1) INTRODUCTION

Audio-visual media and especially television represent a major economic force within the European Union and worldwide. According to Commission's researches an average person in Europe spends about three hours in front of television and 98 per cent of the European households own a TV. Despite the fact that usage of new media is increasing, television is still the most commonly used and the most influential type of media. Therefore, the focus of this paper will be broadcasting and especially television broadcasting sector within the media.

Television has technological, economic and cultural aspects. Until the 1980's European states only focused on the cultural aspect and tended to regulate television broadcasting at nation state level. Most of the Member States operated public service broadcasters and did not let private broadcasters to be in the market. There were two reasons of the state cartel; importance of safeguarding national cultures and the important role attributed to broadcasting in a democratic society, namely, to ensure freedom of expression and pluralism of opinion.[1] Even after the private broadcasters emerged, television sector remained a tightly regulated area.

Within the framework of EC law and the EU's media policy, audio-visual media have a mixed role. On the one hand, European Court of Justice decided that broadcasting is a service[2] and on the other hand the EU never denied the cultural importance of the broadcasting. The tendency to emphasise cultural aspects was further reinforced by Member States' reluctance to let the EU interfere with their national media policy. The unsolved contradiction between these two positions caused disagreement over how far broadcasting could be regarded as 'special' and whether its particular characteristics justified an exemption from article 59 of the EC Treaty and/or its provisions on competition and state aid. Consensus has not yet been

[1] NITSCHE, Ingrid, Broadcasting in the European Union: The Role of Public Interest in Competition Analysis, TMC Asper Press, The Hague, Netherlands, 2001, p.4.
[2] Case 155/73, (1974).

reached on how to balance these conflicting positions. Media and competition/internal market law tend to be treated as two different sets of legal regimes. The early judgements on broadcasting were delivered almost twenty years ago when states' broadcasting monopolies were still widespread. Despite the emergence of private broadcasting, it was not until broadcasting enterprises in Europe started to merge on a large scale[3] that the media turned into an important issue for competition law. Even today, there is still a certain uneasiness about the application of competition law to the audio-visual sector, especially expressed by public broadcasters.

The aim of this paper is to show that both of the conflicting positions are important and need to be regulated and the regulations should be done considering the competition rules. Most of the times, competition rules play a major role when regulating media because competition laws intend to include all laws that effect the conditions of competition. Since media is a highly competitive sector it is useful to analyze media regulations in the light of competition rules. Media is the fourth power after legislature, government and judiciary and also it is an essential element for democracy. So Member States cannot leave it unregulated within their national states and the EU. When regulating media within the EU framework, another question arises; how far should it go? This is an ongoing discussion and it will be touched upon in this paper also.

The recent explosion of media and communications technology was expected to deliver consumer a new age of competition across all media markets. There is no doubt that today; consumers have the opportunity to receive news, information, and entertainment from a great variety of media. However this growth in variety should be accompanied by independent, diversely owned competitive communications services and media voices. The crucial question at this point is how the media should be regulated and what should be the role of competition rules when regulating media?

This paper is divided into eight chapters to find out the answers for these questions. Following the introduction chapter, the second chapter starts with defining the term "media" and

[3] See, for example, RTL/Veronique/Endemol, OJ 1996 L134/32; Kirch/Bertelsmann/Premiere OJ 1999 L 53/1; Deutsche Telekom/Beta research, OJ 1999 L 53/1.

analyzes the media sector in general including the types and characteristics of media and most importantly the objective of pluralism in media. The third chapter briefly discusses the economic reasons behind regulating media by explaining very basic economics and newly emerging media economics. The fourth chapter examines the broadcasting policy in the EU and touches upon the competition rules and directives adopted by the European authorities. The fifth chapter is dedicated to public service broadcasting and tries to show why broadcasting should not be left only to private broadcasters. The sixth chapter focuses on private broadcasting and concentration of ownership issues which is a big obstacle to maintain media pluralism and secure democracy within the society. As a candidate country to the EU, Turkey has made a lot of efforts to align its legislation with the EU legislation and still there a lot of outstanding issues such as guaranteeing freedom of expression (defamation is still a criminal offence carrying prison sentences), political independence of administrative capacity (RTÜK) and restrictions on the share of foreign capital in television enterprises that needs to be re-regulated in order to complete alignment. The seventh chapter which deals with broadcasting in Turkey is included to this study in order to point out the short history of Turkish broadcasting, the effect of competition rules in broadcasting regulations, the European Commission's evaluation of Turkish Broadcasting and determine where Turkey stands in complying with the harmonization of the EU legislation in relation to broadcasting sector which would help better understanding the future regulation needs The final conclusions are summarized in chapter eight. Consequently, this paper l tries to reach the reasons behind why the media should be regulated and why a competitive media market is essential for the public.

2) ANALYSIS OF MEDIA SECTOR

2.1 Definition of the Media Sector

Before we start examining the media sector and its regulations in Europe and Turkey it is important to define what we mean by "media". According to a dictionary definition, media refers to the "means of communication that reach large numbers of people, such as television, newspapers, magazines and radio".[4] Thus, the media sector is concerned with the production and distribution of information on a one-to-many basis.

It seems appropriate to use a broad interpretation of the word "information" in this context. Varian (1998)[5] takes "information goods" to encompass anything that can, in principle, be digitised. We assume that all printed, audio, visual or audiovisual content are considered to be information goods, and therefore potentially part of the media sector.

The media industries differentiate themselves from other sectors involved in markets for the transmission or distribution of information goods in that the media sector is characterised by the distribution of the same information to a potential audience that comprises a large number of people.[6] As an example, both radio broadcasting and fixed-line telephony are concerned with transmission of audio information, but fixed-line telephony is a one-to-one or one-to-several exchange so, it is outside the media sector, while radio stations make the same information available to a mass audience and fall therefore within our definition of media.

Another key boundary is that between media and direct one-to-many communications such as public speeches or theatre performances. By accepting the definition of media as "means of communications", we require not only that an information good be supplied to many recipients, but also that there should be a medium of some kind to express this information, be it a book, newspaper, radio, television or the internet.[7]

Thus, it is generally possible to draw a distinction between the information good itself and the method of distribution used. A particular recording of a piece of music can be considered an

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[4] Collins Concise Dictionary (1997) 3rd edition.

[5] Varian, H (1998) "Markets for information goods" http://www.sims.berkeley.edu/~hal/Papers/japan."

[6] European Commission, Competition Studies-1, Market Definition in the Media Sector, Economic Issues, Report by Europe Economics for the European Commission, Directorate-General for Competition, Information, Communication and Multimedia, November 2002. p.15.

[7] Ibid.

information good, or media content. The same recording can then be physically distributed as a CD or audio tape, or distributed through the internet or radio stations: these are different forms of media distribution.[8]

2.2 Characteristics and Types of Media

According to Tyner[9], media have seven key concepts:

a. All media are constructions: The media do not present simple reflections of external reality; they present productions, which have specific purposes. The success of these productions lies in their apparent naturalness. However, although they appear to be natural, they are in fact carefully crafted constructions that have been subjected to a broad range of determinants and decisions. Media are manufactured constructs. Careful planning and execution has gone onto the process of constructing the media into a seemingly natural reality.

b. Media construct reality: Although media are not real, they are influential in shaping our attitudes, behaviour and ideas about the world. The media provides us with information about people, places and things which we may not know about. This media information is sometimes used as the basis for our decision making.

c. Audiences negotiate meaning: Audiences use their minds to make sense of the information. As individuals or as groups, we anticipate the codes and conventions in media as we "read" sense into the message. Basic to an understanding of media is and awareness of how we interact with media texts. When we look at any media text, each of us finds meaning through a wide variety of factors: personal needs and anxieties, the pleasures or trouble of the day, racial and sexual attitudes, family and cultural background. All of these have a bearing on how we process information.

[8] Ibid.
[9] TYNER, K., Key Concepts of Media Literacy, Media Literacy Resource Guide, Ontario Ministry of Education, 1997.

d. Media have commercial implications: Billions of dollars are associated with media industries. Advertising drives media industries. The commodity that is bought and sold is the audience.

e. Media contain value messages: Media are not value free. All media has explicit or implicit values and ideology. All media products are advertising in some sense, for themselves, but also for values or ways of life. They usually affirm the existing social system. The ideological messages contained in.

f. Media have social and political implications: Media not only sells products but also ideas, messages, political candidates and has the power to shape audiences into political constituencies. Media technologies have the power to alter our culture and the way we use our leisure times.

g. Media have unique aesthetic forms that are closely related to content: There is an artistry and creative vision in the media that we are exposed to. Each medium has unique codes and conventions that influence its content.

