory, n. 38.

The EU legislative measures directly or indirectly safeguarding media pluralism may be summarised in one sentence: some measures exist, but they are flawed, fragmented and inadequate. This applies in particular to safeguards for structural media pluralism. First of all, there are still no EU rules on the concentration of media ownership. The existing measures contributing to a larger or lesser extent to structural media pluralism are economic in focus and have only a passing effect on media pluralism. Access rights regulated in the Access Directive apply only in situations when an operator is designated with significant market power. Therefore, they are effective only in situations of dominance and they have an inevitable *ex post* effect, which for media pluralism is not ideal. The E-Communications framework also does little in terms of securing interoperability as there are no binding EU standards on CAS and APIs. Finally, the country of origin principle which is the cornerstone of the TVWF directive, can indeed contribute to structural pluralism, but it can also lead to situations where operators purposefully locate themselves in countries with liberal regulatory regimes and thus avoid more strict regulations in countries to which they actually intend to broadcast.

Measures supporting internal media pluralism are somewhat more numerous and with a more specific public interest focus. Still, the picture emerging is that internal media pluralism is safeguarded at the EU level in an inconsistent and incoherent manner put together in a fairly random way. The flaws of must-carry rules centre on the much too narrow definition of public interest, no preferential access to associated facilities, and the fact that they should be implemented with must-offer and must-distribute rules on other levels of the broadcasting value chain. Lists of events and short reporting rights focus on citizens' right to information and only in an indirect manner contribute to media pluralism. And finally, although the production quotas have probably the greatest potential, they too have their shortcomings in being non-binding (the unfortunate "where practicable" clause), too modest and ill monitored, executed and sanctioned. With regard to the MEDIA programme, it is laudable, but still rather modestly financed, and in practice it has little impact on increasing diversity of content available on European television.

The European Union is happy to hand over full responsibility for guarding media pluralism in Europe to the individual Member States. Meanwhile, the problem of increasing media concentration has long ago crossed national borders and slipped out of the control of the

individual states. Despite the fact that the majority of EU Member States have some form of media ownership regulation, it is by no means sufficient in the current era of cross-border broadcasting and global media empires. Moreover, the liberalisation sentiments which have taken over media regulators in Europe mean that the rules are being relaxed or, in some cases, done away with completely. The anomalies such as Italy under Berlusconi or the "Rywingate" scandal in Poland only seem to strengthen the argument that Member States alone are not able to deal with pressures of regulating media markets in order to guarantee pluralism and diversity. The TVWF directive has not helped either, since its provisions have been either simply ignored by Member States without consequence, or have been interpreted by the ECJ is such a way so as to allow for "regulatory arbitrage in Europe".[1430] Satellite broadcasters have in great numbers relocated to the United Kingdom where they are not subject to any media ownership restrictions and from where, the likes of Murdoch's conglomerate, are free to "invade" Europe.

The flaws of currently available tools supporting media pluralism have led to one conclusion: there is a need for positive action at the EU level aimed at preventing the growth of media empires in Europe. Contrary to the European Commission's apparent conviction, digitalisation and multichannel television not only fail to solve the problem of media concentration, but rather increased the power of powerful media corporations which have expanded their interests into other channels and gained control over bottlenecks such as CAS, EPGs and APIs.

The ever closer European Union is best placed to implement a "harmonising re-regulation"[1431] for the media sector. In the ideal world, positive action by the EU should take the form of a regulation on media pluralism including the safeguards for both the external and the internal face of media pluralism. Unfortunately, nowhere in the EC Treaty is there a firm legal basis for the Community action which is aimed specifically at the protecting pluralism. The Lisbon Treaty, if ratified, will be of no help either. Article II-11 which states only that "the freedom and pluralism of the media shall be respected", cannot be seen as a legal basis for any harmonising action. And in the current political climate in the EU, prospects for the

[1430] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 28.
[1431] Humphreys, P., 'Regulating for Pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', n. 138, 10.

introduction of a legal basis in the near future are bleak. The current Commission's priority is the realisation of the Lisbon Strategy to make Europe the most competitive market economy by 2010. The media must form a part of this competitive economy and are actually considered as one of the key factors for the success of the mission. This definitely leaves democratic concerns of media regulation out of the picture.

This, however, does not mean that the subject should be entirely dropped. On the contrary, academic advocacy for positive action should continue with increased vitality, since "given the wealth of media companies and their shrewd donations into [the] political process, the advocates for the public interest are in far too short a supply".[1432] This is especially so in the times of rapid change and technological progress, which should never be an excuse for national and European regulators refusing to face up to the issue of concentrated media power[1433] and "stripping media owners of regulations so that they can simply pursue profits without constraint".[1434] As noted by Harcourt,

> "even if the Commission's vision of vast quantity of channels with interactive services were to be realised, this will not automatically provide media diversity, quality of programming output or even facilitate consumer choice".[1435]

Despite the rapid development of technology, the values that justify special treatment of the media sector are primarily democratic and remain unchanged.[1436] Tongue observes that "the public interest in broadcasting hasn't changed just because the type of signal from broadcasters will be different".[1437] Meanwhile, the European Union succumbed to the pressure of commercial operators for a liberal regulatory regime which allowed for the exploitation of media markets for capital growth. In the quest for the most competitive economy in the world by 2010, the EU "has sacrificed the wider goal of the protection of pluralism and therefore the protection of democracy in Europe".[1438]

[1432] Goodman, A., Goodman, D., 'Why media ownership matters?', n. 129.
[1433] Humphreys, P., 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', n. 87.
[1434] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 139.
[1435] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 204.
[1436] Gibbons, T., 'Pluralism, guidance and the new media' n. 1304, 307.
[1437] Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', n. 79, 139.
[1438] Harcourt, A., *The European Union and the regulation of media markets*, n. 89, 212.

In this current neo-liberal climate, regulation of a developing media industry is at best considered paternalistic, and at worst – as an attempt at censorship. However, leaving this sector to market forces without any form of regulation in public interest is even more dangerous.[1439] There can be no doubt that more EU rules on media pluralism are a must. And given the EU's current competence, it is possible to suggest some solutions which could be introduced *now* to complement what the EU is already currently doing. Although this would not be as powerful as a regulation, these measures could at least result in changing the political agenda with regard to the EU action on media concentration. This thesis has examined several possible solutions, including:

(i) Strengthening transparency and the monitoring of media concentrations. A suggestion has been made for the establishment of a Europe-wide media concentration monitoring body, such as European Media Ownership Observatory;

(ii) Adopting "soft law with hard statements", starting with a Recommendation on measures to promote media pluralism, modeled on the recently adopted Recommendation on the protection of minors and human dignity. A proposal for a draft Recommendation is annexed to this thesis;

(iii) The introduction of a media specific merger review by introducing a "pluralism test" to the EU Merger Regulation and establishing a European Media Council to assist DG Competition in the analysis of media merger cases;

(iv) The promotion of public service broadcasting as a counterweight to consumerism, through the establishment of EU-wide minimum conditions to ensure that the public service broadcaster is independent and free from interference by the government.

In addition, two further measures could be strengthened at the EU level: the promotion of media literacy, and subsidies for European media production.

[1439] Tambini, D., 'What citizens need to know. Digital exclusion, information inequality and rights', n. 1316, 123.

Surprisingly, the underestimated powers of the Council of Europe may in the end prove to be the key to eventual success. Almost all of the above measures have been continuously suggested by the Council of Europe and this has been acknowledged by the European Parliament. Although not as powerful as harmonisation legislation, the 1994 Recommendation on measures to promote media transparency,[1440] the 1996 Recommendation on the guarantee of the independence of public service broadcasting,[1441] or the system of exchange of information between the Council's Member States should, therefore, be seen as effective sources of inspiration for the EU. The Council has managed to raise awareness of the problem posed by excessive media concentrations. It has enhanced an in-depth analysis of the media ownership structures and introduced a system of information exchange between the Council's Member States. All of this represents a big step towards establishing transparency of media ownership in Europe, which may in the end prepare the ground for the next attempt to introduce a media concentration legislation.

While the above solutions are possible to be introduced *now*, even with a limited mandate of the EU to act in democratic matters, the real problem is the actual *will* to do it. As noted by the Finnish Prime Minister, Matti Vanhanen, the EU is currently trapped in a vicious circle. Citizens do not consider the EU useful because they cannot see it influencing their own lives for the better. This turns into diminishing popularity of the concept of the Union among the European nations and makes national leaders afraid to formulate bold solutions for the future of the EU's scope of competence.[1442] However, despite "gloomy analyses over the EU's failure to connect to its citizens",[1443] Europe's younger generations are increasingly feeling "European" next to their national identities. A recently published report shows that citizens in most Member States favour EU action in areas where Europe does not hold key powers and which are generally not foreseen as areas for major future initiatives.[1444]

This means that, hopefully, the political climate in the EU may change and after a long period of becoming "ever wider" the EU will turn to becoming "ever closer". The time may come

---

[1440] Council of Europe, Recommendation No R(94) 13 on Measures to promote media transparency.
[1441] Council of Europe, Recommendation No R(96) 10 on the guarantee of the independence of public service broadcasting.
[1442] Vanhanen, M., 'Address to Parliament on 21 June 2006 on Finland's EU Presidency,' http://www.valtioneuvosto.fi/toiminta/selonteot/selonteot/en.jsp?oid=160298 (accessed 8 September 2007).
[1443] 'Feeling of 'Europeanness' on the rise, study says', *EUObserver*, 23 October 2006.
[1444] 'Citizens more ambitious than leaders on future EU policies', *EUObserver*, 11 May 2007.

that broadcasting and media policy will fall within specific EU policies and with them the protection of media pluralism will become an EU objective. The legal basis for EU action in this field could then be introduced. It is not necessarily day-dreaming and it is not at all implausible – when the existing Commission changes, so too might the EU's political prerogatives. In the EU, much depends on the persons in charge and the ability of skilful agenda setting. As poignantly noted by Harcourt, "the EU is a 'paradise' for the agenda setter, given the multiplicity of access-points that a purposeful advocate of a particular issue can use in order to enter their 'pet' solutions into the policy process".[1445]

Therefore, constant raising of awareness of the dangers posed by excessive media concentration is vital. Admittedly, advocates of preserving the pluralistic structure of the media sector in Europe have a difficult job to do in trying to get their message through to the public. Media companies may easily make us believe that a consolidated media market is actually in our interest as they are the means of communication and they shape the message that we, as viewers, receive. Therefore, one must support the Council of Europe and the European Parliament in their efforts to raise awareness. Constant monitoring and reminding may one day again build up the political momentum for legislative action. The battle for a harmonising directive may have been lost ten years ago, but the hope remains that eventually the war for a comprehensive European control of excessive media concentrations will be won. The soft law measures this thesis suggests as solutions "for now" may seem powerless and even ridiculous given the enormity of the task. However, they prevent the issue of media pluralism from being totally swept under the carpet by the neo-liberal wave and may in time result in the political momentum being built for the stronger and binding action to be taken at the EU level. If not now for this generation, then perhaps for the generations to come.

