

## **The EU and Audiovisual Regulation: An Agency for De-regulation or Re-regulation - A Research Agenda.**

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### **Abstract**

Since the 1980s in the audiovisual sector new forms and arenas of regulation have developed, as policy makers have sought to adapt to new market and technological realities: principally, globalization, trans-frontier broadcasting by satellite, and the digital convergence of broadcasting, telecoms and the Internet. One key element of regulatory change is the European Union's accumulation of regulatory influence in the audiovisual field, in part to re-establish problem-solving capacity that is escaping the national level as the result of the new technologies (satellite broadcasting, etc.). At first sight at least, the regulation of cross-border broadcasting appears to be an excellent example of the EU's development as a 'regulatory' political system (Majone 1996, Harcourt 2005: 7). This paper examines this process of the EU's accretion of influence, and asks whether its role in the audiovisual field has been 'de-regulatory' or 're-regulatory'. More precisely, it explores the hypotheses 1) that within the context of globalization, commercialization and technological change, regulatory competition between jurisdictions keen to maximize media investment leads to substantive (if not formal) deregulation: a 'race to the bottom'; 2) that the EU has the capacity either to amplify or to moderate de-regulatory competition between its Member States; but 3) that it has a de-regulatory bias. In this connection, the paper highlights the distinction between the EU's powers of negative integration, notably the market making powers that EU institutions wield as a result of the economic goals enshrined in the Union's treaty base, and on the other hand, the EU's potential for positive integration, notably the harmonization of market correcting rules. Without prejudging the findings of a current ESRC funded empirical research project that *inter alia* investigates this subject,<sup>1</sup> the paper suggests that, in the politically sensitive audiovisual field, EU 'negative integration' appears to be far easier to achieve than positive integration. The paper focuses on policies to promote cultural diversity and public service goals.

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<sup>1</sup> ESRC project: 'Globalization, regulatory competition and audiovisual regulation in 5 countries'. Conducted by Professor P. Humphreys, School of Social Sciences, University of Manchester, Professor T. Gibbons School of Law, University of Manchester and Dr. A. Harcourt Department of Politics, University of Exeter. ESRC Ref.No. RES-000-23-0966. Duration: 1st February 2005 – 31<sup>st</sup> January 2008.

### **The Analytical Framework**

Globalization is often seen as naturally encouraging a (*de*)regulatory competition (see e.g. McKenzie and Lee 1991) between 'competition states' (Cerny, 1997), which are eager to retain and attract investment within their regulatory jurisdictions. From an economist's perspective, regulatory competition is seen to be simply a natural process driven by market actors and capable of making for more efficient regulation. However, as some public lawyers and political scientists have argued, from the perspective of the wider public interest it can also lead to a 'race to the bottom' (see e.g. McCahery et al 1996). Conventional theories of a 'deregulatory' race-to-the-bottom (or *towards* the bottom) assume that governments will engage in regulatory competition when capital is mobile and economic actors engage in regulatory arbitrage. Accordingly, states engage in regulatory competition by lowering regulatory standards to maintain investment or attract it from abroad and to promote national champions, the 'Delaware effect'. However, not all political scientists are convinced. David Vogel (1995), for example, suggests that there is nothing inevitably 'deregulatory' about regulatory competition, which under certain circumstances may actually drive regulatory standards upwards, the so-called 'California effect'.

In this connection, the EU is particularly interesting because of its potential to provide problem-solving capacity in areas where the national capacity of its Member States is being eroded under the impact of forces such as technological change and globalization (Scharpf 1997, 1999). As Vivien Schmidt (1999: 172) has argued, the EU has the potential either to reinforce globalization pressures or to moderate them. Several studies suggest that the EU has not contributed significantly to downward regulatory competition, the 'Delaware effect' (Woolcock 1994; Sun and Pelkmans 1995; Goodhart 1998). David Vogel's (1995) study of consumer protection and environmental regulation even found that the EU contributed to a 'race to(ward) the top', the 'California effect'. However, in some sectors, such as road haulage, the EU's concern with economic competition means that it has tended to accentuate the process of deregulation and in other sectors the EU's regulatory capacity has been kept minimal by Member States jealously guarding national sovereignty. This is clearly the case with regard to social policy, industrial relations, and business and capital taxes. In relation to cultural policy in the media, the picture is not yet clear.

A diversity of EU media policies impact – directly or indirectly - on cultural diversity and public service broadcasting. Thus, EU policies regarding the regulation of the European audiovisual market determine the increasingly commercial international context within which national cultural policies for broadcasting and public service broadcasters operate. The EU's stance in world trade talks bears on the European countries' ability to protect and promote cultural production and ultimately even on the long-term future of public service broadcasting. EU policies regarding the 'convergence' of broadcasting, IT and telecoms, under the impact of digital technologies, provide another important constraint. Above all, EU competition policy places a question mark over the future funding basis of public service channels.

EU policies vary according to the balance of influence between Member States, between Member States and the supranational institutions, notably the Court and the Commission, and between the internal branches even of the Commission. The Member States have diverse views, reflected in the generally complex negotiations surrounding draft Directives. Thus, the goals of culturally protectionist France have often been at odds with those of the more 'open' UK or Germany. Collectively, though, Member States have sought to retain primary responsibility for media policy, with the EU relegated to a supportive role. The Commission, on the other hand, acting as a 'purposeful opportunist' (Cram 1997) and as a 'policy entrepreneur' (Radaelli 2000) has sought both to expand its competences and to coordinate a European response to the new international market and technological challenges. However, the Commission's priorities vary according to particular Directorate-Generals. Collins (1994: 18-19) has famously described a broad conflict between 'liberals' (e.g. DG Competition) and '*dirigistes*' (e.g. DG Culture). Policies emerge from a complex process of negotiation, with Member States and EU institutions seeking to respond to – and promoting and allying themselves with – important economic and other political interests, these operating increasingly at transnational, as well as national, level.