For different needs of people, there are different types of media, differing in content, impact and effect. People use different media in different ways, spend different amount of time in different media environments, they consume services under different circumstances and pay for them in different ways.[10] As a result, competition between the media is muted in the marketplace and, in some respects; the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas.[11]

The sectors of the media market divided by the Tabernero and Carjaval (2001)[12] are:

- General news daily press
- Economic newspapers
- Magazines

[10] BİLİR, Hakan, Media Ownership Control: To What Extend is Competition Law and Policy Sufficient to Provide for Diversity and Plurality in the Media?, STPS – WP – 0508, p. 5.
[11] COOPER, M.N., Mapping Media Market Structure at the Millennium, 2001.
[12] TABERNERO, A.S and CARJAVAL, M., Globalization and Concentration in the European Media Industry: The Leaders Market Shares, School of Public Communications, University of Navarra, 2001.

- Publishing houses
- Over the air radio
- Open television
- Pay television
- Cinema film distribution
- Music industry
- Advertising agencies
- Internet

In this paper, I will not have the chance to analyze all types of media and the effect of competition rules to each type. I'll try to take media industries as a whole and make general comments but my focus will be on broadcasting sector, the policies and the applicability of competition rules to broadcasting sector.

2.3 Evaluation of Media

Analyzing media one can start with examining performance of media industries. So there is a need for performance criteria and norms. Dennis McQuail suggests six media performance norms that encompass most judgements and take them up in order of ease of use.[13]

a. Efficiency: Media industries ought not to waste resources; that is they should be as efficient as possible. This is the sole criterion of the free market approach. Monopolists waste resources in order to maintain their position of power.

b. Multiple voices: Media industries ought to facilitate free speech and political discussion. A democracy needs freedom of expression to make it work and the mass media ought to be open enough to promote debate of all points of view. The marketplace of ideas calls for criteria of accuracy and completeness. This surely much count in any definition of diversity.

c. Public order: Media industries ought to facilitate public order. In times of war, violence, and crime, how should we regulate media (if at all) to ensure differences? This

[13] GOMERY, D., Ownership Policies, Diversity and Localism, FCC Roundable, USA.

is a growing area of concern as the media easily jumps across national and local boundaries.

d. Cultural quality: Media industries ought to protect and maintain cultural quality and offer some product diversity. Can advertising generated revenue companies develop quality programming, and not simply dish up more sensationalism? Here the issue of use of television in elections becomes paramount. This surely must count in any analysis of diversity and localism.

e. Technical change: Media industries ought to bring to the marketplace new technologies as quickly as possible. It has long been known that monopolies and collusive oligopolies resist the innovation of new technologies in order to protect their highly profitable status quo positions.

f. Equity: Media industries ought to be equitable. Should members of groups in society be shut out of the mass media industries as employees and managers, or as consumers? For some consumers, access is becoming more and more restrictive as a larger share of the mass media goes to direct payment.

2.4 Objectives of Media

After examining the performance of media industries, one should analyze the basic objectives that are widely shared across the EU[14]:

. *Pluralism*: the guaranteeing of pluralism of opinions which serves for the public interest, for the media sector.
. *Cultural diversity*: standing for the preservation of national identities.
. *Choice:* the widening of choice where we have to open access to the new media that innovation and markets provide.

14 UNGERER, H., Competition Rules and the Media: Are They Determinant of Complementary?, European Union Media Law and Practices Radio and Television Supreme Council and Association of Television Broadcasters, Istanbul, 01.04.2005. p.3.

The EU Treaty allows Member States to put into place their media regulatory framework largely to their choice. The fundamentals of the EU policy in this area are built:[15]

i. The basic framework for the media at EU level is set by the Television without Frontiers (TWF) Directive, and the associated Directives. The TWF Directive is now under review, particularly with regard to adjusting its provisions to the New Media. We will analyze this directive in details in Chapter 3.

ii. The European Convention on Human Rights sets Europe-wide goals. In the medium term, an overarching framework at the EU level would be set by the new EU Constitution. The failed Constitution includes under Title II the Charter of Fundamental Rights. Title II / Article 11 stipulates "... The freedom and pluralism of the media shall be respected".

iii. Plurality requires the availability of choice. Choice between different opinions and offers within the same media but also between different types of media: access to TV, Print and New Media. The development of open competitive market structures is therefore vital. This makes Competition Law application an essential component of sound policies in the media sector. Since pluralism is vitally important objective of media, EU policy and competition law we'll analyze it in details below.

2.5 Pluralism as an Objective and Policy

Pluralism is generally associated with diversity in the media; the presence of a number of different and independent voices, and of differing political opinions and representations of culture with the media.[16] Citizens expect and need a diversity and plurality of media content and media sources.

The concept of pluralism is comprised of two aspects. 'Political' pluralism is about the need, in the interests of democracy, for a range of political opinions and viewpoints to be represented in the media.[17] Democracy would be threatened if any single voice, with the

15 Ibid.

16 DOYLE, Gillian, Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media, Sage Publications, UK, London, 2003, p.12.

17 Ibid.

power to propagate a single political viewpoint, were to become too dominant. 'Cultural' pluralism is about the need for a variety of cultures, reflecting the diversity within society, to find expression in the media.[18] Cultural diversity and social cohesion may be threatened unless the cultures and values of all groupings within the society are reflected in the media.

Maintaining and developing media pluralism is crucial for the democratic process in the Member States as well as in the European Union as a whole. 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. Similar provisions are included in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2.5.1 Legislation on Media Pluralism

The Commission published in December 1992 a Green Paper '*Pluralism and Media Concentration in the Internal Market: an assessment of the need for Community action*, designed to launch a public debate on the need for Community action in this field. The debate did not show a clear need for Community intervention and no formal initiative was taken by the Commission.

The protection of pluralism has been a continuing concern of the European Parliament, which was always in favour of European actions in the field of pluralism and media concentration. Several EP reports have been voted since the 90s[19]: The European Commission has always paid close attention to calls coming from the European Parliament concerning the issue of concentration and pluralism in the EU media sector. Responding to earlier calls from the Parliament for action, the Commission asked whether one should re-examine the need for Community action in this field during the course of a much broader consultation on the *Green*

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18 Ibid.

19 Resolution in OJEC C 68 of 19.03.90, Resolution in OJEC C 284 of 2.11.92, B4-0262 in the OJEC C323 of 21.11.94, B4-0884 in OJEC C 166 of 3.07.95; European Parliament resolution 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) P5_TA(2004)0373; P5_TA(2003)0381; 'Television without frontiers' European Parliament resolution on Television without Frontiers, on the application of Articles 4 and 5 of Directive 89/552/EEC for the period 2001-2002, Provisional 2004/2236(INI)

paper on Services of General Interest[20] (2003). The results highlighted the differences that exist across the Member States, indicating that the issue should be left to the Member States.

The Council of Europe has been very active in the field of media concentration/media pluralism and diversity through recommendations and reports. Work on this issue started in 1989 and an important number of concrete actions followed, including all important aspects of this issue (recommendations on media pluralism, on freedom of expression, on the role of public service broadcaster, establishment of code of conduct during election campaigns, cooperation between regulatory authorities etc.).[21] The latest initiatives, a ministerial resolution combined with an action plan, were adopted during the 7th European Ministerial Conference on Mass Media Policy in 2005. Ministers agreed to continue to monitor the development of media concentrations in Europe as a political priority of the organisation, in particular at the transnational level, with a view to suggesting any necessary legal or other initiatives.[22]

Since private broadcasting had been licensed in national markets, Member States had to put some specific measures to ensure media pluralism, in order to protect freedom of expression and to ensure that the media reflect a spectrum of views and opinions that characterise a democratic society. These include a wide set of different instruments that goes from merger control rules to content requirements in the licensing system, the establishment of editorial status and includes also codes of conduct regarding professionalism in journalism and other measures.[23]

2.5.2 Competition and Pluralism

Efficiency and pluralism are not conflicting concepts. In fact, in most situations, what is good for competition would also be good for pluralism as well and generally, a plurality of competitors (voices) will allow for a variety of products (discourses). Yet, nobody would

[20] White paper on Services of General Interest COM (2004)374
[21] EC Information Society and Media Directorate-General, Media Pluralism-What should be the European Union's role?, Issues Paper for he Liverpool Audiovisual Conference, July 2005, p.2.
[22] Ibid.
[23] Ibid.