[1445] Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', n. 135.

Annex

Proposal for the

RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

on Measures to Promote Media Pluralism[1446]

The European Parliament and the Council of the European Union,

Having regard to the Treaty establishing the European Community, and in particular Article 157 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee,

After consulting the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

(1) The Charter of Fundamental Rights of the European Union ("the Charter") declares in Article 11 the right to freedom of expression, providing in paragraph 2 that the freedom and pluralism of the media shall be respected.

(2) The European Union should gear its political action to preventing any form of violation of the right to freedom of expression and media pluralism.

(3) Following the accepted definition of media pluralism provided by the Council of Europe [1], the notion of "media pluralism" should be understood as plurality of independent and autonomous media providers (structural pluralism) as well as a diversity of media types and contents (views and opinions) made available to the public (internal pluralism). Both the structural and internal aspects are central to the notion of media pluralism.

(4) Legislative measures need to be enacted at Union level on the protection of media pluralism in times of growing media concentration.

(5) The constant development of new information and communication technologies makes it imperative for the Community to ensure full and adequate protection for citizens' interests in this field on the one hand, by guaranteeing the free delivery and free provision of information services and, on the other hand, by ensuring that public interest is protected.

(6) The Community has already intervened in the field of audiovisual and information services in order to create the necessary conditions to ensure the free movement of television broadcasts and other information services, in compliance with the principles of free competition and freedom of expression and information, but it should act with greater determination in this area with the aim of adopting measures to protect media pluralism. Such action should strike a balance between further development of European audiovisual industry on the one hand and citizen's right to plural and diverse media on the other.

[1446] Modelled on the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, n. 1290.

(7) It is suggested that the Council and the Commission should pay special attention to the implementation of this Recommendation when revising, negotiating or concluding new partnership agreements or new cooperation programmes with third countries, bearing in mind the global nature of producers, distributors or providers of audiovisual content and Internet access.

(8) The changing media landscape, resulting from new technologies and media innovation, should not change the commitment of the European Union and the Member States to preserve and promote structural and internal media pluralism.

(8) Self-regulation of the audiovisual sector is proving an effective additional measure, but it is not sufficient to protect media pluralism. The development of a European audiovisual geographic area based on freedom of expression and respect for citizens' rights should be based on continuous dialogue between national and European legislators, regulatory authorities, industries, associations, citizens and civil society.

HEREBY RECOMMEND THAT:

The Member States, in the interests of promoting the development of the audiovisual and on-line information services industry, take the necessary measures to ensure the protection of structural and internal media pluralism in all audiovisual and on-line information services by:

1. considering the introduction of measures into their domestic law or practice establishing the upper thresholds of permissible media and cross-media ownership, without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium;

2. ensuring the independence of national regulatory authorities;

3. ensuring proper financing and independence of public service broadcasting;

4. ensuring editorial independence of both public and private broadcasters;

5. considering the introduction of media specific merger review procedures;

6. considering adopting "conflict of interests" legislation prohibiting combining the ownership of media companies and holding positions in the government;

7. promoting media literacy in order to encourage the take-up of technological developments on the one hand, and to improve the level of awareness among European citizens of the forces governing media industry on the other;

TAKE NOTE THAT THE COMMISSION:

1. Declares full commitment to protecting media pluralism, as well as the right to information and freedom of expression enshrined in Article 11 of the Charter of Fundamental Rights;

2. Has launched a three-step approach for advancing the debate on media pluralism within the European Union;

3. Has published a Staff Working Paper on Media Pluralism outlining efforts to promote pluralism by third parties and organisations, notably the essential work undertaken by the Council of Europe, and has a concise first survey of Member States' audiovisual and print media markets. This baseline analysis also includes information on national media ownership regulations and the very diverse regulatory models of the 27 Member States;

4. Has commissioned an independent study on media pluralism in EU Member States to define and test concrete and objective indicators for assessing media pluralism in the EU Member States;

5. Intends to issue in 2008 a Commission Communication on the indicators for media pluralism in the EU Member States, on which a broad public consultation will take place;

6. Has committed to keep the European Parliament and Council informed about the progress made.

---

[1] Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe to Member States on Measures to Promote Media Pluralism

---

Done at Brussels, on ....

For the European Parliament
The President
....

For the Council
The President
....

ANNEX I

INDICATIVE GUIDELINES FOR THE IMPLEMENTATION, AT NATIONAL LEVEL, OF MEASURES IN DOMESTIC LAW OR PRACTICE SO AS TO PROMOTE MEDIA PLURALISM

Objective: introducing measures in domestic law or the practice of the Member States promoting structural and internal media pluralism, with due regard for their domestic and constitutional provisions and without prejudice to the possibility of adjusting its exercise to the particularities of each type of medium.

The term "medium" refers to any means of communication for dissemination to the public of edited information on-line such as newspapers, periodicals, radio, television and Internet-based news services.

Member States should consider introducing into their domestic law, measures indicating upper thresholds for acceptable media and cross media concentration. This should preferably be measured by a percentage of audience share and distinction should be made between concentration at national and regional levels.

Member States should consider supplementing their national competition law regimes with specific media merger review procedures. For instance, a body separate from the competition authority could look at the media pluralism aspects of the merger and the opinion of this body that the merger would have negative effects on media pluralism could prevent the merger from taking place.

Public service broadcasting should be vigorously promoted by ensuring proper financing, endorsing the idea of public service in broadcasting and guaranteeing full independence of public service broadcasting from political pressures.

Member States should adopt the measures guaranteeing full independence of national media regulatory authorities by providing that majority of the members of the authority should be representatives of civil society organisations and non-state media organisations, with political nominations constituting a minority. The provisions requiring members to be experienced media professionals should be introduced and observed.

Member States should adopt measures ensuring editorial independence of journalists, in both public and commercial media. Media providers should be encouraged to adopt and observe "codes of editorial independence" providing for appropriate remedy and appeal procedures.

Measures on conflicts of interest should be introduced rendering it impossible to combine government positions and the ownership of the media company. In case of election to the government, owners of media companies could have a choice of either selling their companies or handing their management to a blind trust.

References

Abbott, K.W., Snidal, D., 'Hard and Soft Law in International Governance' (2000) International Organization, 54(3), 421-456.

AGB Nielsen Media Research, Audience share data, (2006), http://www.medialive.ie/Television/chshare.html.

Albarran, A.B., Mierzejewska, B, I., 'Media Concentration in the US and European Union: A Comparative Analysis', 6th World Media Economics Conference, 12-15 May 2004, http://www.cem.ulaval.ca/6thwmec/albarran_mierzejewska.pdf.

Alger, D., *Megamedia. How giant corporations dominate mass media, distort competition, and endanger democracy*, (Rowman & Littlefield Publishers, 1998).

Alston, P., Weiler, J.H.H., 'An 'Ever Closer Union' in Need of Human Rights Policy', (1998) European Journal of International Law.

Annan, K., UN Secretary General, address at the World Television Day, 21 November 2003, http://www.un.org/News/Press/docs/2003/sgsm9007.doc.htm.

Alter, K. and Meunier-Aitsahalia, S., 'Judicial Politics in the European Community: European Integration and the Path breaking Cassis de Dijon Decision', (1994) Comparative Politcal Studies 26.

Anonymous, 'Charges In Corruption Inquiry', New York Times, World Briefing: Europe: Poland, 16 January 2003.

Anonymous, 'Lawmakers Start Corruption Inquiry', New York Times, World Briefing: Europe: Poland, 11 January 2003.

Anonymous, 'Polish Hollywood producer jailed', BBC News, 26 April 2004.

Anonymous, 'Tetra Laval decision: good news for business?', Practical Law Company, 31 March 2005, available at: http://crossborder.practicallaw.com/2-200-5556.

Anonymous, 'Another Public Broadcaster Under Government Pressure – Nobody's Happy', 9 May 2007, www.followthemedia.com.

Anonymous, 'Brussels aims to lift cover on EU lobby groups', *EU Business*, 15 August 2006.

Anonymous, 'Brussels reluctant to end political media ownership', *MaltaToday*, 15 April 1007, http://www.maltatoday.com.mt/2007/04/15/t15.html.

Anonymous, 'Brussels risks war with Kohl', *The Guardian,* 2 February 1998.

Anonymous, 'Citizens more ambitious than leaders on future EU policies', *EUObserver*, 11 May 2007.

Anonymous, 'EU claims a bit of Oscars glamour', *EU Business*, 26 February 2007.

Anonymous, 'European Policy Briefing', *EURONEWS*-Bulletin of the European Federation of Journalists, June 2006, www.nuj.org.uk/binshow.php?id=1369&bin=4.