Complex though the EU policy process is, one general hypothesis promises to provide some clarity. Fritz Scharpf (1997, 1999) has argued that EU 'negative integration' is easier to achieve because the Commission and the European Court of Justice can rule unilaterally on competition related matters, whereas the harmonization of market correcting rules - 'positive integration' - is rendered more difficult to achieve because of the need for agreement in the Council of Ministers and Parliament. Negative

integration has generally been de-regulatory, in the sense of removing rules that obstruct the free movement of goods and services and impede competition in the single market. Positive integration implies EU regulatory harmonization, in other words a re-regulation, generally to provide common ‘market correcting’ measures. With this in mind, the following paper shows that the complexity of EU audiovisual policies can be clarified by plotting the EU’s audiovisual policies diagrammatically in terms of the degree to which regulatory capacity has shifted to the EU level, or not.

**Figure 1: National and European capacity for regulation**

<b>European capacity high</b>	
<ul style="list-style-type: none"> <li>• Single audiovisual market (negative integration)</li> <li>• Convergence: regulating ‘electronic communications’ (negative integration)</li> <li>• Competition policy with a ‘Community dimension’ (negative integration)</li> </ul>	<ul style="list-style-type: none"> <li>• GATT/WTO negotiations (shared competence between EC and Member States)</li> </ul>
<b>National capacity low</b>	<b>National Capacity high</b>
<ul style="list-style-type: none"> <li>• Anti-concentration rules and cross-media ownership (failed EU positive integration)</li> <li>• Broadcasting content regulation/international commercial broadcasters</li> <li>• Conditional-access regulation (?)</li> </ul>	<ul style="list-style-type: none"> <li>• National audiovisual production support schemes</li> <li>• Broadcasting content regulation/ Public service broadcasting</li> <li>• Conditional-access regulation (?)</li> </ul>
<b>European capacity Low</b>	

**Source:** Adapted from a table (‘National and European problem-solving’) in Fritz W. Scharpf, ‘Introduction: the problem capacity of multi-level governance’, *Journal of European Public Policy*, 4:4 (December 1997), pp. 520-538, p. 532.

### **Negative Integration: Television Without Frontiers.**

EU negative integration in the audio-visual field was achieved during the 1980s by a process that culminated in the enactment of the 1989 Television Without Frontiers

(TWF) Directive, creating the legal framework for a single European audiovisual market. There were a number of pressures behind TWF's genesis apart from the obvious one of the 1992 Single Market Initiative. A key factor was the arrival of trans-frontier satellite broadcasting. The Luxembourg based SES-Astra satellite series offered broadcasters an opportunity to circumvent restrictive national regulation; this weakened the regulatory capacity of Member States and provided a rationale for the EU to become the locus of at least some regulatory policy making in the audiovisual field (Humphreys, 1996, 169-170). Another key factor was the pressure on the European media industry that arose from globalization. Commission officials drafted the TWF Directive in the belief that EU-wide liberalization was required in order to create for European companies the economies of scale and scope associated with a large internal market that, it was hoped, would boost the international competitiveness of the European audiovisual industry *vis a vis* the USA. Moreover, during the 1990s the Commission came to deem the audiovisual sector, now converging with telecoms and the Internet, to be of highly strategic importance for Europe's competitiveness in the emerging 'global Information Society' (Humphreys, 1996, 293-294).

The direct powers of the European Court of Justice (ECJ) were of key importance in paving the path for the Commission to liberalize the sector. The process of producing the TWF directive was preceded by two key ECJ rulings<sup>2</sup> - in 1974 and 1980 - on specific competition issues. Crucially, the rulings defined broadcasting as a tradeable service subject to the EC treaties and specified the illegality of any discrimination against broadcasting services from other Member States. In 1984 the Commission published a Green Paper called 'Television Without Frontiers: Green Paper on the Establishment of a Common Market for Broadcasting Especially by Satellite and Cable'. In it, the Commission referred to these ECJ rulings to justify its involvement in the sector on fundamentally economic grounds<sup>3</sup>. Through drafting the Green Paper and the subsequent TWF directive, the Commission played the role of a very active 'policy entrepreneur', exploiting to the full its power to set the agenda and formulate policy. Nonetheless, given the need for the inter-governmental negotiation of a minimum of harmonised rules for an internal audiovisual market, there followed an extended period of laborious negotiation in the Council of Ministers before the market-liberalizing EU Television Without Frontiers (TWF) Directive (Council of the

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<sup>2</sup> The 1974 Sacchi and the 1980 Debaue rulings.

<sup>3</sup> Culture was not an EU activity until the 1992 Maastricht Treaty gave it a role in this field.

European Communities, 1989) was finally enacted in 1989.<sup>4</sup> TWF opened up the European TV market by mandating the free reception and establishment of broadcasting services from other Member States subject to the observation of fairly liberal minimum content and advertising regulations that were harmonized at the EU level by the Directive. In effect, TWF established ‘mutual recognition’ as the core internal market principle for the audiovisual sector, with the country of origin – not the country of reception - exercising the regulatory jurisdiction. Since the enactment of TWF, the European Court of Justice has continued to play a direct role, ruling on a number of occasions against ‘protectionist’ Member States for failing to comply with the liberalising requirements of the Directive. According to Harcourt (2005: 22), in numerous rulings the ECJ ‘has paid attention to TWF’s provisions on market liberalization (e.g. cross-border broadcasting), whilst ignoring those relating to public interest goals (e.g. restriction of advertising time, content quotas) and sometimes overriding them (e.g. protection of minors). This has eroded the national capacity to regulate media markets and created a situation of regulatory arbitrage in Europe.’