seriously argue that one automatically guarantees the other. According to ARINO[24], some contradictions may arise and the reasons can include:

i. *Different approaches to the notion of 'public interest'*. Both the safeguard of competition and of pluralism are said to be in the public interest, but they are understood differently. For the purposes of competition, the public interest primarily equals the 'satisfaction of consumer preferences'. By contrast, under the pluralism paradigm, the public interest is seen as the collective benefit resulting from an informed public debate on civic issues. Thus, reference is made to something that goes beyond what 'interests the public' to include another two fundamental functions of the media: that of informing and that of acting as a 'watchdog' of government.[25]

ii. *Different perceptions of acceptable levels of industry concentration*. Usually, concentration is considered as both a competition and a pluralism concern. However, because competition law is mostly corrective and deals with abuses of dominance, certain high levels of concentration might be allowed as long as market power is not abused. It may be the case that a single or few firms operating in the market prove to be more efficient than a multiplicity of inefficient firms. Such a situation would not produce competition concerns. However, from a pluralism perspective dominance (as opinion power) would be alarming in itself.

iii. *The specific economics of media markets* also generate contradictions between competition and pluralism. Generally, competition is expected to deliver choice as a plurality of sources would eventually lead to diversity of content for the audience. In theory, firms will offer a variety of products to provide for the tastes of as many consumers as possible. Yet, media markets show a natural tendency towards product homogeneity. This is partially the result of an unusual feature of media products: the broadcasters' capacity to have two unconnected customers for each media sale (viewers and advertisers). In a way, competition in the media suffers from a 'domination of the majority' and this perversely results in a tendency to under serve minorities.[26] Therefore, there are often situations where, despite the co-existence of a large number of competitors (or precisely because of it) they all end up selling essentially the same kind of product (or saying the same thing).

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[24] ARINO, Monica, Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps, COMMUNICATIONS & STRATEGIES, no.54, 2nd quarter 2004.
[25] Ibid. p.101
[26] Ibid. p.102.

2.5.3 Application of Merger and/or Specific Media Ownership Rules

The application of European competition law plays an important role in respect of the preventing the creation or the abuse of dominant positions and with regard to ensuring market access for new entrants. Application of the Merger Regulation prevents concentrations that significantly impede effective competition in the Common Market, especially through the creation or strengthening of dominant positions. Application of the antitrust rules prevents foreclosure of competitors from those markets and contributes to ensuring access to content and platforms for operators. Thus, in applying antitrust and merger control principles competition policy can make an important contribution to maintaining and developing media pluralism, both in traditional television markets and in new upcoming markets.

European competition law cannot replace, nor does it intend to do so, national media concentration controls and measures to ensure media pluralism.[27] Article 21(4) of the Merger Regulation[28] allows Member States to apply additional controls in order to protect of pluralism in the media. The Member States of the European Union operate different systems[29]: In some Member States specific procedures as regards media mergers and acquisitions are in place; for instance, the minister(s) responsible may request a special intervention on the grounds of pluralism, or the merger/acquisition may require the approval of the minister. In other countries general competition rules and criterias apply. In most of these countries there is co-operation between the Competition Authority and the Broadcasting Regulatory Authority in mergers, acquisitions and other concentration cases concerning media markets. In some Member States competition policy contains a link to media law whereby decisions made by the Competition Authority must be in line with the ownership restrictions laid out in the media law. Such national media ownership regulation covers and combines rules on press ownership, broadcasting ownership, cross media ownership regulation as well regulations on foreign ownership of the media, as in some countries.

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[27] EC Information Society and Media Directorate-General, Media Pluralism-What should be the European Union's role?, Issues Paper for he Liverpool Audiovisual Conference, July 2005, p.2.

[28] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings; JO L 24, 29.01.2004, 1-22

[29] EC Information Society and Media Directorate-General, Media Pluralism-What should be the European Union's role?, Issues Paper for he Liverpool Audiovisual Conference, July 2005, p.2.

2.5.4 Measures to Promote Pluralism Actively

The Television without Frontiers Directive lays down minimum standards that all broadcasters have to comply with. This directive allows Member States to put in place stricter rules for television broadcasters under their jurisdiction, including measures concerning "The need to safeguard pluralism in the information society and the media". In addition, several provision of the directive actively promotes pluralism: the aim of Articles 4, 5 and 6 is to facilitate the circulation of audiovisual works from other countries and to support independent producers. The latest report 6 on the application of these articles shows that this is an important and useful instrument.[30]

Furthermore, the MEDIA Programme is vital in that respect. It aims to strengthen the competitiveness of the European audiovisual industry with a range of support measures dealing with training of professionals, development of production projects, distribution and promotion of cinematographic works and audiovisual programmes. MEDIA Programmes will be explained in details in chapter 3.3.2.

Public service broadcasting has an important role to play to guarantee media pluralism. The Commission's policy recognises the importance and special role of public service broadcasting 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 from the Commission on the application of State aid rules to public service broadcasting.[31] This leaves the possibilities open for the Member States to support public service broadcasting in order to promote media pluralism actively.

But the financial aspect of public service broadcaster is only one side of the coin. The status of public service broadcaster, their role within the media landscape as well as their independence needs to be ensured through the legislative framework which underpins their activities.[32] According to the subsidiarity principle, these are tasks for the Member State. One

[30] The average broadcasting time for European works in the EU-15 was 66.10% in 2002. The showing of independent producers' works broadcast by all European channels in all Member States was and 34.03% in 2002. The share allocated to recent European works by independent producers was 21.10% in 2002.
[31] EC Information Society and Media Directorate-General, Media Pluralism-What should be the European Union's role?, Issues Paper for he Liverpool Audiovisual Conference, July 2005, p.3.
[32] Ibid. p.4.

result of the forthcoming European Institution for the Media (EIM) study undertaken for the European Parliament 'On the Information of the citizen in the EU' is very interesting: "The status and independence of public service broadcasting is in no way secured in many of the countries in the EU".

Other important issues can only be mentioned briefly: e.g. editorial freedom, working conditions of journalists, the question of the relationship between media and political actors. It is important to admit that even if freedom of expression as well as freedom of information is legally protected in all EU Member States, the actual practice can only be judged by the reality of everyday working experience.[33]

[33] Ibid.

3) ECONOMIC BACKGROUND

3.1 Media Economics

The media is a significant sector of economic activity, accounting for some 3-5 per cent of Gross Domestic Product (GDP) in most countries of Western Europe.[34] The performance of this economically valuable sector is, to some extend at least, tied up with the market structures in which media firms operate and, especially, with degrees of concentration of ownership. Thus, instances of market dominance in the media raise concern not only about pluralism but also about economic well-being and performance of the media industry.

Media economics is a combination of economic studies and media studies. It is concerned with the changing economic forces that direct and constrain the choices of managers, practitioners and other decision-makers across the media.[35] There are different attempts to explain media economics. According to one economist, media economics 'is concerned with how media operators meet the informational and entertainment wants and needs of audiences, advertisers and society with available resources'.[36] According to another economist, media economics refers to 'the business operations and financial activities of firms producing and selling output into the various media industries'.[37]

In general, media economics includes a range of issues including international trade, business strategy, pricing policies, competition and industrial concentration as they affect media firms and industries. Due to the aim of the study, only competition theme will be explored in this study.

3.1.1 Microeconomics and Macroeconomics

The difference between macro and microeconomics is about whether that which is being studied involves large groups and broad economic aggregates or small well-defined groups

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34 DOYLE (2003), p. 30.
35 DOYLE, G., Understanding Media Economics, Sage Publications, London, 2002.p.2
36 Ibid.
37 Ibid.

and individual firms and sectors.[38] Macroeconomics is concerned with very broad economic aggregates and averages, such as total output, total employment, national income, the general price level, and the rate of growth of the economy as a whole. These sorts of aggregates are arrived at by summing up the activities carried out in all individual markets and by summarizing the collective behaviour of all individuals.

The overall performance of the economy has important effects on the business performance and prospects of firms in all sectors, including media. Indeed, the fortunes of most media firms are highly sensitive to the ups and downs of the economy as a whole. Many media firms rely on advertising as a primary source of income. Analysis of long-term trends in advertising shows that there is a strong connection between the performance of the economy as a whole and levels of advertising activity. Revenues for media firms from direct expenditure by consumers are also clearly dependent on broader economic aggregates such as levels of income and consumer confidence.[39]

While macroeconomics is about forces that affect the economy as a whole, microeconomics is concerned with the analysis of individual markets, products and firms. An economy is 'a mechanism that determines what is produced, how, when and where it is produced, and for whom it is produced'.[40] These decisions are taken by three types of actors, consumers, firms and governments, and are co-ordinated in what are called 'markets'.[41] Economics relies on certain assumptions about how these actors make their choices.