Anonymous, 'Feeling of 'Europeanness' on the rise, study says', *EUObserver*, 23 October 2006.

Anonymous, 'In Italy's interests', *Financial Times,* 4 March 2002.

Anonymous, 'Italy govt plans RAI reform in next stage of TV revamp', *AFX News*, 29 November 2006.

Anonymous, 'ITV Digital seeks cooperation', www.advanced-television.com, 1-8 October 2001, http://www.advanced-television.com/2001/2001_newsarchive/1-8oct.html.

Anonymous, 'ITV rejects merger move from NTL', *BBC News*, 21 November 2006.

Anonymous, 'Mega Media Mergers: How dangerous?', *BusinessWeek Online*, 23 February 2004.

Anonymous, 'National interest and summer holidays', *Inside Italy,* 8 May 2007, http://www.loccidentale.it/node/1847.

Anonymous, 'OFCOM eases regional TV demands', *Reuters* ,8 February 2005.

Anonymous, 'OFCOM inquiry awaits BSkyB', *Global Competition Review*, 27 February 2007.

Anonymous, 'OFT calls for broadcasting probe', *Global Competition Review*, 20 April 2007.

Anonymous, 'Pope decries media concentration, 'destructive' contents of the web', *Monsters and Critics*, 9 March 2007, http://tech.monstersandcritics.com/news/article_1275082.php/Pope_decries_media_concentrationdestructive_contents_of_the_web.

Anonymous, 'The UK Competition Commission to investigate BSkyB's merger with ITV, following a referral from the Trade and Industry Secretary, Alistair Darling', *Global Competition Review*, 5 May 2007.

Anonymous, 'UK government orders investigation into Sky's 17.9% stake in ITV', 25 May 2007, www.followthemedia.com.

Arino, M., 'Competition law and pluralism in European Digital Broadcasting: addressing the gaps', (2004) 54 Communications and Strategies.

Arino, M., 'Pluralism in digital broadcasting: myths, realities and the boundaries of European Intervention', in Preissl, B., Muller, J. (Eds.), *Governance of Communications Networks. Connecting Societies and Markets with IT*, (Physica-Verlag, 2006).

Arino, M., Valcke, P., 'The future (or non-future) of must-carry', *OfcomWatch*, 11 April 2005, http://www.OFCOMwatch.co.uk/2005/04/future-or-non-future-of-must-carry.

Arnull, A.M., Dashwood, A.A., Ross, M.G., Wyatt, D.A., *European Union Law* (Sweet&Maxwell, 2000).

Association of Commercial Television in Europe (ACT), 'Comments to 'Media Pluralism – what should be the European Union's role?, Issues Paper'', http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-act.pdf .

Association of Commercial Television in Europe, 'Response to Issues Paper 3 for the Liverpool Audiovisual Conference 2005 on 'Cultural Diversity and Promotion of European and Audiovisual Production'', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip3-act.pdf.

Bagdikian, B., '*The Media Monopoly*', 6th ed., (Beacon Press, Boston 2000).

Bagdikian, B., *The New Media Monopoly* (Beacon Press, Boston 2004).

Baker, C.E., 'Media Concentration: giving up on democracy' (2002) Florida Law Review 54-5.

Barani, L., 'Hard and Soft Law in the European Union: The Case of Social Policy and Open Method of Coordination', Webpapers on Consitutionalism & Governance beyond the State 2/2006.

Barendt, E., *Broadcasting law. A comparative study*, (Clarendon Press, Oxford 1993).

Barendt, E., *Freedom of Speech*, 2 ed., (Oxford University Press, 2005).

Barendt, E.M., Hitchens, L.P., *Media Law: Text, Cases and Materials*, (Longman, London 2000).

BBC, 'Memorandum to the Joint Committee on The Draft Communications Bill', http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2062002.htm.

Bekkers, R., Mobile telecommunications standards: UMTS, GSM, TETRA, & ERMES, (Artech House, 2001), 95.

Beltrame, F., 'Lawmaking in the European Union', paper prepared for the W. G. Hart Legal Workshop, Institute of Advanced Legal Studies, 1996.

Berlin, I., *Four essays on liberty*, (Oxford Paperbacks, Oxfrod 1969).

Beunderman, M., 'Brussels reluctant to regulate national media rules', *EUobserver*, 17 January 2007.

Beunderman, M., 'Brussels wary of rules on national media', *BusinessWeek.com,* 18 January 2007.

Bibby, A., 'Global Concentration in the Media', UNI-MEI World General Assembly, Los Angeles, 1-3 October 2003, http://www.andrewbibby.com/pdf/Media%20Concentration.pdf.

Bosnjak, A., 'UK's media minister in talks over Sky's ITV stake', http://www.ovum.com/go/content/c,68460.

Bratkowski, P., 'Death of television', *Newsweek Poland* 30/2004.

Broadcasting Commission of Ireland 'Ownership and Control Policy', 2005, http://www.bci.ie/documents/o&c_policy_05.pdf.

Broadcasting Policy Group, 'Beyond the Charter',

http://www.tvlicensing.biz/pdf/beyond_the_charter.pdf.

Burt, T, 'European M&A to gather pace', *Financial Times*, 6 February, 2005.

Campaign for Press and Broadcasting Freedom, 'Comments on 'Media Pluralism – what should be the European Union's role?', Issues Paper'', http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-cpbf.pdf.

Campaign for Quality Television, 'Serious Documentaries on ITV: an Endangered Species', 1999.

Cavallin, J., 'European Policies and Regulations on Media Concentration', (1998) International Journal of Communications Law and Policy 1.

Cece, B., 'Italylabours to rid itself of Berllusconi', 18 July 2006, http://www.cafebabel.com/en/article.asp?T=T&Id=7535.

Chalmers, D., Hadjiemmanuil, C., Monti, G., Tomkins, A., *European Union Law: text and materials,* (Cambridge University Press, 2006).

Choueka, R., 'United Kingdom: Competition in the television sector', Lawrence Graham's 'SmartLaw' Newsletter, March 2007, http://www.mondaq.co.uk/article.asp?articleid=47038&searchresults=1.

Coen, D., 'Business-Regulatory Relations: Learning to Play Regulatory Games in European Utility Markets', (2005) Governance 18(3).

Coen, D., 'The European Business Interest and the Nation State: Large-firm Lobbying in the European Union and Member States', (1998) Journal of Public Policy 18.

Collins Concise Dictionary (Collins, 1997).

Collins, R., 'Realising Social Goals in Connectivity and Content', in Marsden, C.T. (ed) *Regulating the Information Society* (Routledge, 2000).

Commission of the Bishops' Conferences of the European Community, 'Comments on 'Media Pluralism – what should be the European Union's role?, Issues Paper'', http://ec.europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-comece.pdf.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European approach to media literacy in the digital environment', COM(2007)833 final.

Competition Commission *Carlton Communications Plc / Granada Plc: a report on the proposed merger*, http://www.competition-commission.org.uk/rep_pub/reports/2003/482carlton.htm#full.

Conason, J., comment on Bagdikian, B., *The New Media Monopoly* (Beacon Press, Boston 2004).

Conference on 'Comparing Media Systems. West meets East', 23-25 April 2007, Wroclaw, Poland, http://www.zksid.politologia.uni.wroc.pl/index.php?lang=en.

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the General Conference of UNESCO at its 33rd session, 2005.

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L/39, amended by Directive 2002/73/EC.

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ 331/51.

Council of Europe, "The Council of Europe and the protection of human rights", booklet, available at http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

Council of Europe, About Conventions and Agreements in the Council of Europe Treaty Series (CETS), http://conventions.coe.int/general/v3IntroConvENG.asp.

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms-summary of the Treaty, http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm.

Council of Europe, Standing Committee on Transfrontier Television (T-TT), Amending Protocol to the European Convention on Transfrontier Television, CM(98)94, Strasbourg 12 May 1998.

Council of Europe, Statute of the Council of Europe, 5 May 1949, http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm

Council of Europe, European Convention on Transfrontier Television, Strasbourg 5 May 1989, European Treaty Series No.132.

Council of Europe, Recommendation No R (94) 13 on Measures to promote media transparency, 22 November 1994.

Council of Europe, Recommendation No R (96) 10 on the guarantee of the independence of public service broadcasting, 11 September 1996.

Council of Europe, Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, 19 January 1999.

Council of Europe, Explanatory memorandum to Recommendation R (99) 1 on Measures to promote Media Pluralism.

Council of Europe, Recommendation 1641 (2004) of the Parliamentary Assembly on Public Service Broadcasting, 27 January 2004.

Council of Europe, Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member Stateson media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

Council of Europe, Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

Council of Europe, Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

Council of Europe, 'Media Pluralism in the Digital Environment', report by the Steering Committee on the Mass Media, October 2000.

Council of Europe, 'Media Diversity in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, December 2002.

Council of Europe, Report of the group of specialists on the democratic and social implications of digital broadcasting (MM-S-DB), 8th meeting, 6-8 October 2003, http://www.coe.int/t/e/human_rights/media/1_intergovernmental_co%2Doperation/archives/mm-s-db(2003)008_en.asp#topofpage.

Council of Europe, 'Transnational Media Concentrations in Europe', report by the AP-MD, Advisory Panel to the Steering Committee on the Mass Media, November 2004.

Council of Europe, 7th Ministerial Conference on Mass Media Policy, Kyiv (Ukraine), 10-11 March 2005, 'Integration and Diversity: the new frontiers of European media and communications policy', adopted texts, MCM(2005)005.

Council of Europe, 'Freedom of expression and information', http://www.coe.int/t/e/human_rights/en_freedomofexpression.pdf.

Council of Europe, 'Media pluralism to safeguard freedom of expression', http://www.coe.int/T/E/Com/Files/Themes/media-freedom/pluralisme.asp.

Council of the European Union, 'Development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (Recommendation)', OJ (1998) L 270/48.