The main thrust of the 1989 TWF directive was clearly de-regulatory, the removal of national legal and regulatory barriers to the single European audiovisual market. Harcourt (2002, 2005) has suggested that TWF, and the ECJ’s related interventions, provided a stimulus for a (*de*)regulatory competition within Europe as Member States sought to exploit the opportunities presented by the new EU legal context of a single European market to attract media investment by providing a suitably relaxed regulatory environment for satellite broadcasters. Luxembourg, with a very light regulatory regime for broadcasting, was conspicuously successful in building up its satellite broadcasting industry (notably the SES-Astra satellites) and attracting international media business. So was the UK, which introduced a very light regulatory regime for satellite broadcasters during the Thatcher era. Levy (1999: 34-35) suggests that companies could obtain an ITC licence ‘more or less on demand’, making the country an attractive location for ‘TV stations keen to beam their signals into neighbouring EU territories while escaping the tighter regulatory regime that was often applied to them in those states.’ Harcourt (2005: 28) observed that ‘the UK’s lax

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<sup>4</sup> It was adopted by qualified majority, with only Belgium and Denmark voting against. France’s support was conditional upon the inclusion of some protectionist elements. The Directive was revised in 1997. Council and Parliament Directive of 19 June 1997 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (97/36/EC). Currently its further revision is being discussed.

regulatory regime for satellite broadcasters has created a situation of regulatory arbitrage in Europe. A significant number of broadcasting companies have relocated to the UK, away from their original locations.’ Similarly, Ward (2002: 62) suggests that the UK government thus promoted the London market for TV production.

### **Cultural Protectionism: Quotas and Subsidies**

However, it is important to understand that the 1989 TWF Directive was a political compromise between economic liberal and culturally protectionist minded Member States. Although it was mostly de-regulatory, at France's insistence the Directive did contain two protectionist measures to reduce the cultural and economic impact of US audiovisual imports. Article 4 of TWF stated that a majority of broadcasting time (not counting news, sports, games, advertising and teletext) should be reserved for 'made-in-Europe' programs and Article 5 specified that broadcasters should reserve at least 10 per cent of their programming budget or transmission time for European works created by the independent production sector. By these measures, the French partially succeeded in transferring their own protectionist cultural policy model to the other Member States. However, the French were disappointed by the political compromises made over these measures in the enactment of TWF and tried to strengthen them when the Directive came up for revision in the period 1995-97. In particular, both articles had been softened to include the ‘get out’ words, ‘where practicable’.

Consequently, France exerted pressure on the Commission during its EU presidency in the first half of 1995 to make the broadcasting quotas binding, arguing that the integrity of European culture was at stake. However, stricter protectionism was opposed by key members of the European Parliament and the Council of Ministers. While some Mediterranean Member States supported the French line, northern European Member States led by the UK and Germany were strongly opposed (*European Voice*, Vol: 1, No: 3, 05/10/1995). In November 1995, the Council voted in favour of a political agreement to leave the rules as they stood, merely agreeing to set up a committee to ensure their proper implementation (*European Voice*, Vol: 1, No: 10, 23/11/1995). The European Parliament’s culture committee immediately sought to reverse this decision, arguing that the Council had pre-empted Parliament expressing its opinion under the co-decision rules recently introduced by the

Maastricht Treaty. The committee argued, too, in favour of extending the scope of the quotas to new online services like video-on-demand (*European Voice*, Vol: 2, No: 2, 11/01/1996). In a June 1996 meeting, the Council stood its ground, opposing any change to the quota rules and their extension to new online services (*European Voice*, Vol: 2, No: 24, 13/07/1996). Notwithstanding its recently acquired co-decision right in this field, the Parliament's position was far weaker than that of the Council of Ministers. If revision of the Television Without Frontier directive were to go to formal conciliation, and no agreement was reached, the existing terms of the directive would simply continue to apply. This, clearly, would suit the Council more than the Parliament, which had in fact submitted no fewer than 200 amendments<sup>5</sup> (*European Voice*, Vol: 2, No: 30, 25/07/1996). The Parliament abandoned its demand for mandatory quotas when a vote in November 1996, failed to gain the support of an absolute majority of all 626 MEPs<sup>6</sup> (*European Voice*, Vol: 2, No: 42, 14/11/1996). The issue remains open to the extent that the operation of Articles 4 and 5 is one to the areas of discussion surrounding the current further revision of TWF.<sup>7</sup>

Another case of transfer of the French cultural policy model to the EU level emerged from the negotiations surrounding the TWF Directive, namely the introduction of a very modestly funded support programme for European film and TV co-productions, called 'MEDIA' (*Mesures pour Encourager le Développement de l'Industrie Audiovisuelle*). This programme involved subsidizing a range of activities from training through to language transfer and distribution. The first phase was launched by the Commission (DG X) in 1988, financed from the Commission's own budget. In December 1990, the Council of Ministers adopted 'MEDIA 1995' as a fully fledged five year programme with its own EU budgetary appropriation of ECU 200 million. However, this only amounted to one-tenth of Commission spending on IT research and was less than what the French alone spent on subsidies for film and TV production. The UK and Germany in particular were reluctant to allow any higher

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<sup>5</sup> These included two particularly controversial provisions respectively requiring the insertion of V-chips in TV sets to strengthen parental control of children's viewing and protecting the rights to show certain 'listed' major sports events from exclusive deals with pay-TV providers. These proposals led to a round of conciliation talks between the Parliament and the Council of Ministers. In the end, the Parliament dropped its support for the V-chip, about which both the Commission and the Council were highly sceptical, and concentrated its energy on the listed events issue where there was much more scope for agreement. Indeed an agreement with the Council was reached on the basis that these be national lists defined by the Member States rather than drawn up at EU level as MEPs had wanted.

<sup>6</sup> Despite producing majority support.