Media economics is special and important because media have special qualities not shared by other products and services; the application of economic theory and economic perspectives in the context of media presents a variety of challenges. Media output seems to challenge the very premise on which the laws of economics are based, scarcity[42]. However much a film, a song or a news story is consumed, it does not get used up.[43]

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38 Ibid, p.3.
39 Ibid
40 Ibid, p.4.
41 Ibid.
42 Scarcity is defined as a condition of limited resources and unlimited wants and needs, ie that society does not have sufficient resources to produce enough to fulfill subjective wants.
43 DOYLE (2002), p.10.

Economics seeks to promote 'efficiency' in the allocation of resources. The notion of economic efficiency is tied up with objectives. But the objectives of media organizations tend to vary. Very many media organizations comply with the classical theory of the firm and, like commercial entities in other fields of industry, are primarily faced towards maximizing profits and satisfying shareholders.[44] A good number, however, appear to be driven by alternative motives. For those who operate in the public service sector, quality of output and other 'public service' type objectives form an end in themselves. Some broadcasting firms find themselves in between the market and the non-market sector, appearing to fulfil one set of objectives for and industry regulator, and another set for shareholders. Because objectives are unclear, the application of any all-embracing model based in conventional economic theory is difficult.

3.2 Market Structure

In economics, market structure describes the state of a market with respect to competition. The terms supply and demand refer to the behaviour of people as they interact with each another in markets. A market is a group of buyers and sellers of a particular good or service. The buyers as a group determine the demand for the product, and the sellers as group determine the supply of the product.[45] We can observe different types of markets in the economy such as perfect competition, imperfect competition, monopoly, monopolistic competition, workable competition and oligopoly.

Across Europe, the initial structure of the eighties, national public service broadcasters based on licence fee; evolve into the dual structure of the nineties adding private broadcasters based on advertisement revenues.

Across the EU, around 45% of revenues of television/broadcasting come from advertisement; the rest in nearly equal parts from public broadcasting fees and from pay-TV subscriptions and competition for those revenue streams delineates the main battlefields in the media sector of today, and the cases that we are facing.[46] The diversification of revenue streams is reflected

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44 Ibid, p.11.

45 MANKIW, N. Gregory, Principles of Economics, Harcourt Collage Publishers, USA, Florida, 2nd Edition, 2001, p.66.

46 UNGERER, H., European Commission Competition DG Information, Communication and Multimedia, Media the Head Division, Oxford IPPR Media Convention, Panel 1: Why can't the market decide, Oxford 13/01/2004. p.4.

by a diversification of platforms and products. Market definitions are becoming a moving target. Though competition has developed, all of the main media markets have remained highly oligopolistic. This is a main challenge that regulators are facing.

Analysis of economic conduct can begin by noting that revenues for media businesses fall into two distinct classes.[47] On one hand, there is direct payment for books, popular music, movies, and pay television, businesses that sell their wares directly to the public. On the other hand, there is the world of indirect payment, characterized by advertisers "buying" audiences; over-the-air television, radio, magazines, and newspapers, for example, rely on advertising dollars to create the bulk of their revenues. These media may have a small initial charge (e.g., the subscription price of a newspaper), but advertising fees generate the bulk of the revenues.

The important difference here for the study of industrial conduct is that with direct payment, customers are able to telegraph their preferences directly. For advertising-supported media, the client is the advertiser, not the viewer or listener or reader. Advertisers seek out media that can best help sell products or services; advertisers desire placement in media that can persuade customers who can be convinced to change their buying behaviour and have the means to execute new purchases.[48]

Given this duality of revenue generation, the industrial organization economic model postulates that the structure of a media industry determines the particular characteristics of its economic behaviour. Once a certain market structure is established, the media economist then looks for certain techniques of price setting and program production, for certain types of marketing and promotion. In short, a certain category of market structure leads to specific corporate conduct.

Market structure and conduct in the media world fall into three main categories which are monopoly, oligopoly and monopolistic competition. However other categories such as perfect competition, imperfect competition, and workable competition are interesting to analyze.

3.2.1 Perfect and Imperfect Competition

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47 GOMERY. D., The Centrality of Media Economics, University of Maryland, Journal of Communication, Volume: 43, Issue: 3, Publication Year: 1993, p. 192.
48 Ibid.

A market or industry structure in which there are many firms, each small relative to the industry, producing virtually identical products and in which no firm is large enough to have any control over prices is called perfectly competitive market.[49] In perfectly competitive markets, new competitors can freely enter and exit the market.

It is very rare to find an example of perfect competition in the real world. Most industries, including the media, sell 'differentiated' products, products that are similar enough to constitute a single group but are sufficiently different for consumers to distinguish one from another.[50] In other words, they may be close substitutes but are not exact substitutes as would be the in perfect competition.

All firms in an imperfectly competitive market have one thing in common: They exercise market power, the ability to raise price without losing any demand for their product. Imperfect competition and market power are major sources of inefficiency.[51] There are two types of imperfectly competitive markets. An oligopoly is a market only a few sellers, each offering a product similar or identical to the others. Monopolistic competition describes a market structure in which there are many firms selling product that are similar but not identical. In a monopolistically competitive market, each firm has a monopoly over the product it makes, but many other firms make similar products that compete for the same costumers.[52] Monopolistic competition exists when there are a number of sellers of similar goods or services, but the products are differentiated and each product is available only from the firm that produces it.[53] So firms have some control over their prices.

3.2.2 Monopoly and Oligopoly

A firm is a monopoly if it is the only seller of that product and if the product does not have close substitutes. The primary cause of monopoly is barriers to entry. Most of the times a

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49 CASE, Karl. E and FAIR, Ray. C, Principles of Economics, Pearson Education Inc, India, 6th Edition, 2002, p.135.
50 DOYLE (2002), p.8.
51 CASE and FAIR, p.263.
52 MANKIW, p.350.
53 Ibid, p.9.

monopoly remain to be the sole seller in the market if other firms cannot enter the market and compete with the monopoly.[54]

In a media industrial monopoly, a single firm dominates. The basic cable television franchise and the single-community daily newspaper provide two examples of media monopoly. To take advantage of this power and exploit economies of larger scale operation, cable television and newspaper corporations collect their monopolies under one institutional umbrella.[55]

Most of the times a monopoly don't care about providing a better quality and cheaper prices because they don't have to. This kind of behaviour is too familiar to any cable television provider. In some countries there is one local jurisdiction for the region. If one does not like the lone cable television corporation's offerings and prices, then the choices are to not subscribe or to move. In some other countries there is only one cable television company for all regions. The monopoly cable company has little incentive to keep prices down or to offer high-quality service.

In an oligopoly a handful of firms dominate. As a result, the actions of any seller in the market can have a large impact on the profits of all the other sellers. That is, oligopolistic firms are interdependent in a way that competitive firms are not.[56] The examples of these are almost similar in all European countries and they are: the TV networks, music record labels and the major film studios.

An oligopoly sees its small number of firms operate in reaction to each other. The metaphor is a poker game with five or six players. Each player knows a great deal about what the other is up to, but does not possess perfect knowledge.[57] Take the case of the dominant over-the-air TV networks. When one offers a new comedy at a particular time on a particular day, its rivals offer counter programs. This leads to some experimentation, although all too often it means only a numbing generic sameness where like programs (e.g., comedies, dramas, or soap operas) face off against each other.

Economists have a great deal of trouble modelling oligopolistic behaviour. The outcomes of oligopolistic corporate interplay depend on how many firms there are, how big they are in

54 MANKIW, p.316.
55 GOMERY, p.193.
56 MANKIW, p.350.
57 GOMERY, p.194.

relationship to each other, past corporate histories, and sometimes the whims of individual owners.[58] Analyzing a purely competitive situation is easier. A firm then can only operate myopically in its best interest. Formulating corporate action in response to hundreds of other rivals is too costly and makes no sense in a world of profit maximization.

Oligopoly is the most common type of market structure that media firms operate in. The media is dominated by a few large firms mostly because of the falling costs due to the economies of large-scale production.[59] Economies of scale are prevalent in the media because the industry is characterized by high initial production costs and low marginal reproduction and distribution costs. Economies of scope, economies achieved through multi-product production, are also commonly characteristic of media enterprises.[60] So there are major advantages in large size for firms that operate in the media industry.

3.2.3 Workable Competition

In the model of 'perfect competition' there are many buyers and sellers of the product, the quantity of products bought by any buyer or sold by any seller is so small relative to the total quantity traded that changes in these quantities leave market prices unchanged, the product is homogeneous, all buyers and sellers have perfect information and there is both free entry and exit out of the market. Since 'perfect competition' does not exist in reality, the concept of 'workable competition' has been developed in search of for competitive outcomes in the absence of perfect competition.[61]

In a speech before the European Parliament[62], Hans von der Groeben described workable competition. According to the Commissioner, 'workable competition' means practically active, effective competition. Therefore, it is especially essential that the entry to the concerned market stays open, that the movement of supply and demand reflects itself in price, that production and sales are not artificially restricted and the freedom of action and freedom of choice of suppliers, buyers and consumers is not challenged. Moreover, competition policy

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58 Ibid.