Council of the European Union, 'Culture and the knowledge society (Resolution)', 2002/C 32/01.

Council of the European Union, Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, COM(2004) 341 final.

Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings amended in 1997 and recently replaced by Council Regulation (EEC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ (1962) 13/204.

Cowie, C., Marsden, C.T., 'Convergence, Competition and Regulation' (1998) *International Journal of Communications Law and Policy* 1.

Cowling, J. 'Winner Takes All' *Media World*, 1 January 2004.

Craig, P., de Búrca, G., *EU Law. Text, cases, and materials*, 3rd edition, (Oxford University Press, 2003).

Craufurd Smith, R., *Broadcasting Law and Fundamental Rights* (Clarendon Press, Oxford 1997).

De Avillez Pereira, M.(Ed), *Antitrust and New Media*, (Kluwer Law International, London 2000).

De Búrca, G., 'Reappraising subsidiarity's significance after Amsterdam', Harvard Jean Monnet Working Paper 7/99, http://www.jeanmonnetprogram.org/papers/99/990701.html.

Didizian, M., Romer, J. 'The Communications Bill – The Place of the BBC', (2003) Computer and Telecommunications Law Review 9(4).

Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities ('Television Without Frontiers Directive'), OJ (1989), L 298/23.

Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ (1997) L 202/60.

Directive 95/47/EC on the use of standards for the transmission of television signals, OJ (1995) L 281/51, now revoked and replaced by the Directive 2002/19/EC on access to, and interconnection of, electronic telecommunications networks and associated facilities ('Access Directive'), OJ (2002) L 108/7.

Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, now repealed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ (2002) L 108/7.

Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), OJ (2002) L 108/21.

Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ (2002) L 108/33.

Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ (2002) L 108/51.

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ (2002) L 201/27.

Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products OJ (2003) L 152/16, repealing Directive 98/43/ec of the European Parliament and of the Council of 6 July 1998

on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ (1998) L 213/9.

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ (2007) L 332/27.

Doyle, G., 'From 'Pluralism' to 'Ownership': Europe's emergent policy on media concentrations navigates the doldrums', (1997) The Journal of Information Law and Technology 3.

Doyle, G., 'Regulation of media ownership and pluralism in Europe: Can the European Union take us forward?', (1998) Cardozo Arts & Entertainment Law Journal 16.

Doyle, G., 'Towards a pan-European directive? From concentrations and pluralism to media ownership', (1998) Communications Law 3-1.

Doyle, G., 'Convergence: 'A unique opportunity to evolve in previously unthought-of ways or a hoax?', in: Marsden, C., Verhulst, S. (Eds.), *Convergence in* Euro*pean Digital TV Regulation*, (Blackstone Press Limited, 1999).

Doyle, G., *Media ownership*, (SAGE Publications, 2002).

Economic and Social and Committee 'Opinion on Commission Green Paper', 93/C304/07.

Eeckhout, P., Tridimas, T. (Eds.), *Yearbook of European Law 1999-2000* (Oxford Clarendon Press, 2000).

European Audiovisual Observatory, 'Developments of digital television in European Union', 4 December 1999, http://www.obs.coe.int/online_publication/expert/00002497.pdf.fr.

European Audiovisual Observatory, Iris Special: 'Television and Media Concentration. Regulatory Models on the National and European Level', Strasbourg 2001.

European Audiovisual Observatory, Iris Special: 'To Have or not to Have – Must Carry Rules', Strasbourg 2005.

European Audiovisual Observatory, 'The financial situation of television companies in the European Union (1999-2004)', prepared by Andre Lange, September 2005.

European Audiovisual Observatory, 'Statistical Yearbook 2006 – Film, television, video and multimedia in Europe'.

European Audiovisual Observatory, Mission Statement, http://www.obs.coe.int/about/oea/org/mission.html.en.

European Broadcasting Union, 'EBU comments on the Charter of Fundamental Rights', 11 May 2000, http://www.ebu.ch/CMSimages/en/leg_charter_fundamental_rights_tcm6-4367.pdf.

European Broadcasting Union, 'Proposed EU Regulatory Framework for Electronic Communications. EBU comments for the European Parliament's second reading',26 October 2001, http://www.ebu.ch/CMSimages/en/leg_pp_communications_261001_tcm6-4369.pdf .

European Broadcasting Union, 'Comments on the Communication from the Commission on the application of State aid rules to public service broadcasting', 8 May 2002, http://www.ebu.ch/CMSimages/en/leg_p_comments_state_aid_rules_tcm6-4395.pdf.

European Broadcasting Union, 'Comments on the Eurostrategies Report regarding Must Carry', 26 June 2003, http://www.ebu.ch/CMSimages/en/leg_pp_mustcarry_Eurostrategies_260603_tcm6-4438.pdf.

European Broadcasting Union, 'Comments on the Commission Staff Working Paper on the Interoperability of Digital Interactive Television Services', 20 April 2004, http://www.ebu.ch/CMSimages/en/leg_pp_interoperability_300404_tcm6-12359.pdf.

European Broadcasting Union, 'Position Paper on the Commission Proposal for a Directive on services in the internal market', 8 December 2004, http://www.ebu.ch/CMSimages/en/leg_pp_directive_services_081204_tcm6-23334.pdf.

European Broadcasting Union, 'Position on Issues Papers for the Liverpool Audiovisual Conference, 5 September 2005', http://www.ebu.ch/CMSimages/en/leg_pp_%20issuespapers_liverpool_050905_tcm6-39736.pdf.

European Charter for Media Literacy, http://www.Euromedialiteracy.eu.

European Commission for Democracy through Law, 'Opinion on the compatibility of the Laws 'Gasparri and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media' (Opinion No. 309/2004), 13 June 2005, Doc. No. CDL-AD(2005)017.

European Commission, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final, 13 December 2005.

European Commission 'Pluralism and Media Concentration in the Internal market: An Assessment of the Need for Community Action' (Green Paper),COM(92)480 final.

European Commission, Communication from the Commission to the Council and the European Parliament, 'Follow-up to the Consultation Process Relating to the Green Paper on Pluralism and Concentration in the Internal Market – An Assessment of the Need for Community Action', COM(94)353 final.

European Commission, 'The Convergence of the Telecommunications, Media and Information Technology, and the Implications for Regulations, towards an Information Society Approach', ('Convergence Green Paper'), COM(97)623).

European Commission, 'Services of General Interest, (Green Paper)', COM(2003) 270 final.

European Commission, 'Services of general interest (White Paper)', COM(2004) 374 final.

European Commission, 'Communication to the Council and Parliament on Audio-visual Policy', COM(90)78.

European Commission, 'Europe's way to the information society – An action plan', COM(94)347 final, 19 July 1994.

European Commission, 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age' (Communication) COM(1999) 657 final.

European Commission, 'Services of general interest in Europe (Communication)', COM (2000) 580.

European Commission, 'Application of state aid rules to public service broadcasting (Communication)', OJ (2001) C 320.

European Commission, 'Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services', OJ (2002) C 165/6.

European Commission, 'The future of European regulatory audiovisual policy (Communication)', COM(2003) 784 final.

European Commission, 'Seventh communication on the application of Articles 4 and 5 of Directive 89/552/EEC 'Television without Frontiers', as amended by Directive 97/36/EC, for the period 2003-2004, 14 August 2006', COM/2006/0459 final.

European Commission, 'Reviewing the interoperability of digital interactive television services pursuant to Communication COM(2004)541of 30 July 2004 (Communication), COM(2006)37 final.

European Commission, 'List of standards and/or specifications for electronic communications networks, services and associated facilities and services, replacing all previous versions (Decision)', COM(2006)6364 final.

European Commission, 'Annex to the 11th Report on the European Electronic Communications Regulation and Markets', 2005, SEC(2006)193.

European Commission, 'Media pluralism in the Member States of the European Union (Staff Working Document)', 16 January 2007, SEC(2007)32.

European Commission, 'The 2003 regulatory framework for electronic communications – Implications for broadcasting (Working Document)', Brussels, 14 June 2002, http://ec.Europa.eu/information_society/topics/telecoms/regulatory/digital_broadcasting/documents/onpcom02_14rev1_14062002.pdf.

European Commission, 'Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services (Working Document)', Brussels, 22 July 2003, http://ec.Europa.eu/information_society/topics/telecoms/regulatory/digital_broadcasting/documents/onp_dbeg_doc_re_must_carry.pdf.

European Commission, 'Suggested guidelines for the monitoring of the implementation of Articles 4 and 5', 11 June 1999, http://ec.Europa.eu/comm/avpolicy/docs/reg/tvwf/eu_works/controle45_en.pdf.

European Commission, 'Cultural Diversity and Promotion of European and Audiovisual Production', Issues Paper for the Liverpool Audiovisual Conference, July 2005, http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/ispa_cultdiv_en.pdf.

European Commission, 'Media Pluralism – what should be the European Union's role?', (Issues Paper for the Liverpool Audiovisual Conference) July 2005, http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/ispa_mediapluralism_en.pdf.

European Commission, Liverpool Audiovisual Conference, 22 September 2005, 'Final Report', http://ec.Europa.eu/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf.

European Commission, High-Level Group on the Information Society, 'Europe and the Global Information Society; Recommendations to the European Council', 26 May 1994, http://Europa.eu.int/ISPO/docs/basics/docs/bangemann.pdf.

European Commission, 'Background Note: The UEFA Champions League', 24 July 2003, MEMO/03/156.

European Commission, 'Commission requests Germany, Ireland and The Netherlands to clarify role and financing of public service broadcasters', 3 March 2005, IP/05/250.

European Commission, 'Public service broadcasting and state aid – frequently asked questions', 3 March 2005, MEMO/05/73.

European Commission, 'Commission closes inquiries into French, Italian and Spanish public broadcasters following commitments to amend funding systems, 20 April 2005, IP/05/458.

European Commission, 'Commission expects most broadcasting in the EU to be digital by 2010', 24 May 2005, IP/05/595.