<sup>7</sup> The review process officially commenced in 2002. The Commission presented discussion papers and conducted two series of public hearings. The process of consultation and deliberation continues. For detail see: [www.europa.eu.int/comm/avpolicy/regul/regul\\_en.htm](http://www.europa.eu.int/comm/avpolicy/regul/regul_en.htm)

expenditure (Humphreys, 1996: 279-281). In 1995 European Culture Ministers agreed in the Council to increase funding to ECU 310 million for the period 1996 – 2000 under what was now called ‘MEDIA 2’. The increase in the EU’s budgetary provision for MEDIA was interpreted by some as compensation to the French for failure to tighten up the TWF protectionist quota regime. The French, however, had called for twice this sum (*European Voice*, Vol: 1, No: 14, 21/12/1995) and a French-inspired proposal from the Commission to establish a special mixed private/public loan guarantee fund for European film-makers was blocked altogether. As a budget issue, the EU’s contribution to such a fund required unanimity among the Member States. An allocation of ECU 90 million from the EU budget for the guarantee fund was opposed by finance ministers from the UK, Germany and the Netherlands (*European Voice*, Vol: 2, No: 24, 13/07/1996). A reduction of the proposed EU contribution to ECU 60 million failed to persuade the three northern European countries, now supported by Austria and Sweden (*European Voice*, Vol: 3, No: 25, 26/06/1997). The film guarantee scheme foundered against this opposition. The MEDIA programme remains in place, still modestly financed. Over 2001-2006, ‘MEDIA plus’ has been allocated € 453.6 million for the distribution and promotion of European audiovisual works, with a further € 59.4 million for the implementation of a training programme for professionals in the European audiovisual industry.<sup>8</sup>

### **International Trade and Cultural Diversity**

The French also mobilised the EU to defend these measures against the USA, under the leitmotiv *'l'exception culturelle'*, in international trade negotiations. The Treaty of Rome had given the EU exclusive external competence over the common commercial policy for international trade in goods. Accordingly, where trade in goods was concerned, Member States were unable to pursue unilateral policies, the European Commission represented the EU in negotiations and, where their approval was required, Member States voted according to qualified majority voting (QMV). However, the issue of competence for trade in services was less clear and led to tensions between the Commission and the Member States during the the Uruguay Round of the GATT. The Council disputed the Commission’s right to conclude

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<sup>8</sup> For detail, see: [www.europa.eu.int/comm/avpolicy/media/index\\_en.html](http://www.europa.eu.int/comm/avpolicy/media/index_en.html)

agreements relating to services<sup>9</sup>. The Commission requested an opinion from the European Court of Justice, which specified in its 1994 Opinion (ECJ, 1994) that the Community and the Member States shared competence to conclude the new General Agreement on Trade in Services (GATS). Accordingly, the Commission could still represent the Community in negotiations but the Member States had to be constantly informed and negotiating positions and any decisions would have to be agreed unanimously. The GATS 1993 was actually signed by both the Commission *and* the Member States in Marrakesh in April 1994 (Young 2002: 41). This need for a common position among the Member States enabled France to enlist the EU in defence of the Europeans' right to apply protectionist program quotas and to subsidize audiovisual production through national and EU TV audiovisual support funds. To date, the French 'protectionist' position with regard to the right of European countries to implement audiovisual quotas and subsidies has been the official EU position.<sup>10</sup>

However, there have been pressures to modify this stance. Not all member States are enamoured with the French-inspired policy. European Member States tend to divide between liberals and protectionists on the issue, with more in the former camp. There are strong complaints from certain European as well as US media companies with transnational operations about European cultural protectionism. The Commission is internally divided on the issue. There has always existed the danger that further audiovisual liberalization might end up being part of a package deal on trade. The long-term prospects for a continuation of *l'exception culturelle* appeared to weaken when the European Convention on a treaty to establish a constitution for Europe proposed to move towards an exclusive competence for the EU for all external trade matters and to decide any issues by QMV, a position that was advocated by External Trade Commissioner Pascal Lamy (*European Voice*, Vol. 9, 2003). However, on French government insistence, an article was inserted into the draft constitution (217, para 4) which by requiring Council unanimity for the negotiation and conclusion of external agreements in the field of cultural and audiovisual services effectively retained the Member State veto. This draft was submitted to the European Council in Rome on 18 July 2003. The draft treaty was subsequently subjected to a tremendous amount of detailed elaboration in the IGC, but the article survived in the final adopted

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<sup>9</sup> And also to trade related aspects of intellectual property rights (TRIPS).

<sup>10</sup> Similarly, the French were able to mobilize EU-wide support, or at least acquiescence from the more economically liberal Member States, for audiovisual services to be exempted from international trade liberalizing agreements over telecommunications and foreign direct investment (Young 2002)..

version (now as Title 5, Chapter III, Article III-315). Thus, the EU has so far at least provided some measure of 'French-inspired' protection against the far-reaching cultural policy deregulation desired by US government and commercial interests.

### **Competition policy**

EU competition law, particularly since the enactment of TWF, has very significantly expanded the EU's scope for media regulation. Indeed, Levy (1999: 81) has observed that 'the operation of European Community competition policy has already had more of an impact on Europe's broadcasting industry than any of the European regulation specifically targeted at the sector.' In Levy's view, 'EU competition policy will continue to be the dominant mode of European-level intervention in the digital TV market for some time to come.' This is because under EU competition law, the European Commission has direct authority, without needing the approval of the European Council or the European Parliament, to make decisions that are subject only to review by the ECJ. Following the 1989 TWF Directive the number of European media mergers and joint ventures increased dramatically and the European Commission Competition Authority's involvement in media decisions increased commensurately (Pauwels 1998; Levy 1999; Harcourt 2005). Harcourt (2005) reports that between 1989-1999 the Commission made over 50 formal decisions, including a relatively high number of negative merger decisions: 8 as compared with 11 negative decisions of a total of 1104 merger decisions in all sectors. The Commission also made its influence felt through a number of significant informal decisions, such as when it suggested that the British satellite broadcasting company BSkyB be excluded from British Digital Broadcasting (BDB) when the UK regulator, the ITC, was issuing digital terrestrial broadcasting franchises in 1997 (Harcourt 2005: 41).