59 MANKIW, p.350.

60 Ibid.

61 AKMAN, Pınar, Searching for the Long-Lost Soul of Article 82EC, CCP Working Paper 07-5, March 2007, p.9.

62 'Competition Policy as Part of the Economic Policy in the Common Market' Speech of Hans von der Groeben before the European Parliament in Strasbourg on 16 June 1965).

is not pursued as the goal itself, but rather in order to reach the maximum possible productivity, fulfilment of demand, wealth and economic freedom for all people in the Common Market. Furthermore, competition provides a basis for a division of income and fortune commensurate with social justice that must be completed with an effective social and income policy.

3.3 Market Definition

In *Continental Can*[63], the ECJ insisted on the Commission analysing a firm's market power in two steps: first, it should define the relevant market and give reasons for its selection. Then it should assess the firm's dominance therein. This has been accepted by Commission and Courts.

The relevant market has two dimensions: the product or service and the geographical area effected.[64] There may be substitutes that are not perfect; in which case selecting a narrow definition will overstate the market power of a firm supplying a large proportion of the defined product. It may not be able to raise prices above the competitive level without losing too many sales for it to be profitable. A wide definition will usually indicate a smaller market share which understates the firm's market power. Market definitions are often subjective and should not determine whether the firm has market power but they do focus attention on the factors relevant to evaluate market power.

3.3.1 Defining Media Markets

Market definition is primarily an analytical tool to help identify, in a systematic way, the competitive constraints faced by an undertaking. The purpose of defining the relevant market is that of identifying those products (in which we include services) whose suppliers are capable of exerting effective competitive pressures on each other and of constraining each other's behaviour.[65]

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63 Case C-6/72.

64 KORAH, Valentine, An Introductory Guide to EC Competition Law and Practice, Hart Publishing, Oxford, 8th edition, 2004, p.95.

65 Commission Report, Competition Studies-1, Nov. 2002, p.10.

One should bear in mind that competition law[66] is essentially articulated around two concepts, anticompetitive agreements on a given market and creation, reinforcement or abuse of a dominant position, whether by legal means (*e.g.* mergers and acquisitions) or illegal ones (abuses to eliminate or weaken competitors). In both cases, the starting point of the analysis is, by definition, the identification of the market on which such dominant position would be held.

It therefore appears that no competition law analysis may be carried out independently from market definition. This is actually all the more true in cases where the market power of the undertaking at stake determines the outcome of the case. In this respect, it should be recalled that under competition law, the same behaviour may be authorised when set up by a company that has limited influence on the market, while it will be considered as an infringement when it emanates from a dominant undertaking.[67]

In the same way, the EU legal regime for mergers is articulated around the concept of dominance: the concentrations that shall be authorised by the European Commission are those that do not lead to the strengthening or creation of a dominant position.

Legal certainty for undertakings thus requires predicting where they stand in a given sector, and whether they, and other companies that provide complementary or related services, may be considered to be acting on the same market.

The role of market definition in competition investigations was outlined in the judgment of the Court of First Instance in the *Volkswagen AG* case[68] (paragraph 230):[69]

"For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been

66 Except as regards state aids, which pertain to a different logic and appreciation and therefore use a distinctive set of criteria and methodology.

67 European Commission, Competition Studies-2, Market Definition in the Media Sector, Comparative Legal Analysis, Report by Bird & Bird for the European Commission, Directorate-General for Competition, Information, Communication and Multimedia, December 2002. p.9.

68 Case C-74/04.

69 Commission Report, Competition Studies-1, Nov. 2002, p.104.

defined. On the other hand, for the purposes of applying Article 85, the reason for defining the relevant market, if at all, is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market."

Nonetheless, some authors have argued that an explicit stage of market definition, framed in terms of the hypothetical monopolist test, is inappropriate in new economy or media cases. From an economic perspective, an open stage of market definition is and remains a valuable tool even in complex or fast-changing media markets.

A key benefit of market definition as part of an economic analysis of competition is that it helps structure the analysis and identifies the right questions to consider when assessing the competitive constraints an undertaking faces. Furthermore, if a dominant position is found, market definition allows for the exact scope of the dominance to be set out. Where a firm (or a group of firms) supplies multiple services it is insufficient to simply label it as dominant. Instead it needs to be shown to hold a dominant position in the supply of particular products or services.

The report[70] identifies three key steps, which can be addressed as a part of analysis of market definition in media cases. The primary purpose of these steps is to act as a checklist to help discipline the analysis of market definition in media cases.

The first proposed step is to define with precision the products likely to be relevant to the case, based on an analysis of the stages of production and a clear specification of the nature of the trading relationship implied by each product.

The second proposed step is to assess substitutability between products and to apply the hypothetical monopolist test framework to reach possible definitions of relevant markets, making (and stating) assumptions about customer preferences and other factors as may be necessary.

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[70] Commission Report, Competition Studies-1, Nov. 2002.

The third proposed step is to use other evidence, in particular precedents and price evidence, to confirm or refute potential market definitions generated in the second step. The value of this evidence will often be limited in media markets due in particular to rapid change, further emphasising the importance of the second step.

Within that framework, many of the apparent methodological problems in market definition for media cases can simply be addressed by a rigorous and careful application of the traditional market definition framework.

There will remain some practical issues, and in any event a healthy analysis of a complex case inevitably requires significant time and effort. But these facts are an indisputable obstacle to conducting valuable market definition analyses in media cases.

3.3.2 Difficulties to Identify the Market

The identification of the market, which should be carried out prior to any significant move by a company, is not as simple as it may look, particularly in the media sector. The reason is that, media sector is an evolving, converging and politically sensible sector.

Market definition is divided into the so-called product and geographic markets. As the Commission points out, the definition of the product market is the framework within which the Commission applies competition law principles. The market is defined according to both product and geographic factors. As far as the product market is concerned, it is traditionally considered to include *"all those products and/or services which are regarded as interchangeable or substitutable by reason of product characteristics, prices and intended use"*[71].

All products and/or services that could be placed on the market by producers or competitors without significant switching costs and within a reasonable time period need to be included in that definition as well. That definition of the product/service market needs to be read in its geographic dimension, which covers the *"area in which (…) the conditions of competition are*

71 Ibid, p.10.

sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas"[72].

At the EU level, the criteria relied upon to identify product and geographic markets are explained in various EU materials, including in particular the Commission's 1997 Notice on market definition[73]. In practice, both product and geographic markets are explained following the analysis of demand and supply, by looking at the product at stake, its price and intended use. National competition laws also perform that core product/geographic and supply/demand distinction.

From a product standpoint, the market includes all substitutes for a given product or service; it therefore focuses on demand, though supply is also taken into account, albeit at a secondary stage. Demand analysis is essentially focused on the so-called "Hypothetical Monopolist Test", otherwise referred to as the SSNIP test[74] (standing for "Small Significant Non-transitory Increase in Price").

In substance, that test aims at assessing the reactions of consumers in the event that a company would increase its prices by 5-10% over a rather long period of time (about one year and more). Products to which the consumers would switch would therefore be included in the same product market, as they would represent substitutes from the consumer's point of view to the product which became more expensive.

From a geographic standpoint, the market will include the areas to which the customers could switch in the short term to companies included elsewhere at negligible cost (demand) and the barriers to entry that differentiate companies from one area from those located outside of it (supply).[75]

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72 Ibid, p.10.

73 Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

74 The hypothetical monopolist test is a thought experiment that can be used as a framework for defining relevant markets. The test effectively seeks to abstract from "within-market" rivalry (by assuming a hypothetical monopolist) in order to assess the scope for competition "between markets". In other words, the hypothetical monopolist test seeks to bring together evidence on demand- and supply-side substitutability into a single framework for defining the relevant market.

75 Commission Report, Competition Studies-1, Nov. 2002, p.11.

The practical implementation of these two sets of tests, which may already seem rather delicate to apply to traditional consumer goods industries, raises specific issues in the present media environment, due to the intangible nature of the services at stake and to their considerable current evolution, though at a pace which is particularly difficult to predict in advance.[76]

The above-mentioned example of the ISP and the TV broadcaster offers a classic illustration of the difficulties of defining market boundaries in such an evolving sector. The same issue would arise concerning the on-line distribution of music and the classical "brick and mortar" distribution system. The accuracy of a substitutability test and the necessity to properly identify dominance is all the more important in light of the issue of upstream access to content. Indeed, different forms of transmission will ultimately require access to analogous contents, the prices of which on the other hand seem to be rising significantly, particularly as regards premium content.