European Commission, 'Commission scrutinises Greek restrictions on media ownership', 10 July 2005, IP/05/987.

European Commission, 'Cutting red tape: What does the European Commission do to deliver?', 12 July 2005, MEMO/05.249.

European Commission, 'The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions', 13 December 2005, MEMO/05/475.

European Commission, 'Commission makes commitments from FA Premier League legally binding', press release of 22 March 2006, IP/06/356.

European Commission, 'Commission orders Dutch public service broadcaster NOS to pay back €76.3 million excess ad hoc funding', 22 June 2006, IP/06/822.

European Commission, 'Making sense of today's media content: Commission begins public media literacy consultation', 6 October 2006, IP/06/1326.

European Commission, 'New round of infringement proceedings in electronic communications: What are the issues?', MEMO/06/371, 12 October 2006.

European Commission, 'Boosting the Diversity of European TV and On-Demand services: Commission paves the way for the new Directive 'Audiovisual without Frontiers', 9 March 2007, IP/07/311.

European Commission, 'Commission closes investigation regarding the financing regime for German public service broadcasters' 24 April 2007, IP/07/543.

European Commission, 'Commission welcomes proposed changes to financing of Irish public service broadcasters and closes investigation', 27 February 2008, IP/08/317.

European Commission, 'European Transparency Initiative: Commission invites lobbyists and interest groups to subscribe to public register', 21 March 2007, IP/07/367.

European Commission, Explanatory memorandum regarding a questionnaire on the revision of the Communication from the Commission on the application of State aid rules to public service broadcasting, 10 January 2008.

European Commission, 'European Merger Control - Council Regulation 139/2004 – Statistics, http://ec.Europa.eu/comm/competition/mergers/statistics.pdf.

European Commission, 'i2010 - A European Information Society for growth and employment', http://ec.Europa.eu/information_society/eEurope/i2010/index_en.htm.

European Commission, 'List of major events', http://ec.Europa.eu/comm/avpolicy/reg/tvwf/implementation/events_list/index_en.htm.

European Commission, Audiovisual and Media Policies, Media Literacy, http://ec.Europa.eu/avpolicy/media_literacy/index_en.htm.

European Commission, Audiovisual and Media Policies, Media Literacy, Media Expert Group, http://ec.Europa.eu/avpolicy/media_literacy/expert_group/index_en.htm.

European Commission, Audiovisual and Media Policies, Media Literacy, Media Literacy Questionnaire, http://ec.Europa.eu/avpolicy/media_literacy/docs/questionnaire_ml_en.pdf.

European Commission, Better Regulation Initiative, http://ec.Europa.eu/governance/better_regulation/index_en.htm.

European Commission, Growth and Jobs Initiative (Lisbon Strategy), http://ec.europa.eu/growthandjobs/key/index_en.htm.

European Commission, Transparency Initiative: http://ec.Europa.eu/commission_barroso/kallas/transparency_en.htm.

European Commission, DG Information Society and Media, 'The need for transparency, freedom and diversity in Europe's media landscape', http://ec.Europa.eu/information_society/media_taskforce/pluralism/index_en.htm.

European Commission, MEDIA: Mesures pour Encourager le Development de l'Industrie Audiovisuelle (Measures to Encourage the Development of the Audiovisual Industry), http://ec.Europa.eu/information_society/media/index_en.htm.

European Commission, XXVI Annual Report on Competition Policy 1996, Part Two.

European Commission, Commission actions expected to be adopted : 05/06 - 12/06, http://ec.Europa.eu/atwork/programmes/docs/execution_report.pdf.

European Commission, Guidelines on the application of Article 81(3) (OJ (2004) C-101/97)

European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ (2004) C-31/5

European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf

European Commission, Notice on cooperation within the Network of Competition Authorities, OJ (2004) C-101/43.

European Coordination of Independent Producers (CEPI), 'Contribution to the 2003 public consultation on the review of the Television Without Frontiers Directive', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/2003_review/contributions/wc_cepi.pdf.

European Federation of Journalists, 'Crisis in Italian Media: How poor politics and flawed legislation put journalism under pressure', Report of the IFJ/EFJ Mission to Italy , 6-8 November 2003.

European Federation of Journalists, 'EFJ expresses dismay over Council of Europe 'Missed Opportunity' to conform media concentration crisis', www.ifj.org, 29 June 2004.

European Federation of Journalists, 'Media power in Europe: the big picture of ownership', 2005, http://www.ifj-Europe.org/pdfs/EFJownership2005.pdf.

European Film Companies Alliance (EFCA), 'Contribution to the public consultation on the revision of the 'Television without frontiers' Directive launched by the European Commission ahead of the Liverpool Audiovisual Conference', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip3efca.pdf

European Institute for the Media (EIM), 'Transparency of Media Control' (1994).

European Institute for the Media, Final report of the study on 'The information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed', Düsseldorf, 31 August 2004, http://www.epra.org/content/english/press/papers/European%20Citizen%20Information%20Project%20Final% REPORT.pdf.

European Parliament and the Council, Decision No 1718/2006/EC of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), OJ (2006) L 327/12.

European Parliament and the Council, Recommendation of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ(2006) L 378/72.

European Parliament, Resolution of 22 May 1996 on the broadcasting of sports events, OJ (1996) C 166.

European Parliament, Resolution on media takeovers and mergers, OJ (1990) C68/137.

European Parliament, Resolution on the European Commission's Green Paper 'Pluralism and media concentration in the internal market, 29 January 1994, OJ C44/177; European Parliament, Resolution on concentration of the media and pluralism, 2 October 1994, OJ C323/167.

European Parliament, Resolution on Pluralism and Media Concentration, (1995) OJ C166/133.

European Parliament, Resolution on media concentration and diversity of opinions, OJ (1992) C 284/44.

European Parliament, Resolution on media concentration, OJ (2004) C25E/205.

European Parliament, Resolution on the application of Articles 4 and 5 of Directive 89/552/EEC ('Television without Frontiers'), as amended by Directive 97/36/EC, for the period 2001-2002, P6_TA(2005)0322.

European Parliament, Committee on Culture, Youth, Education and the Media (Rapporteur: Galeote Quecedo, G.), Recommendation for second reading on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive amending Directive 89/552/EEC, A4 - 0346/96.

European Parliament, 'Report on the Future of Public Service Television in a Multi-channel Digital Age (Tongue Report)', 11 July 1996, A4-0243/96.

European Parliament, 'Draft report on the application of Directive 89/552/EEC Television Without Frontiers', 2003/2033(INI).

European Parliament, 'Report on the application of Articles 4 and 5 of Directive 89/552/EEC (the 'TV without Frontiers' Directive), as amended by Directive 97/36/EC, for the period 2001-2002 (Rapporteur: Henri Weber), A6-0202/2005.

European Parliament, 'Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights)', 5 April 2004, A5-0230/2004.

European Parliament, Committee on Culture and Education, Draft Report on concentration and pluralism in the media in the European Union, 7 March 2008, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-402.864+01+DOC+PDF+V0//EN&language=EN

European Parliament, Written Question P-1625/05 by Dimitrios Papadimoulis (GUE/NGL) to the Commission, Subject: Media concentration, http://www.Europarl.eu.int/registre/questions/ecrites/2005/1625/P6_QP(2005)1625_EN.doc.

Eurostrategies, 'Assessment of Member States Measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communications networks and services in the context of the new regulatory framework (Report)', March 2003,

http://ec.Europa.eu/information_society/topics/telecoms/regulatory/studies/documents/finrep_18march_2003.pdf.

Fairbairn, C., 'Serving the public good in the digital age: implications for UK media regulation', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications'.

Fastweb, 'Comments on 'Media Pluralism – what should be the European Union's role?', Issues Paper'', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6fastweb.pdf.

Feintuck, M., Varney, M., *Media regulation, public interest and the law*, (Edinburgh University Press, 2006).

Fraser, M.W., 'Television', in Kassim, H., Menon, A., *The European Union and National Industrial Policy*, (Routledge, 1996).

Garzaniti, L., *Telecommunications, broadcasting and the internet*, (Thomson, Sweet&Maxwell, London 2003).

Gattuso, J., 'The Myth of Media Concentration: Why the FCC's Media Ownership Rules are Unnecessary', http://www.heritage.org/Research/InternetandTechnology/wm284.cfm.

Geradin, D., 'Competition law problems raised by the entry of incumbent telecommunications operators in the media content delivery market', University of Zurich, 7 September 2005, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796066.

Gerl, M., Slovenian Broadcasting Council, Working Group II 'Licensing Local Broadcasters', EPRA, Barcelona, 19-20 April 2001, www.epra.org/content/english/press/papers/EPRA200105a.doc.

Gibbons T., 'Concentrations of Ownership and Control in a Converging Media Industry', in Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999).

Gibbons, T., 'Pluralism, guidance and the new media', in Marsden, C. (Ed.), *Regulating the Global Information Society*, (Routledge, London 2000).

Gibson, O. 'Davies Hits Out over Satellite Coverage' *The Guardian*, 25 November 2002.

Giles, C., 'The public interest challenges for the communications sector over the next 10 years: contestable public service funding', in: 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications'.

Global Competition Review, 'BSkyB to divest ITV stake', 29 January 2008.

Global Competition Review, 'BSkyB will appeal', 21 February 2008;

Global Competition Review, 'Virgin asks for review of BSkyB decision', 26 February 2008

Goldberg, D., Prosser, T., Verhulst, S. (Eds.), *Regulating the changing media. A comparative study*, (Clarendon Press, Oxford, 1998).

Goldberg, D., Prosser, T., Verhulst, S., 'Regulating the changing media', in Goldberg, D., Prosser, T., Verhulst, S. (Eds.), *Regulating the changing media. A comparative study*, (Clarendon Press, Oxford, 1998).