European competition decisions have impacted on the audiovisual sector in a number of distinct ways. Important decisions have been made about the acquisition and sale of rights to key kinds of programming, such as sports programmes, DG Competition's concern here being to ensure fair access to such content. Some of the Commission's earliest decisions went against the then dominant positions of public-service broadcasters in the rights marketplace, leading Collins (1994: 155-156) to suggest that DG IV was embarked on an 'implacable pursuit of the public service broadcasters'

(Humphreys 1996: 284). However, as new commercial broadcasters have gained strength, more recent decisions have gone against them, such as the UK's leading pay-TV operator BSkyB. Moreover, the Commission has so far been sensitive in its handling of rather more serious disputes between commercial and public broadcasters.

The question of the future scope of the public-service remit in the digital age soon became the most hotly contested competition policy issue bearing on public service broadcasting. In recent years, the EC competition authorities have received a considerable number of complaints from the private sector about alleged distortion of the media market resulting from 'unfair benefits' enjoyed by public service broadcasters, most notably their deployment of public funding to enter new media markets that could be left to the private sector (e.g. 24-hour news services, children's channels) and also – in many cases – their drawing supplementary funding from advertising. Commercial broadcasters, and their political supporters, argue that in the multi-channel era public-service broadcasting should be confined to areas of clear market failure, restricting themselves to providing what the market fails to deliver.

Contradictory signals have come from within the Commission about the future of public service broadcasting. On the one hand, there have from time to time been noises seemingly questioning the public service broadcasters' traditional *comprehensive* remit (i.e. to provide sport, films, and other entertainment, as well as programmes that commercial broadcasters are less disposed to offer) and their possibilities for expansion into certain new media 'markets', notably on-line provision. A number of commentators and policy protagonists have expressed concern about the deregulatory potential that EU competition policy holds for traditionally comprehensive 'European-style' public service broadcasting. On the other hand, as Ward (2002: 97-110) makes clear, all the specific rulings that the Commission Competition authorities have thus far made regarding the development of new media services (notably niche TV channels, such as 24-hour news services and children's channels) by the public service broadcasters have been in their favour. Moreover, the EU's stated commitment to protect a broad 'European-style' concept of public service broadcasting, as more than a 'US-style' marginal concept, goes back a number of years, and derives from a number of institutional sources.

Thus, Levy (1999: 48) notes that in September 1995 (then) Competition Commissioner van Miert, appearing before the Culture Committee of the European

Parliament (EP), 'spoke of public service broadcasting as an essential tool in preserving pluralism and of the need to ensure at Community level that the conditions for its continued existence were maintained.' Moreover, in 1996 a meeting of EU Culture Ministers in Galway expressed 'considerable and strong' support for the concept of public service, and argued that public service broadcasters 'must continue to have access to major popular programmes comprising, in particular, sports events' and that funding of public broadcasters should be 'adequate and guaranteed, and not subject to review under competition and state aid regime' (Levy 1999: 48). Subsequently, the UK Socialist MEP Carole Tongue drafted an EP resolution on public service broadcasting which formed the basis for the subsequent appending of a protocol on this subject to the 1997 Treaty of Amsterdam. The Protocol states:

'The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of the 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, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of that public service shall be taken into account'<sup>11</sup>

The Treaty of Amsterdam also explicitly recognised the importance of public services by introducing a new provision in its Article 16 which emphasises the importance of public services generally and the ability of Member States to provide these services as they see fit, subject to competition provisions (Harrison and Woods 2001).<sup>12</sup>

In November 2001 the Commission released a Communication on the application of state aid rules to public service broadcasting (CEC 2001). It cited the Protocol of the Amsterdam treaty, confirming that the definition of the public service remit is a matter for the Member States. The Communication states that state support for public service broadcasters does constitute state aid in the terms of the EC treaty and therefore 'will

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<sup>11</sup> Treaty of Amsterdam, 1997: 87.

<sup>12</sup> The relevant section of Article 16 (former Article 7d) of the Treaty states that: '...given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions'.

have to be assessed on a case by case basis' (CEC 2001: Para 17). But it makes clear that, *so long as the remit is clearly defined by the Member State* (my emphasis), the Commission has to confine itself to evaluating the proportionality of that aid. The Commission Communication stresses the need for transparency. In the first place, there should be a 'clear and precise definition of the public service remit.' Secondly, the Communication guidelines make clear that in order to allow the Commission to carry out its 'proportionality test' for funding, a separation of accounts between public service activities and non-public service activities must be maintained to 'provide the Commission with a tool for examining alleged cross-subsidisation and for defending justified compensation for general economic interest tasks.' While the Commission thus accepts the competence of the Member States to define the public service broadcasting and also to determine how it is funded, clearly it is crucially important that in future the Member States spell out clearly the remit of public service broadcasting that they deem to be socially, culturally and democratically appropriate. Equally, it is important that they have in place adequate monitoring and control mechanisms to ensure the fulfilment of the public service remit. If Member States do not meet these demands, then they render their public broadcasting services vulnerable to an adverse ruling on competition grounds. It is therefore quite possible that in the future a public service broadcaster may be found to be making inappropriate use of 'state-aid' – i.e. its public funding - under EU competition rules.