Furthermore, that field of activity is currently going through an important concentration phase, in this manner creating competition concerns. It thus appears that content is potentially becoming an upstream bottleneck for the players in the media environment, the access to which should be adequately regulated by competition law. For that purpose, a proper analysis of the market, the players thereon and their relationships (whether vertical or horizontal) is necessary.

Finally, the global coherent application of these criteria is particularly difficult to achieve considering the number of rules applied and institutions involved. Indeed, besides competition law, media is governed by specific sets of rules, which are at the boundaries with fundamental liberties, cultural protection and public service, and which must now be applied in the context of an important economic recession which has hit the media sector over the last year. These sets of rules coexist with competition law, which fully applies to the media sector.

The diversity of the legal frameworks (competition together with sector focused and coexistence of national and EU rules) is echoed by the number of institutions that are involved in the media market definition process. DG Competition of the EU Commission intervenes at

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[76] Ibid.

the supra-national level, for competition cases which have a pan-European (or at least a cross-country) effect, while DG Education and Culture intervenes on the regulatory side. At the national level, jurisdiction in the media environment is split between the National Competition Authorities (NCA's), which apply national and EU competition rules, and the National Regulatory Authorities (NRA's); while the former deal with competition cases, the latter are usually involved in "purely media related" matters; besides, most national systems provide for a cooperation framework between these institutions.

3.3.3 Definition of the Relevant Products

It is better to state that markets definition should start by identifying the relevant products (which are often services in media cases). However, there have been instances where markets have been defined not at the product or service level but at the firm, business or activity level. Furthermore, there are cases where the analysis could have been assisted by defining markets for relevant services at a different level of the supply chain, or defining markets for less obvious forms of trade.

Basing media market definition on a clear specification of the relevant services has several advantages that are explained in the Commission Report[77].

First, firms compete in the provision of services rather than in the undertaking of business activities. While there may be strong interdependency between different services (e.g. advertising and reader/viewer acquisition) this does not call for markets to be defined at the firm or activity level. Markets should be defined with reference to the services relevant to the competitive assessment required; this calls for identification of the relevant services.

Second, analysis of market definition must take care not to make unnecessary generalisations. The risk can be reduced by defining specific services from the outset. Even if products *A* and *B* seem very similar, it is preferable to start by defining the relevant services of the supply of *A* and the supply of *B* and then combine these to a single market if substitutability analysis dictates, rather than just considering the extent of the relevant market for *A* and *B*, which implicitly assumes away differences in competitive conditions between *A* and *B*.

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[77] Commission Report, Competition Studies-1, Nov. 2002, p.80-81.

Third, media markets often involve complex supply chains. If competition analysis is to be based on competitive conditions and behaviour at a certain level of the supply chain, then it is important that a relevant market is defined at this level. Otherwise competitive assessment may be undertaken with reference to an implicit market definition that is subject to less scrutiny. A clear specification of the relevant services should avoid this pitfall by identifying for market definition all the relevant services in the supply chain. This may involve the specification of an access service which is not currently provided.

Fourth, competition can take place in the supply of free content and other services. Since it may be appropriate to define markets in order to assess such competition, it is necessary to begin market definition with reference to the services a firm supplies, regardless of whether this concerns monetary exchange, rather than according to business activities that can be associated with revenue streams.

3.3.4 The Structure of Media Markets

The complex nature of media industries often leads to rich and intricate structures for relevant markets which may appear to make the market definition a complicated task. Key features associated with relevant markets in the media sector are summarised below.

Competition takes place in the supply of product and services, rather than in the undertaking of business activities, is that relevant markets must be defined with reference to trade and not undertakings.

Nevertheless, supply-side substitutability sometimes plays an important part in market definition. But it is important to realise that supply-side substitutability does not widen the definition of the market in terms of the products traded within in. Instead, it extends the capacity that is potentially available to supply these markets. Only in cases where all possible suppliers of one product could easily switch to supplying the other and vice versa might it be appropriate to define a single market for products that are not linked by demand-side

substitutability (because in such a case the competitive conditions in the supply of both products would be certain to remain the same).[78]

Despite the above, markets sometimes need to be defined to cover products in which there is no actual trade. This requires an assessment of the way in which competitive constraints could operate if there were to be trade in these products. The case of gateways and bundling demonstrate the importance of defining these markets and recognising any dominant position that might be held in them: refusal to give access to an upstream gateway, or to supply "must-have" goods in unbundled form, may be an anticompetitive abuse, but such abuse is abuse of a market in which there is no actual trade.[79]

Media industries are characterised by complex chains of production, with trade taking place at a variety of levels. The definition of markets at different levels in these chains may differ markedly, and many potential anti-competitive effects involve leveraging across the chain of production. As a result, if there is a suspected distortion of competition in one market or at one level of the supply chain, the most relevant market to be defined may be at a different level in the chain.

Market definition (in any sector) is not an exercise in parcelling out the space of possible trades into relevant markets within which competition occurs (or fails to occur) and between which there are no important constraints.[80] In fact, relevant markets can have a complex structure and overlap in many ways. The example of bundling shows how relevant markets may need to be defined to contain the bundle and one component, and the bundle and another component, even if these two components cannot be placed in the same relevant market. For example, a relevant market may be defined for the supply of a bundle of pay-television and telephony which includes the supply of standalone pay-television services, but at the same there may be other relevant markets for the supply of pay-television in unbundled form, or the supply of telephony services in unbundled form.[81] In order to recognise market power where it may exist, the potential for dominance needs to be assessed in each of the markets comprising the relevant products.

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78 Ibid. p.105
79 Ibid.
80 Ibid.
81 Ibid.

Similarly, the existence of apparent chains of substitutability does not mean that a broad market can be defined for all substitutes, even if each individual link of each chain is robust. Markets for specific content with few effective substitutes, such as music or literature, may be defined by relatively small clusters of similar products, and apparent chains of substitution do not automatically allow markets to be extended to match genres into which products can be pigeonholed.[82]

4) BROADCASTING POLICY IN THE EU

4.1 History of Broadcasting Policy in the EU

Broadcasting in the EU was not harmonised until the late 1980s. When the Treaty of Rome was first prepared, the contracting countries did not consider broadcasting as a part of the freedoms or market forces within the Member States' legal regimes. Until the Television without Frontiers Directive (1989) neither the primary nor the secondary legislation of the Community law covered the broadcasting. But even before that, Community institutions and especially European Court of Justice faced problems about cross-border broadcasting. In the absence of specific secondary legislation, most of those of cases were solved on the basis of Article 49 of EC Treaty.[83] Harmonisation of the Broadcasting legislation was left behind because of some technical and economic aspects. Even now, there is discussion over the extend to which broadcasting falls into the Community's competence and which aspects remain for the Member States to regulate.

Maastricht Treaty created an express Community competence for culture by inserting Title IX 'culture' (now Title XII) into the EC Treaty, so this problem became regulated by primary law.[84] The Community's contribution to the Member States' culture is, according to Article 128(5) (now Article 151) limited to the adoption of 'incentive measures excluding any harmonisation of the laws and regulations of the Member States'. Hence, this provision excludes a Community competence to harmonise the cultural aspects of broadcasting. However, since Article 128 (now 151) provides in paragraph 4 that 'the Community

82 Ibid.
83 NITSCHE, p.15.
84 Ibid.

competence to harmonise the cultural aspects into account in its action under other provisions of the Treaty', media regulation can be based on the freedom to provide services or freedom of establishment.

Initiatives in this sector often take the form of 'soft law', in particular, recommendations and notices. In addition to soft law measures, one needs to mention the first and the most important directive which is Television without Frontiers. This directive harmonises some issues on transnational broadcasting, most notably the question of who has jurisdiction over a given situation, in order to avoid more than one Member State having the competence to regulate a certain trans-border transmission.

4.2 Context of Broadcasting Policy in the EU

Television has experienced a quite similar although not simultaneous evolution in both Western and Eastern Europe. During last fifty years, television has gone through a process of constant commercialisation. In Europe, broadcasting was controlled by only the State for more than half a century. Broadcasting evolved only in the last two to three decades into a dual system, composed of a public sector increasingly competing, often becoming the weaker side, with commercial broadcasters in private ownership. In Central and Eastern European nations, the end of the monopoly of the State over broadcasting came only in the early 1990s, and was started by the collapse of communist regimes throughout the region.[85] Once it began, the whole process was much faster than in Western Europe. What came as a surprise to many was the massive invasion of Western capital into the television industry, often relegating domestic players to the margins of the markets.