Goldberg, D., Prosser, T., Verhulst, S., *EC Media law and policy*, (Longman, London 1998).

Goodhall, Alexander & O'Hare (GAH), Feasibility of using audience measures to assess pluralism (1997).

Goodman, A., Goodman, D., 'Why Media Ownership Matters?', *Seattle Times*, 3 April 2005.

Graham A., Davies G., *Broadcasting, Society and Policy in the Multimedia Age* (John Libbey Media, 1997).

Grande, E., 'The state and interest groups in a framework of multi-level decision-making: the case of the European Union', (1996) Journal of European Public Policy, 3:3.

Hallin, D., Mancini, P., *Comparing Media Systems*, (Cambridge University Press,2004).

Harcourt, A., *The* Eur*opean Union and the regulation of media markets*, (Manchester University Press 2005).

Harcourt, A., 'The European Commission and regulation of the media industry', (1998) Cardozo Arts & Entertainment Law Journal 16(2).

Harcourt, A., 'EU Media Ownership Regulation: Conflict over the definition of alternatives', (1998) Journal of Common Market Studies, 36-3.

Harcourt, A., 'Support for regulation and transparency of media ownership and concentration – Russia, Study of European approaches to media ownership', http://www.medialaw.ru/e_pages/publications/e-conc.htm.

Harcourt, A., 'European policy and legal framework for media ownership – Aims, obstacles and effectiveness', Regional conference for South-East European and new EU member countries on 'Concentration of media ownership and its impact on media freedom and pluralism, Bled, Slovenia, 11-12 June 2004, http://www.mirovni-institut.si/media_ownership/conference/pdf/Harcourt.pdf.

Hedges, M, 'Polish President puts new spin on Polish plumber jokes', www.followthemedia.com, 10 April 2007.

Hedges, M., 'It is a Fight to the Death: Branson v. Murdoch', www.followthemedia.com, 28 March 2007.

Helberger, N., *Controlling access to content : regulating conditional access in digital broadcasting*, (Kluwer Law International, 2005).

Helberger, N., 'The 'Right to Information' and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation', (2006) Entertainment Law Review 2.

Herman, E. S., *Beyond Hypocrisy: Decoding the News in an Age of Propaganda*, (South End Press, 1992).

Hindman, M., Cukier, K.N.,'More Media, Less Diversity', *The New York Times*, 2 June 2003.

Hitchens, L.P., 'Media Ownership and Control: A European Approach', (1994) The Modern Law Review 57.

Hoffman-Riem, W., *Regulating media. The licensing and supervision of broadcasting in six countries*, (The Guilford Press, New York 1996).

Humphreys, P., 'The Changing Nature of the Broadcast Media in Europe: Some Key Policy Issues', 1995, http://www.psa.ac.uk/journals/pdf/5/1995/hump.pdf.

Humphreys, P., *Mass Media and Media Policy in Western Europe* (Manchester University Press, 1996).

Humphreys, P., 'Power and Control in the New Media', paper presented at the ECPR-Workshop 'New Media and political Communication', University of Manchester, 1997.

Humphreys, P., 'Regulating for pluralism in the era of digital convergence: the issues of media concentration control and the future of public-service broadcasting', the ECPR Joint Research Sessions, Mannheim, 26-31 March 1999, Workshop 24: 'Regulating Communications in the Multimedia Age', http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w24/Humphreys.pdf.

Humphreys, P., 'Regulating for media pluralism: Issues in ownership and competition', in Andrew, J.,Crook, M., Holmes, D., Kolinsky, E., (Eds.) *Why Europe? Problems of culture and identity, Vol.2: Media, Film, Gender, Youth and Education* (Macmillan, New York 2000).

Humphreys, P., 'The EU and audiovisual regulation: an agency for de-regulation', 2005, http://regulation.upf.edu/ecpr-05-papers/phumphreys.pdf.

Hunt, J, 'The Court of Justice as a policy actor in the development of the EC labour law regime: the case of the Acquired Rights Directive', (1998) Legal Studies 18 (3).

Institute of European Media Law (EMR) 'Media Market Definitions – Comparative Legal Analysis. Report for the European Commission', Chapter 7: Ireland; July/October 2003, http://ec.Europa.eu/comm/competition/publications/studies/media/ireland.pdf.

International Federation of Journalists, 'Public Broadcasting For All. A Campaign for Reform of Public Service Broadcasting', http://www.ifj.org/default.asp?index=929&Language=EN.

Ireland, Department of Communications, Energy and Natural Resources, 'Broadcasting Bill', http://www.dcmnr.gov.ie/Broadcasting/Broadcasting+Bill/.

Ireland, Houses of the Oireachtas, Joint Committee on Communications, Marine and Natural Resources, Tenth Report 'Considerations, recommendations and conclusions on the Joint Committee's consultation on the draft General Scheme of the Broadcasting Bill', April 2007 http://www.oireachtas.ie/documents/committees29thdail/committeereports2007/Broadcasting.pdf.

Ireland, Radio and Television Act, 1988, Public Act No. 20/1988.

Ireland, Broadcasting Act, 2001, Public Act No. 4/2001.

Ireland, Competition Act 2002, Public Act No. 14/2002.

Ireland, Competition Act 2002 (Section 18 (5) and (6)) Order 2007, S.I. No. 122 of 2007.

Ireland, Competition Authority, Determination of merger notification M/05/024 - *UGC (Chorus) / NTL,* 4 November 2005.

Ireland, Competition Authority, Determination of merger notification M/07/040, *Communicorp/SRH*, 7 December 2007.

Ireland, Competition Authority, Determination of merger notification M/07/069, *UTV/FM104*, 17 January 2008

Italy, 'The Principles governing the broadcasting system and RAI-Radiotelevisione Italiana SpA, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting' ('The Gasparri Law'), CDL(2004)092.

Italy, Law no. 287 of 10 October 1990, Competition and Fair Trading Act (Official Gazette no. 240 of 13 October 1990) applies to the media sector.

Italy,'Rules for the resolution of conflicts of interest' ('the Frattini Law'), CDL(2004)93rev.

Jakubowicz, K., 'Legislative guarantees of plurality of information sources', Implementation of constitutional provisions regarding mass media in a pluralist society, Collection Science and Technique of Democracy (1994) 13.

Jakubowicz, K., 'PSB in Post-communist Countries: Finding the Right Place on the Map', the 2007 Spry Memorial Lecture, Montreal, 27 November 2007, http://www.com.umontreal.ca/Spry/spry-kj-lec.htm.

Janis, M.W., Kay, R.S., Bradley, A.W., *European Human Rights Law. Text and Materials*, 2nd ed (Oxford University Press, 2000).

Jones, C.A., 'Television Without Frontiers', in: Eeckhout, P., Tridimas, T. (Eds.), *Yearbook of European Law 1999-2000* (Oxford Clarendon Press, 2000).

Kaitatzi-Whitlock, S., 'Pluralism and media concentration in Europe: media policy as industrial policy', (1996) European Journal of Communication 11(4).

Karppinen, K., 'Against naïve pluralism in media politics: some implications of the radical-pluralist approach to the public sphere', Public Spheres and Their Boundaries, Tampere 25-27 May 2006, http://www.uta.fi/laitokset/tacs/papers0506/karppinen.pdf.

Kennedy, D., 'Monopoly Money', *Boston Phoenix*, 17 January 2002.

Kevin, D., 'Media ownership and pluralism: regulatory trends and challenges in the European Union Member States', presentation at the 20th EPRA meeting, Istanbul 2004, www.epra.org/content/english/press/papers/Media%20ownership%20and%20pluralism%20Kevin%20Istanbul%2 final.ppt.

Kilkelly, U. (ed), *ECHR and Irish Law*, (Jordans, 2004)

Klimkiewicz, B., 'Media Pluralism: European Regulatory policies and the Case of Central Europe', European University Institute Working Paper, RSCAS No. 2005/19.

Knee, J.A., 'Should we fear media cross-ownership?', (2003) Vol. 26, 3 Regulation.

Knysz, W., 'TVP fires rebel journalist', *Gazeta Wyborcza*, 17 July 2007.

Komorek, E., 'European attempts to regulate media concentrations. Persisting conflict of interests', (2004/2005) Hibernian Law Journal 1.

Kroes, N., 'Strengthening the European Creative Industries in the Light of the i2010 Strategy', Opening address at the Austrian Presidency Expert Seminar: Content for competitiveness, 2 March 2006, http://Europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/140&format=HTML&aged=0&language=EN&guiLanguage=en.

Kublik, A., 'The rebellion of *The News'* reporters', *Gazeta Wyborcza*, 17 June 2007.

Kuhne, H., 'Critical Examination of the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation', cited by Tongue, C., in 'Culture or Monoculture? The European Audiovisual Challenge' in: Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999).

Lang, M., 'Entering the Digital Age. The Promise of Pluralism and the Danger of Monopoly Control', article presented at the ECPR-Workshop on *New Media and Political Communication* in Bern, 27 February 1997.

Lange, A., Van Loon, A., *Multimedia Concentration Regulation in* Europe, (IDATE, Montpelier and Institute for Information Law, Amsterdam 1990).

Levy, D., *Europe's Digital Revolution. Broadcasting Regulation, the EU and the Nation State*, (Routledge, 1999).

Liberty Media Corporation Annual Report 2004, http://www.libertymedia.com/ir/pdfs/AnnualReport2004.pdf.

Llorens-Maluquer, C., 'European responses to bottlenecks in Digital Pay-TV: impacts on pluralism and competition policy', (1998) Cardozo Arts & Entertainment Law Journal 16(2-3).

Longstaff, P.H, 'Competition in the communications sector: can unpredictable systems be regulated?', http://sai.syr.edu/facultypapers/ITS%20Helsinki%20paper1.pdf.

Lorimer, R., Scannel, P., *Mass Communications: A Comparative Introduction* (Manchester University Press, 1994).