Other EU competition decisions have concerned digital alliances between commercial players. Thus, in 1994 and again in 1998, DG IV blocked bids to produce a digital TV alliance by the leading German companies, Bertelsmann, the Kirch group and Deutsche Telekom AG. These commercial interests wanted to establish a digital joint venture called MSG to deliver pay television and other interactive services such as video-on-demand through a proprietorial conditional access system. However, the Commission vetoed the alliance on the grounds that it would pose a threat to an open market in Germany for pay-TV and other future digital communication services. The Commission justified its decision on the grounds that the alliance would create a dominant position in three markets: First, it would leverage the Kirch group's already dominant position over German television programme rights and libraries into the pay-TV market. Second, it would create monopoly control over the provision of conditional access and subscriber management systems for pay-TV and other new digital services. Third, the alliance would consolidate Deutsche Telekom AG's (then)

dominance of the German cable market (Humphreys 1996, pp. 285–6). Generally, though, as Ward (2002: 91) has suggested, the ‘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.’ The aim was to promote ‘European champions’, such as the RTL group (Bertelsmann), Telefonica, and Vivendi. The cases incurring negative decisions fell foul of the Commission’s policy ‘to promote pan-European market mergers rather than individual market concentrations’ (Ward 2002: 94)

### **EU Media Ownership Regulation**

The EU has plainly provided little positive integration in the audiovisual field. The classic market correcting measure to accompany TWF would be media specific rules to ensure media pluralism and diversity: for instance, harmonized rules restricting media concentration. EU competition rulings – for instance against the successive attempts by Germany’s largest communications companies to produce a digital alliance - might have the effect of protecting a minimum of media pluralism. However, they are plainly no substitute for more elaborate media-specific rules to protect pluralism and a diversity of media output. The TWF Directive said little about the problem of media concentration, despite the fact that market liberalization was bound – indeed, intended - to lead to the expansion of Europe’s largest media concerns. The arrival of new media and in particular the digital convergence of the information and communications industries (see below), too was driving a marked trend towards media concentration as large, generally internationally-ambitious, private media corporations sought to exploit new economies of scale and scope. Much of the investment in the new media came from large corporations, like News Corporation (Rupert Murdoch), Bertelsmann, Vivendi, Liberty, and AOL Time Warner. The potential dominance of the new digital media landscape by a few powerful international media corporations greatly concerned European media unions and journalists associations, and also the European Parliament’s culture committee. No matter how competitive the market was deemed to be in purely economic terms, media concentration raised questions of the potential abuse of editorial power by media owners and controllers, the narrowing of the range of viewpoints represented in

the media, and at the very least a diminution of the diversity of media content. The Commission, was at first inclined to view media pluralism rules as a matter for the Member States. However, it was compelled to give attention to the issue by a number of EP resolutions calling for EU action. Even then, the Commission's main concern was that the patchwork of diverse national regulations on media ownership would impede the internal market, although over time it appears to have taken the media pluralism issue more seriously too (Humphreys 1996: 286-293; Harcourt 2005).

A Commission draft directive was finally produced in 1996 that would have restricted any further acquisition by a private broadcasting company that owned channels capturing more than 30 per cent of a country's TV or radio audience and similarly restricted the expansion of any cross-media company (press, radio, TV) with a combined audience share of 10 per cent (it did not apply to public service broadcasters). However, the draft directive was soon shelved before it could become the subject of any negotiation in the Council of Ministers and with the European Parliament (Humphreys, 2000, 86-89; Harcourt 2000). Divergent positions on media pluralism within the Commission had characterised, and impaired to an extent, policy formulation. Undoubtedly, however, 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). This failure of DG XV to progress harmonisation of media-specific anti-concentration rules designed to safeguard 'pluralism' contrasted with the Commission's relatively active application of general EU competition policy to the media field by DG IV<sup>13</sup>. This itself is highly illustrative of the EU's liberal bias towards negative integration. It exemplifies the difficulty that the Commission encounters in pursuing more interventionist cultural and social policies (positive integration) that confront powerful vested economic interests and challenge Member States' claims of competence for media policy as cultural policy.

As a result of the EU's failure to achieve any harmonized base-line rules, nothing has prevented a de-regulatory 'race to the bottom', the start of which was suggested by the marked deregulation of anti-concentration rules in both the UK and Germany in

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<sup>13</sup> A number of studies have pointed to the EC competition authority's increasing activism in the communications field: notably Pauwels, 1998; Levy, 1999, 80-99; and Harcourt, 2000, 116-138.

1996, the next stage of which seemed to be heralded by the even more dramatic deregulation by the UK's Communications Act 2003.<sup>14</sup> In both countries governments seemed to have bought the media owners' argument that deregulation was needed for the international competitiveness of their national media industries. The prospects for restraining any such deregulatory race appear to be highly unpromising. As Gillian Doyle (2002: 94) has observed: 'At the level of each [European] state, 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. Similarly, at the European level, greater flexibility is argued for on the basis that the European audiovisual industry encounters great external competition from the American and Japanese industries.'

### **Broadcasting/Telecommunications Convergence**

By the latter half of the 1990s, the EU agenda concerning broadcasting-specific regulation, including the way media pluralism might be protected against media concentration, had been overtaken by a policy debate about the appropriate aims and methods of regulation given the 'convergence' of broadcasting, telecoms, and IT (Humphreys, 1999b). By now, technological innovation – particularly digitalization, the communication and processing of information in a binary code of zeros and ones – was breaking down the boundaries between these hitherto largely discrete sectors. Digitalization means that media can be packaged and delivered in a number of different formats and via diverse communication channels (including the Internet). Increasing numbers of homes in Europe are connected to high bandwidth networks through which they can receive in addition to standard telephony and television a plethora of multimedia, on-demand and interactive 'new media' services. Digital 'convergence' of electronic media, telecoms and computing, traditionally sectors with widely varying degrees of sector-specific regulation, produces pressures for more flexible, 'technology neutral' regulation. Some now argued that the collapse of traditional boundaries between the telecoms, IT and broadcasting industries, meant that that regulation would have to converge, leading to a single 'horizontal' regulatory

<sup>14</sup> Prior to this, both of these countries had among the strictest anti-concentration rules in Europe. Evidence of a 'race to[wards] the bottom' was a key finding of the ESRC research project 'regulating for Media Pluralism' (Grant no: L12625109) conducted by the author and colleagues at the University of Manchester between 1996-1999, under the auspices of the ESRC's Media Economics and Media Culture research programme. For detail, see *inter alia*: Gibbons 1998a and 1998b, Humphreys and Lang 1998, and Humphreys 1998, 1999b, 2000a and 2000b, and 2003. Also see the study by Gillian Doyle (2002).