4.2.1 Western models

During the first phase of television in Western Europe, the philosophy was based on a combination of cultural paternalism, public service values and administrative logic prevailed over broadcasting.[86] The national enterprise was in charge of promoting culture and education and the propagation of controlled political information.

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85 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.33.
86 Ibid.

In the UK, television has always had a central position in policy-making. There was a general consensus on the role of television in society and also a general acceptance of broadcasting independence as a key principle in shaping the television system. The Reithian[87] motto "to inform, to educate and to entertain" became the cornerstone of broadcasting "philosophy" in the UK and remains a touchstone for public service values up to the present day. Until 1982 the only two broadcasters on the UK market were the BBC and the ITV network, which commenced broadcasting in 1936 and 1955 respectively. Both were subject to public service obligations. The UK system was totally reformed in 1990, when new legislation strengthened competition.

The BBC was the model for the recreation of Western German broadcasting after WWII. The German public service broadcaster departs from the BBC model in that the governing bodies of German broadcasters comprise not a small group of "the great and the good" chosen by Government, but of representatives of important interest groups from within society. For the post authoritarian countries in Central and Eastern Europe, this model of including civil society and political groups in broadcasting governance was highly significant. The monopoly of public service broadcasting ended in 1982 when, after much lobbying from the industry, the conservative Government liberalised the broadcasting market and permitted private broadcasters to operate by allowing the establishment of the dual broadcasting system.[88]

The concept in France was based on political control and cultural ambition until 1968. The State monopoly on French broadcasting ended in 1982, when private players were allowed on the market. However, the State still plays an important role in the regulation of broadcasting.[89]

Italian broadcasting is a special case of which allows the involvement of politicians in the regulation of broadcasting and especially in the State-owned broadcasting channel RAI. Commercial television emerged in the 1970s in a totally unregulated marketplace.[90] In the mid-1990s, commercial television helped propel to political power the northern Italian

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87 The BBC's founding principles were established by Lord Reith. The BBC's public service obligation and its licence fee funding are both legacies of Reith.

88 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.33.

89 Ibid.

90 Ibid.

entrepreneur Silvio Berlusconi, who, as Italy's Prime Minister, has enjoyed a great power over commercial and public service television in recent years that has no precedent in any developed European democracy.

4.2.2 Eastern Models

During communism, in all Central and Eastern European countries television was used as the representative of the single ruling party, and usually served to worship the countries' authoritarian leaders. After the collapse of communism in 1989-1990, a new period started for broadcasting in the region. Its restructuring followed the development of television in Western Europe. In the early 1990s, post-communist governments started to open the market to private players, while at the same time taking steps to transform the state broadcaster into something more independent. Private broadcasters pursued all commercial gains quickly and this situation outperformed the State broadcasters, which were mostly reluctant or unable to keep up. Altogether, the degree of success of reforms in the broadcasting sector obviously mirrored the overall pace of transformation in each of the countries.

In the early 1990s, many post-communist countries experienced "media wars" between political elites and journalistic communities over the control of media. In Hungary, for example, ever since the political change of 1989-1990, the country's media landscape has been the front of such a conflict between political elites and journalists over what the proper function of the media in a pluralistic and open society should be.[91]

In most of the post-communist countries, the changes in the television sector created a chaos, without any clear policy or legal frameworks in place, which led to an explosion of unlicensed broadcasting outlets.[92] In Poland, for example, by early 1993 there were 57 illegal television broadcasters.[93] Between 1993 and 1997, the major nationwide television broadcasters were licensed. Despite a late start in liberalising its broadcasting market, Albania enjoyed speedy growth in the sector. However, this process took place in a chaotic and lawless context, with

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91 Ibid. p.34.

92 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.34.

93 HENDRIKSE, Wouter and HALBERG, Grazyna Maria Lukasik, The Polish TV Media Industry – EU Implications: A Case Study of the MTV Mastiff Group, the Independent Television Content Producer, International Business Master Thesis No 2005:10, School of Economics and Commercial Law, Göteborg University, printed by: Elandrs Novum AB, p.37.

no regulation in place. The Radio Television of Albania was monopolistic until 1995, and then the private station TV Shijak started operating.

Slovakia was quick in formally converting its State broadcasters into public service operators. By 1991, both Slovak Television and Slovak Radio formally became public service broadcasters, and in the early 1990s six private television operators were able to take license.[94] In the Czech Republic, the first commercial television station that broke the monopoly of the State broadcaster was TV Nova. Unlike its Central European peers, such as former Czechoslovakia and Poland, Hungary was slow in passing broadcasting legislation, which was first enforced only in 1996. Liberalisation of the market was also late in Hungary, with the first private television operators being licensed in 1997.

In Bulgaria, with the entrance on the market in the mid-1990s of two national television stations, bTV and Nova TV, television became a competitive industry, and Bulgarian National Television lost its dominance. bTV is owned by Balkan News Corporation, a company belonging to the transnational media entrepreneur Robert Murdoch. In Romania, foreign and local private investors opened stations in the country between 1993 and 1998, turning broadcasting into a energetic industry and obliging the State broadcaster to overhaul its operations several times to catch up with the competition.

In the Baltic countries, Lithuania already allowed private broadcasters to operate in 1992. By 1996 the restructuring of the former State broadcaster into a public service station had been completed. Estonia started the liberalisation of the television sector in the 1990s, and managed to formally finish the transformation of State television broadcaster into a public service broadcaster by 1994. The liberalisation process was somewhat slower in Latvia, where the first private broadcaster, LNT, started to operate only in 1996, which challenged the dominance of the public LTV.

Turkish television was dominated for more than twenty years by the State broadcaster, which was granted the country's sole licence in 1964 and enjoyed a monopoly until 1990. In 1990, first privately owned television station, unlawfully started to air to Turkey from the Federal

94 FRANZKE, J., Slovak Telecom Administration Transformation and Regulation in a Dynamic Market, Universitat Potsdam, Heft 6 (2005), p.4.

Republic of Germany. Other stations followed this unlawful attempt. The official end of the State monopoly in broadcasting took place in 1993.

4.3 EC Competition Law and Audiovisual Policy

Digital technologies bring major changes in the audiovisual sector. According to the Communication of 14 December 1999[95], the growth of the audiovisual sector through the development of digital technology will bring with it economic growth and the potential creation of jobs. It is important for the legislative framework to maximise this growth and potential. In view of the social and cultural role of audio-visual media, this legislative framework must at the same time protect the general interest, which has been on the basis of audiovisual policy regulation since its inception. More specifically, this regulation protects the general interest by basing itself on such principles as freedom of expression and the right of reply, pluralism, protection for authors and their works, promotion of cultural and linguistic diversity, the protection of minors and human dignity, and consumer protection.

The European Community's audiovisual policy has incorporated these principles and common objectives, particularly the freedom to provide services and support for the industry. More specifically:

i. the "Television without Frontiers" Directive established a legal framework ensuring the freedom to provide television broadcasting services in the Community, taking due account of certain general interests; [96]

ii. the Media I, Media II, Media Plus, Media Plus Training and Media 2007 programmes complemented and built on action by Member States by supporting training, project development and the distribution of European works.[97]

Although these principles and objectives still form the hard core of audiovisual policy, developments in the sector call for the regulation of audiovisual content to be defined more closely.

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95 Communication of 14 December 1999 from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and guidelines for the Community's audiovisual policy in the digital age (COM 1999) 657 final – Not published in the Official Journal)

96 See section 3.5.6 for details

97 See section 3.3.2 for details

The regulation of audiovisual content must be guided by the principles arising from numerous consultative and analytical exercises. The principles of proportionality and the separation of transport and content regulation, general interest objectives, recognition of the role of public service broadcasting, self-regulation and regulatory authorities are the basic principles according to which the Commission intends to carry out its regulatory activities.

To the extent that audio-visual sector has a commercial function, but according to ECJ, broadcasting qualifies 'by its nature' as a service and triggers the application of internal market and competition rules. One should keep in mind that competition rules need to be interpreted in the wider context of the Treaty. For this purposes article 151(4) of the Treaty is most relevant. It obliges the Community to take cultural aspects into account in its action under other provisions of the Treaty. Accordingly, to the extent that audiovisual goods and services have an intrinsically cultural value, article 151(4) should play a role both in internal market and in competition law assessments of audiovisual markets.[98] At this point there is a question whether if the requirement that competition law 'takes into account' as strong in the cultural realm as it is in the field of environmental or social policy. This cannot be the case from the moment that cultural policy is regarded as a matter left to Member States (principle of cultural autonomy). Article 151 is therefore a different type of 'policy linking' clause in that audiovisual policy is not a Community policy.