Lowe, P., 'Media Concentration and Convergence: Competition in Communications', Oxford Media Convention, January 13, 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_002_en.pdf.

Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999).

Marsden C. and Verhulst S., 'Convergence: a Framework for Discussion', in Marsden C. and Verhulst S. (Eds.), *Convergence in European Digital TV Regulation* (Blackstone Press Limited, London 1999).

Marsden, C.T. (ed) *Regulating the Information Society* (Routledge, London 2000).

Marsden, C.T., 'Pluralism in the multi-channel market - suggestions for regulatory scrutiny' (1999/2000) International Journal of Communications, Law and Policy 4.

Mastrolonardo, R., 'Media concentration: the Italian case-study', Open Democracy 14 March 2002, http://www.opendemocracy.net/media-globalmediaownership/article_54.jsp.

McCallum, L., 'EC Competition Law and Digital Pay Television', 1999 Competition Policy Newsletter 1.

McCarthy, A., Power, V., *Irish Competition Law. The Competition Act, 2002*, (LexisNexis, 2003).

McChesney, R.W., 'The political economy of global media', 1998, http://www.waccglobal.org/wacc/publications/media_development/archive/1998_4/the_political_economy_of_global_media.

McChesney, R.W., 'The nine firms that dominate the world', Global Policy Forum, August 2003, http://www.globalpolicy.org/globaliz/cultural/2003/0804media.htm.

McGonagle, M., *Media law,* 2nd ed. (Thomson, Round Hall, Dublin 2002).

McGougan, J., 'The challenge of convergence to audiovisual regulation: Is the current regulatory framework approaching its sell-by date?', in: Marsden, C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, 1999).

McLuhan, M., *The Gutenberg Galaxy* (University of Toronto Press, 1962).

McQuail, D., Siune, K. (Eds.), *Media Policy. Convergence, Concentration and Commerce*, (SAGE Publications, 1998).

MEDIA Desk Ireland, http://www.iftn.ie/mediadesk/index.html.

Mendes Pereira, M., 'Vertical and horizontal integration in the media sector and EU competition law', Conference on the ICT and Media Sector within the EU Policy Framework, Brussels, April 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_009_en.pdf.

Monti, M., 'Pluralism and Media Concentration', speech to the European Parliament's Committee on Culture, Youth, Education and the Media, 26 September 1995.

Monti, M., 'Does EC competition policy help or hinder the European audiovisual and telecoms industries?', British Screen Advisory Council, The Cavendish Conference Centre, London, 26 November 2001, http://www.bsac.uk.com/reports/monticompetition.pdf.

Motta, M., Polo, M., 'Concentration and public policies in the broadcasting industry: the future of television', (1997) Economic Policy 12.

Mowbray, A., *Cases and materials on the European Convention on Human Rights*, (Butterworths, 2001).

Moyers, B., 'Keynote address to the National Conference on Media Reform', Madison, Wisconsin, 8 November 2003, http://www.commondreams.org/views03/1112-10.htm.

Naughton, J., 'Our changing media ecosystem', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications'.

Nicol, A., Millar, G., Sharland,A., *Media Law and Human Rights* (Blackstone Press Limited, 2001).

Nieto, A., *Time and the information market: the case of Spain*, (Media Markets Monographs, University of Navarra, Pamplona 2001).

Nitsche, I., *Broadcasting in the European Union: The role of public interest in competition analysis*, (T.M.C. Asser Press, The Hague, 2001).

Noveck, B.S., 'Thinking analogue about digital television? Bringing European content regulation into the Information Age', in: Marsden C, Verhulst S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999).

O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches', paper presented to the Irish Media Research Network Conference, 16 June 2006.

O'Malley, T., 'The state of the media – Media Policy and the need for reform', The Campaign for Press and Broadcasting Freedom, 6 December 2001, http://keywords.dsvr.co.uk/freepress/body.phtml?category=&id=150.

O'Malley, T., 'Defend the public service broadcasting values of TV and radio', 15 October 2004, http://www.indymedia.org.uk/en/2004/11/300387.html.

OFCOM, 'Strategy and Priorities for the Promotion of Media Literacy - A statement', http://www.OFCOM.org.uk/consult/condocs/strategymedialit/ml_statement/.

OFCOM, 'The Communications Market 2004. Television', http://www.ofcom.org.uk/research/cm/cmpdf/cmr04_print/tele.pdf.

OFCOM, 'Review of Media Ownership rules', 14 November 2006, http://www.OFCOM.org.uk/research/media_owners/rulesreview/rules.pdf.

OFCOM, Review of Public Service Broadcasting (PSB) Television', http://www.OFCOM.org.uk/tv/psb_review/.

OFCOM, Review of public service television broadcasting, Phase 3 – 'Competition for quality', http://www.ofcom.org.uk/consult/condocs/psb3/psb3.pdf.

Oliver, E., 'Small media players ensure competition', *The Irish Times*, 5 September 2005.

Open Society Institute, 'Television across Europe: regulation, policy and independence' (Monitoring Report) 11 October 2005, http://www.soros.org/initiatives/media/articles_publications/publications/Eurotv_20051011.

Open Society Institute, '4000 channels in Europe, but what's on TV', press release, 11 October 2005, http://www.eumap.org/pressinfo/press_releases/media/europe/englishpr.pdf.

Orebech, P., 'The EU competency confusion: limits, 'extension mechanisms,' split power, subsidiarity, and 'institutional clashes'', (1999) Journal of Transnational Law & Policy 13:1.

Organisation for Economic Co-operation and development 'Media Mergers', 19 September 2003, http://www.oecd.org/dataoecd/15/3/17372985.pdf.

Ovey, C., White, R.C.A., *Jacobs and White: The European Convention on Human Rights*, 3rd ed (Oxford University Press, 2002).

Peters, B., 'Corporate Media Trends in Europe', Contribution to the CPBF conference on the 'Communications Revolutions – who benefits?', 2001, http://keywords.dsvr.co.uk/freepress/body.phtml?category=&id=102.

Petley, J, 'The re-regulation of broadcasting, or the mill owners' triumph', (2002) Journal of Media Practice 13-3.

Piris, J.-C., 'Does the European Union have a Constitution ? Does it need one?', Harvard Jean Monnet Working Paper 5/00, http://www.jeanmonnetprogram.org/papers/00/000501.rtf.

Pons, J.F., 'The application of competition and anti-trust policy in media and telecommunications in the European Union', speech at International Bar Association,14 September 1998, Vancouver, Speech 1998/41, http://ec.europa.eu/comm/competition/speeches/text/sp1998_041_en.html.

Poland, TVP Journalists' Code of Ethics, http://tvp.pl/5465,20060106287625.strona.

Puttnam, D., 'The continuing need to advance the public interest', in 'Communications. The next decade' – a collection of essays prepared for the UK Office of Communications', November 2006.

Randall, H., 'Commercial speech under the European Convention on Human Rights: Subordinate or Equal?', (2006) 6 Human Rights Law Review 53.

Reding, V., 'Sport and Television: Ready to Face New Challenges?', Sportel Monaco, 11 October 2004, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/448&format=HTML&aged=1&language=EN&guiLanguage=en.

Reding, V., 'The European Commission and media industry: The need for a new partnership', Luxembourg, Opening of the European Newspaper Publishers' Association Congress, 5 November 2004, http://ec.Europa.eu/commission_barroso/reding/docs/speeches/speech_lux_20041105.pdf.

Reding, V., 'Better Regulation for Europe's media industry: the Commission's approach', Audiovisual Conference – Between Culture and Commerce, Liverpool, 22 September 2005, http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/532&format=HTML&aged=1&language=EN&guiLanguage=en.

Reding, V., 'Europe, the media and European media policy', Congress of the Federal Association of German Newspaper Publishers, Berlin, 26 September 2005,

http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/552&format=HTML&aged=1&language=EN&guiLanguage=fr.

Reding, V., 'New Rules for a Convergent Multi-Media World: The Need for a 'Light Touch'', IIC and Chatham House 36th annual conference, London, 10 October 2005, http://Europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/590&format=HTML&aged=0&language=EN&guiLanguage=en.

Reding, V., 'The role of public service broadcasters in a vibrant and pluralist digital media landscape', speech at joint EBU-MTV's conference 'From secret service to public service', Budapest, 3 November 2006, http://ec.Europa.eu/commission_barroso/reding/docs/speeches/ebu_mtv_20061103.pdf.

Reed, S., Resch, I., 'Can Murdoch Invade Europe?', *Business Week,* 15 March 1999, http://www.businessweek.com/1999/99_11/b3620157.htm.

Rifkin, J., *The Age of Access*, (Penguin Putnam, New York 2001).

Robertson, G., Nicol, A., *Media Law*, 4th ed. (Penguin Books, London 2002).

Roukens, T., 'What are we carrying across the EU these days? Comments on the interpretation and practical implementation of Article 31 of the Universal Service Directive', in European Audiovisual Observatory, *Iris Special: To Have or not to Have – Must Carry Rules*, 2005.

Roxborough, S., 'NewsCorp. plans German pay-TV outlet', *The Reporter*, 12 March 2008.

Rumphorst, W., 'Public Service Broadcasting in an Enlarging Europe: Contributing to European Policy Objectives', Amsterdam, 2 September 2004, http://www.ebu.ch/CMSimages/en/leg_p_psb_wr_300804_tcm6-15161.pdf.

Samuelson , P., 'Five challenges for regulating the Global Information Society', in Marsden, C.T., (Ed.) *Regulating the Global Information Society*, (Routledge, 2000).

Sanchez-Tabernero, A. and Carvajal, M., *Media Concentration in the European Market. New Trends and Challenges*, (Media Markets Monographs, University of Navarra, Pamplona 2002).

Sanchez-Tabernero, A., 'Media Concentration in Europe. Commercial Enterprise and the Public Interest', (The European Institute for the Media, Manchester 1993).