model for the entire ‘converged’ communications sector. Others, however, argued that content regulation, traditionally associated with broadcasting, should be kept distinct from carriage regulation to safeguard non-economic public interest goals.<sup>15</sup>

The European Commission broached the theme of the regulatory policy implications of ‘convergence’ in a Green Paper published in December 1997 (CEC 1997). The European Commission’s Green Paper tried to appear open-minded about the future direction of regulation. It recognised that opinions and interests were divergent, indeed polarised, on the issue. Within the Commission itself there were different viewpoints, notably between DG X (cultural policy, broadcasting) and DG XIII (industrial policy, telecommunications and IT). Accordingly, the Green Paper presented three options. Essentially, these were:

- to ‘build on current structures’, i.e. to adapt and refine the existing separate ‘vertical’ (i.e. sector-specific) regulatory approach;
- to ‘develop a separate regulatory model for new activities, to co-exist with telecommunications and broadcasting regulation’, i.e. to move pragmatically towards a new ‘horizontal’ approach whilst leaving scope for ‘vertical’ regulation of distinctive services;
- to ‘progressively introduce a new regulatory model to cover the whole range of existing and new services’, i.e. a radical regulatory overhaul involving a single ‘horizontal’ approach, in recognition of the dramatic extent of convergence.

DG XIII (Information Society) appeared to favour the third option (Levy 1999: 132). Plainly, its main concern was to break down existing national regulatory boundaries between the broadcasting, telecoms and IT sectors in order to promote investment in and the full exploitation of the new technologies, with a view to their potential major contribution to European economic competitiveness and job-creation. However, DGX (Culture) was more concerned about the implications for broadcasting. During the consultation initiated by the Green Paper strong support for the continued sector-specific regulation of broadcasting was expressed by many respondents, including

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<sup>15</sup> It will be interesting to see how the recently merged UK communications regulator OFCOM, with its internal content board, performs this latter role.

public service broadcasters and Member State governments, who emphasised that broadcasting would continue to have a unique relevance for the expression and formation of opinion, and therefore a ‘fundamental role...for ensuring democratic pluralism, diversity and the sharing of culture’ (CEC 1998: 4). Content regulation was excluded from the new ‘horizontal’ regulatory model for communications infrastructure and services, outlined by the Commission in 2000 and adopted by the Council of Ministers in a series of directives during 2002 (for detail see Ward 2002, 111-124).<sup>16</sup>

The new 2002 regulatory package extends the scope of the EU’s pro-competitive ‘1998 regulatory package’ for telecommunications to all electronic communication networks and services. It is intentionally deregulatory in that it abolishes the burdensome old telecoms licensing system, replacing it with a much lighter touch authorization regime for all networks and services providing electronic communications *carriage*, including those (e.g. terrestrial, satellite, cable, etc.) providing broadcasting content. It also aimed progressively to roll back the Member States’ regulation of communications infrastructure and related services as their individual electronic communications markets (e.g. fixed line, cable, mobile, etc.) became competitive. However, as a result of the Member States’ special sensitiveness about the media, the framework accepts that broadcasting *content* could continue to be regulated ‘vertically’ according to Member States’ preferred socio-cultural models; accordingly, they could retain licence requirements for content providers (i.e. ‘broadcasters’). Moreover, in order to protect the network access of public service broadcasting (content), the Universal Services Directive, a key part of the new EU regulatory package, allowed Member States to impose ‘reasonable “must carry” obligations’, for the transmission of public service channels (services that meet ‘general interest’ objectives), on providers of electronic communication networks used for the distribution of radio or television broadcasts (Article 31).

In sum, communications carriage has been subject to further EU de-regulation, but audiovisual content has clearly been spared the ‘telecoms style’ de-regulation, that

<sup>16</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework directive), *OJ 2002 L108/33*; Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *OJ 2002 L108/7*; Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive), *OJ 2002 L108/21*; Directive 2002/22/EC on universal services and users’ rights relating to electronic communications networks and services (Universal Services Directive), *OJ. 2002 L108/51*.

might have occurred. Under the convergence regulatory framework, strictly regulated public-service broadcasting was safe from any hypothetical EU-inspired and convergence-justified deregulation. Equally, though, in the internationalized audiovisual environment, with its scope for regulatory arbitrage, international commercial media companies continue to enjoy extensive freedom from regulation. In this respect, Ward (2002: 131) contends that the failure to produce EU-level rules for audiovisual content (positive integration) left ‘a fissure between national regulation and European regulation that technically allows companies to bypass stringent regulatory demands.....In remaining national in scope, the regulators are in danger of being left behind by current trends.....Big companies require big regulators.....At the moment we are in a position where, as the commercial sector becomes more internationalized, these channels increasingly enjoy minimal regulation.’

### **Regulating Access to Digital Broadcasting**

The limits of the EU’s regulatory capacity in the audiovisual sector is further exemplified by the issue of regulating access to the new digital networks, the regulation of so-called conditional access systems (CAS), the ‘digital gateway’ systems, which through desk-top boxes scramble and unscramble TV signals and together with subscriber management systems allow only those consumers who have paid for a service to access it. According to a detailed study by David Levy (1999, pp. 63–79) the European Commission abdicated from the responsibility to regulate for either common standards or 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 (e.g. BSkyB in the UK and Ireland). This fragmentation of the European digital TV market clearly went against the grain of the EU’s principal audiovisual policy, namely the creation of a single European market in order to promote a stronger European audiovisual industry (Humphreys 1996, pp. 256– 96).

This regulatory policy failure also raised competition and media pluralism issues. Control of the set-top box presented the opportunity to discriminate through price or access terms against potential competitors in the field of pay-TV and new Information Society services. As John Birt (then) Director General of the BBC, famously declared in his 1996 MacTaggart lecture: ‘The battle for control of and a share of the enormous economic value passing through that gate-way, will be one of the great business battles shaping the next century....[N]o group should be able to abuse control of that set-top box to inhibit competition (*The Guardian*, 24 August 1996, p. 27, cited in Humphreys and Lang 1998: 21). Warning against ‘digital dictators’, the *Guardian* newspaper even editorialised that the digital gateway ‘should be enshrined in law as a common carrier owned and operated by users without prejudice’ (*The Guardian*, 29 October 1996, p. 16, in Humphreys and Lang 1998: 22).

Under pressure from the European Parliament, some statutory access provisions were actually included in the EU’s 1995 Advanced Television Standards Directive. Its Article 4 specified that CAS providers should be required to supply third-party access (i.e. including to their rivals) to their conditional access services on ‘fair, reasonable and non-discriminatory’ terms. The directive also obliged national regulatory authorities to ensure that CAS operators kept separate financial accounts, published unbundled tariffs, and that they should not prohibit a manufacturer from including a common interface allowing connection with other access systems. However, the latter stipulation was a far cry from mandating the inclusion of a common interface. Manufacturers were most unlikely to include a common interface against the wishes of their customers. Moreover, the directive was ‘so vague as to leave national officials unclear as to what provisions meant, and as to which needed to be written into national law. The result was that national implementation varied hugely’ (Levy 1999: 73). This regulatory deficit on the part of the EU has not been remedied by the adoption of its new regulatory framework for the ‘converging’ electronic communications sector (see previous section). The Access Directive of the new framework reproduces the relatively weak provisions from the Advanced Television Standards Directive, though it has introduced a new EU obligation (not provided for in the 1995 Advanced Television Services Directive) for operators to provide access to application program interfaces and electronic programme guides on ‘fair, reasonable and non-discriminatory terms’. How exactly these worthy regulatory

principles are to be implemented, however, is left to the discretion of the regulators in the individual Member States (Humphreys and Simpson 2005: 135-136).

## **Conclusion**

Given the fast-moving nature of developments in this field, any conclusions must be tentative. More research remains to be done.<sup>17</sup> Nonetheless, the paper has explained how the EU has – and is likely to continue to have – a mixed degree of regulatory competence in the audiovisual field. The EU's influence is greatest in issues concerning the European internal market and competition issues with a Community dimension. Here the EU has direct responsibility. With regard to the internal market, there is some evidence to suggest that the impact of the EU has been to trigger a 'de-regulatory competition' among the Member States. However, there is a need for more empirical academic research on this particular theme. With regard to competition policy, too, there is certainly the potential for a negative impact on public service broadcasting. However, to date, the Commission would appear to have proceeded rather cautiously in view of the strong Member State sensitivities on this subject. This caution contrasts with the Commission's activism against those private sector mergers and alliances deemed to threaten the development of a single market populated by strong pan-European champion companies. Nonetheless, the relationship between the Commission and public service broadcasters is heavily fraught with tension. In Richard Collins' words the 'structural conflict between the competition principles of the European treaty and the status and practice of PSB is both inescapable and likely to become more salient.'<sup>18</sup> How this tension will be resolved is open to a considerable uncertainty, despite the Commission's production of guidelines. The Commission wields considerable discretionary power in making its competition judgements. The pressure from the private sector is bound only to mount with digital convergence.

The paper suggests that the Commission has been both a 'purposeful opportunist', seeking to expand its influence and if possible its competence in the audio-visual field, and a 'policy entrepreneur', grappling with the complexities of international

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<sup>17</sup> As currently by the ESRC project described in footnote 1.

<sup>18</sup> Richard Collins, 'The future of public service broadcasting in the United Kingdom', paper presented at the conference *The Future of Public Broadcasting in a Changing Media Society*, Institute of Mass Communication and Media Research, University of Zurich, 27-29 September 2002, p. 10. .

market and technical change. However, there would nonetheless appear to be distinct limits to European Union positive integration in the audiovisual sector because of the power of private media lobbies interested in a weakly regulated European market (see Doyle 2002; Harcourt 2005), and above all because of the politically sensitive nature of the sector and the Member States' desire to retain primary responsibility for it (see Levy 1999). The relative weakness of the Commission in promoting positive integration, in the absence of a strong Member State consensus on the need or desirability, is illustrated by the manifest failure to achieve harmonized media-specific anti-concentration rules designed to safeguard 'pluralism' and equally by the failure to produce detailed EU-rules for regulating conditional access systems. The contrast with the application of general EU competition policy to the media field by DG Competition is suggestive of a liberal bias in the EU towards negative integration. This highlights the difficulty that the Commission encounters in promoting more interventionist cultural and social policies (positive integration) that challenge powerful vested economic interests when there is a lack of Member State support. The Member States have been adamant that the sensitive field of media policy is primarily their field of competence; indeed, the Draft treaty on the Establishment of a European Constitution defines it as an area where the EU can only take 'supporting, coordinating or complementary action'. This leaves negative integration, the removal of regulatory barriers to the internal market, as the EU's main achievement to date.

However, the story has not been completely 'de-regulatory'. EU negative integration in the shape of Television Without Frontiers has been accompanied by one noteworthy measure of 're-regulation', notably the EU-wide adoption of French style protectionist quotas, though – as seen – the French and their supporters in the European Parliament have failed so far in their attempts to have these quotas strengthened. Also, the deregulatory pill of TWF was sweetened a little (for the French) by a (very) modest measure of budgetary support for European audiovisual production. So far, at French insistence, the EU has served as an effective shield for these policies against US pressure in international trade negotiations. Above all, it is noteworthy that the Commission's competition policy interventions over the launch by public broadcasters of new digital services, including online ones, have *so far* been supportive of a comprehensive understanding of public service broadcasting. In sum, whether or not the EU's impact has been de-regulatory or re-regulatory is a question deserving of further empirically orientated academic research. All of the issues

discussed herein remain open, in particular the tension between competition policy and public service broadcasting, the long-term external trade related issues, and not least the long-term impact of the digital convergence between media, telecoms and IT.

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