Sauter, W., 'The Rejection of the ONP Voice Telephony Directive by the European Parliament' (1994) 5 Utilities Law Review 176.

Schechter, D., 'Why the latest news about online news ain't so good', 2000, http://www.mediachannel.org/views/dissector/lessnews.shtml.

Scheuer, A, Strothmann, P., 'Media supervision on the threshold of the 21st century. What are the requirements of broadcasting, telecommunications and concentration regulation?', Iris Plus, Legal Observations of the European Audiovisual Observatory, Issue 2002-2.

Schoental, M., 'Major Events and Reporting Rights', IRIS-plus, 2006-04.

Schomberg, W., Sanderson, R., 'EU challenges Italy over Berlusconi media law', *Reuters,* 19 July 2006.

Search.com, 'British Sky Broadcasting',
http://www.search.com/reference/British_Sky_Broadcasting.

Senden, L., *Soft Law in European Community Law* (Hart Publishing, 2004).

Senden, L.,'Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?', (2005) Electronic Journal of Comparative Law 9.1.

Shah, A., 'Corporate Influence in the Media. Media Conglomerates, Mergers, Concentration of Ownership',
http://www.globalissues.org/HumanRights/Media/Corporations/Owners.asp.

Shaw, H., 'O'Brien bidding to rule the airwaves', *The Irish Times*, 24 July 2007.

Smith, P., 'The Politics of UK Television Policy: The Introduction of Digital Television', paper presented at Workshop 24, Regulating Communications in the 'Multimedia Age', European Consortium of Political Research, 27th Joint Sessions of workshops, University of Mannheim, Germany, 26 - 31 March 1999,
http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w24/smith.pdf.

Smolenski, P., 'The Law for a Bribe, that is Rywin comes to Michnik', *Gazeta Wyborcza*, 27 December 2002.

Snyder, F., 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) The Modern Law Review 56(1), 19-54.

Stone, P., 'Murdoch puts his money where his mouth is – he's setting aside another $1 billion to buy Internet sites, and he's close to gobbling up a search engine', www.followthemedia.com, 23 January 2006.

Stone, P., 'Why do British Prime Ministers insist on keepmg their meetings and discussions with Rupert Murdoch Private?', www.followthemedia.com, 8 February 2008.

Tambini, D., 'What citizens need to know. Digital exclusion, information inequality and rights', in 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications'.

Time Magazine, '1999 Person of the year Poll', http://www.time.com/time/moy/.

Time Magazine, Person of the Year, Complete List 1927-2004,
www.time.com/time/personoftheyear/archive/stories/.

Time Magazine, 'Person of the Year', 15 December 2006 / 1 January 2007.

Tongue, C., 'Public service broadcasting and European Community policy', address to the Experts Meeting on Public Service Broadcasting in Europe, Amsterdam, 17 February 1997, http://www.poptel.org.uk/carole-tongue/pubs/amster.html.

Tongue, C., 'Culture or Monoculture? The European Audiovisual Challenge', in: Marsden C., Verhulst, S. (Eds.), *Convergence in European Digital TV Regulation*, (Blackstone Press Limited, London 1999).

Trager R., Dickerson, D.L., *Freedom of Expression in the 21st Century*(Pine Forge Press, Inc., 1999).

Treaty establishing the European Community, consolidated version OJ (2002) C325.

Trubek, D.M, Cottrell, P., Nance, M., 'Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity', Jean Monnet Working Paper 02/05

United Kingdom, 'Written contribution to the Public Consultation for the review of the 'Television without Frontiers' Directive, Observations on Issues Paper 6 'Media Pluralism'', http://ec.Europa.eu/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip6-uk.pdf.

United Kingdom, Department of Trade and Industry/Department for Culture, Media and Sport (2002a), The Draft Communications Bill – The Policy, London, HMSO.

United Kingdom, Department of Trade and Industry, Statement, *Media Guardian*, 7 October 2003.

United Kingdom Film Council, 'Comments on 'Media Pluralism – what should be the European Union's role? (Issues Paper)'', http://ec.Europa.eu/comm/avpolicy/docs/reg/modernisation/issue_papers/contributions/ip3-ukfc.pdf.

Ungerer, H., 'Competition Policy and the issue of access in broadcasting markets: the Commission perspective', Vision in Business, Broadcasting Competition Law, Brussels, 14-15 January 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_001_en.pdf.

Ungerer, H., 'Legal and Regulatory Aspects of Public Service Broadcasting – Panel Contribution', Conference on Public Service Broadcasting, International Press Institute and Romanian Radio Broadcasting Corporation, Bucharest, 19-20 September 2003, http://ec.Europa.eu/comm/competition/speeches/text/sp2003_020_en.pdf.

Ungerer, H., 'Why can't the market decide?', Oxford IPPR Media Convention, 13 January 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_001_en.pdf.

Ungerer, H., 'Legal framework to secure open Media Markets and the Independence of the Press – the role of EU competition law', Conference on Democracy and Human Rights in the EU, Opole (Poland), 5 June 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_009_en.pdf.

Ungerer, H., 'Application of Competition Law to Media – some recent issues', Nera Conference, Brussels, 22 June 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_019_en.pdf.

Ungerer, H., 'Application of EU Competition Rules to Broadcasting – The Transition from Analogue to Digital', Universita di Napoli, Naples, 20 September 2004, http://ec.Europa.eu/comm/competition/speeches/text/sp2004_013_en.pdf.

Ungerer, H., 'Impact of European Competition Policy on Media', IESE Business School & School of Communication of the University of Navarra, Centre for Media Studies, Madrid, 15 February 2005, http://ec.Europa.eu/comm/competition/speeches/text/sp2005_002_en.pdf.

Ungerer, H., 'Competition rules and the media: are they determinant or complementary?', Panel contribution at European Media Law and Practices. Radio and Television Broadcasters, Istanbul, 1 April 2005, http://ec.Europa.eu/comm/competition/speeches/text/sp2005_004_en.pdf.

Valcke, P., 'The future of must carry. From must-carry to a concept of universal service in the info-communications sector', in European Audiovisual Observatory, *Iris Special: To Have or not to Have – Must Carry Rules*', 2005.

Van Heffen, O., Kickert, W.J.M., Thomassen, J.J.A. (Eds.), *Governance in Modern Society: Effects, Change and Formation of Government Institutions* (Springer 2000).

Van Loon, A. 'Freedom versus access rights in a European context', in Marsden, C.T., (Ed.), *Regulating the Global Information Society*, (Routledge, 2000), 287.

Vanhanen, M., 'Address to Parliament on 21 June 2006 on Finland's EU Presidency,' http://www.valtioneuvosto.fi/toiminta/selonteot/selonteot/en.jsp?oid=160298.

Various Authors, 'Communications. The next decade. A collection of essays prepared for the UK Office of Communications', November 2006, http://www.ofcom.org.uk/research/commsdecade/comms10full.pdf.

Varney, E., 'Regulating the digital television infrastructure in the EU. Room for citizenship Interests?', (2006) SCRIPT-ed 3:3.

Varney, M., 'Must-Carry obligations in the New European Regulatory Framework for communications: A true guardian of pluralism and diversity?', (2004/2005) *Utilities Law Review* 14.

Varney, M., 'Must-Carry provisions and digital broadcasting: an effective means of protecting pluralism and diversity in media output?', paper presented at SLS Annual Conference in Keele, September 2006 (unpublished).

Vass, S., 'Murdoch's empire under threat as spotlight shines on it for the first time', *Sunday Herald*, 6 March 2007.

Vivarelli, N., 'A year without Berlusconi', *Variety,* 20 March 2007.

Vivarelli, N., 'RAI not sure which Endemol's up', *Variety,*18 May 2007.

Wallis, R. 'Diversity in media - pluralism through privatisation or?', Conference on Cultural Diversity, Copenhagen, 2002, http://www.hanoi.dccd.dk/DCCD/cultdiv.nsf/5a522743b22349c8c1256bc1004b9ebd/d6d1d04d6ec38762c1256c86004b4165?OpenDocument.

Ward, D., *The European Union democratic deficit and the public sphere. An evaluation of EU media po*licy, (IOS Press, Amsterdam 2004).

Ward, D., 'State aid or band aid? An evaluation of European Commission's approach to public broadcasting', (2003) Media, Culture and Society 25.

Ward D., 'Media Concentration and Pluralism: Regulation, Realties and the Council of Europe's Standards in the Television Sector', UNIDEM Campus Trieste Seminar 'The role of media

freedom and pluralism in strengthening democracy', Trieste, Italy, 24–28 January 2005, http://www.venice.coe.int/docs/2005/CDL-UDT(2005)004-e.pdf.

Ward, D., Fueg, O.C., D'Armo, A., 'A mapping study of media concentration and ownership in ten European countries', published by the Commissariaat voor de Media, 2004, http://www.mediamonitor.nl/html/documents/mappingstudy_ward_jun2004.pdf.

Web dictionary of cybernetics and functions, http://pespmc1.vub.ac.be/ASC/MEDIA.html.

Weber, J., 'Big media still dominate in Web 2.0 era', *Times OnLine,* 7 May 2007.

Westphal, D., 'Media Pluralism and European Regulation', (2002) European Business Law Review 5.

Whiddington, C., 'European Union', in De Avillez Pereira, M.(Ed), *Antitrust and New Media*, (Kluwer Law International, London 2000).

White, A., 'Public Media, Democratic Values: Challenges Facing Public Service Broadcasting in the Age of Transition', Regional Meeting on Public Broadcasting, 15-17 February 2002, Budapest, http://www.ifj.org/default.asp?index=885&Language=EN.

Wiedermann, V., 'The future of Public Service Broadcasting in Europe and the Commonwealth', VLV's 10th International Conference, London, February 11th 2005, cited in O'Mahony, C., 'A future for Public Service Broadcasting: new challenges, new pressures, new approaches'.