To begin with, there is no specific allocation of the EU competence in the audiovisual field. Nor is there any reference to audiovisual policy. A few provisions that generally refer to 'culture' in its widest sense come closest to this. Article 151 has been interpreted more as a reminder to the Community of member state sovereignty than as supporting Community action.[99] Indeed, it seems more of a response to the fear of expansion of Community powers in the audiovisual field.[100] As a result, the scope for Community action on the basis of the current legal framework appears to be considerably more restricted in the field of culture than in other fields of policy. Tensions arise between the interest of national media companies to

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98 This has been sanctioned by the Court of Justice. For instance, in a reference for preliminary ruling in *Familiapress*, the ECJ accepted restrictions to the free movement of goods to guarantee the pluralism in the press. Case C-368/95, *Vereinigte Familiapress Zeitungsverlagsund vertriebs GmbH v. Heinrich Bauer Verlag*, [1997] ECR I-03689.

99 ARINO, p.105.

100 Article 151 limits these powers to 'supporting and supplementing' excluding 'any harmonisation of the laws and regulations of the MS'.

compete on a global scale and the reluctance of member state governments to hand control over audiovisual policy over to Brussels.

Despite the relatively limited scope for supranational action in the audio-visual sector, regional institutions have effectively played a significant role in developing a 'European media policy'. Various Treaty objectives have indirectly served as a primary motor for regulatory change (these include the establishment and functioning of a common market for goods and services[101], external trade policy and industrial policy[102]). Competition policy and state aid policy have proved no exception to this rule. In today's digital and convergent media environment the number of EU regulations that directly or indirectly affect broadcasting has increased substantially. Two factors can be cited to explain this trend:

i. EU competence in related areas has been used to leverage power into broadcasting. By means of telecommunications liberalisation, broadcasting networks have been regulated, along with the associated technical facilities upon which the provision of audiovisual services depends. This has become more apparent under the new regulatory framework for electronic communications. In the area of intellectual property rights, there has also been extensive harmonisation, which has affected the broadcasting sector.[103] Content remains relatively untouched, but competition law has also justified intervention in that area. All these initiatives limit the capacity of to regulate on broadcasting issues.

ii. The second factor is related to the diminished capability of national authorities to deal with cross-national and cross-sectoral developments. Cross-media empires developed by companies like News Corporation, Vivendi, Time Warner, Bertelsmann and Telefonica pose a threat to pluralism and potentially to competition as well, but this threat cannot be fully addressed on a sector-specific basis or within individual legal jurisdictions.

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101 Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in MS concerning the pursuit of television broadcasting activities [1989] OJ L 298/23, as amended by Directive 97/36/EC [1997] L 202/60, *Television Without Frontiers Directive (TVWF).*

102 E.g. The 'MEDIA Programmes' and the Eurimages Fund provide practical support to the industry.

103 For example, Directive 93/83/EC aims to coordinate certain rules concerning copyright in satellite broadcasting and cable retransmission.

While the distribution of competences over broadcasting still remains unclear and highly controversial, the leading role of the Community not only in shaping national audiovisual policies, but also in developing a 'European' media policy must be accredited.

The distinctive allocation of competences for broadcasting narrows the margin of the discretion exercised by the EU competition authorities in their assessment of non-economic considerations in media cases. The challenge is striking a balance between competition and media specific concerns. Difficulties emerge in cases which do not involve choosing one or the other, but rather the extent to which one can be sacrificed at the expense of the other (situations where efficiency is enhanced at the expense of pluralism, or where competition is restricted to the benefit of pluralism). In such situations, competition authorities face a trade-off between, for instance, achieving a first best solution from a competition view point, or a second best solution that protects or enhances pluralism. Although such ambiguous cases are the exception rather than the rule, it is precisely in these situations where democratic concerns arise.

4.3.1 Different Approaches within the Commission

The EU broadcasting and audio-visual policy is contradictory and fragmented so it is useful to outline different approaches within the Commission services. Several DGs (directorate generals) are involved in the audio-visual sector, namely, former DG III (Industrial Affairs), DG IV (Competition), DG X (Audio-Visuals, Communication and Culture) and DG XIII (Telecommunication Industries and Innovation). DG III was the lead directorate for the Community's most striking innovation in the media field, the 'Television without Frontiers' Directive. DG IV's competition policy has a deep impact on the audio-visual sector. DG XIII is concerned with the 'hardware' of broadcasting, dealing with different means of telecommunication (including satellites and television standards). Finally DG X has a special responsibility for the audio-visual industries and hosts the MEDIA programs. In particular, DG X's audio-visual policy takes the industrial policy viewpoint, with MEDIA I and II and the new MEDIA plus program providing for a framework designed to assist the European audio-visual industries. These ideological differences are mirrored in the market-oriented DGs III and IV can also be drawn along the north-south divide: normally the UK agrees with

Ireland and the Netherlands, sometimes also with Germany, whereas France and Greece are usually to be found at the other end of the policy spectrum.[104]

The difference between 'dirigists' vs. neo-liberal and diversity vs. unity is also expressed in the terminology used. In the mid-nineteen eighties, Community documents started to differentiate between broadcasting and audio-visual policy. From 1986 onwards, those who viewed the creation of a single market as the major priority sailed under the banner of 'broadcasting policy', whereas those who sought the protection of the European film and video production industry chose 'audio-visual' as their motto. Usually, the European Parliament's Hahn-Report[105] is quoted as the birth of community broadcasting policy, and it advocated the use of television as a tool for European unification.[106] Existing Community policy stresses the diversity throughout Europe, which is mainly a consequence of failing to successfully introduce transnational broadcasting in the 1980's.

4.3.2 The MEDIA Programs

During the 1980s, the European Parliament and the Commission had proposed some measures to support the European audio-visual sector. These initiatives resulted in the MEDIA (Measures to Encourage the Development of the Industry of Audio-Visual Production) program, which started its pilot phrase in 1986. The Council decided to support MEDIA[107], which reflects the interventionist assumption that structural change in the European market was required to enable European producers to achieve 'economies of scale'.[108] The pilot stage lasted from 1988 to 1990.

After the pilot stage, the Council adopted a new decision… which includes a five year action program to promote the development of the European audio-visual industry, starting on 1 January 1991. The funding of the program was ECU 200 million as a whole and ECU 84 million for the years 1991 and 1992.

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104 NITSCHE, p.47.

105 Report on Radio and Television Broadcasting in the Community on behalf of the Committee on Youth, Culture, Education and Sport (The Hahn Resolution) PE Document 1-1013/81.

106 NITSCHE, p.48.

107 Decision 90/38/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry (media) (1991-1995), OJ L 137, 20.5.1992.

108 NITSCHE, p. 49.

With a view to continuing the action undertaken by the MEDIA programme, which aimed to encourage the development and distribution of European audio-visual works during five year period (1991-1995), the Commission has adopted a new programme (MEDIA II)[109] to strengthen the European program industry, covering the period from 1 January 1996 to 31 December 2000.

The reference amount for implementation of the program is ECU 310 million and the MEDIA II programme lasted between 1996 and 2000.

In addition to the Member States of the European Union, MEDIA II will be open to countries that have concluded cooperation agreements containing audiovisual clauses and to countries that are members of the European Economic Area (EEA).

After two years and six months of implementation of the programme, the Commission will present an evaluation report to the European Parliament, the Council and the Economic and Social Committee, accompanied, if necessary, by proposals for adjustment.

The Media Plus programme[110] came after the MEDIA (1991-1995) and MEDIA II (1996-2000) programmes. The MEDIA Plus - Development, Distribution and Promotion programme has a budget of 350 million euros for the period from 1 January 2001 to 31 December 2005.

The programme's general objectives are: to improve the competitiveness of businesses in the European Union, in particular small and medium-sized enterprises; to support the transnational movement of European works and to promote linguistic and cultural diversity in Europe. It also promotes the enhancement of Europe's audiovisual heritage, the development of the audiovisual industry in regions with a low production capacity and/or a restricted geographical or linguistic area, and the use of new technologies.

The MEDIA Plus Training programme[111] has a budget of EUR 50 million for the period from 1 January 2001 to 31 December 2005. By Decision 2004/845/EC, the programme was

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109 Council Decision 90/685/EEC of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (media) (1991-1995).
110 Council Decision 95/563/EC of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II – Development and distribution) (1996-2000).

extended up to 2006. The MEDIA Plus-Training budget thus rose from 50 to 59.4 million euros to allow for the impact of the EU's enlargement.

The aim of the programme is to improve further vocational training for professionals in the audiovisual sector in order to improve the competitiveness of the European industry in this field. The main objectives are to: improve knowledge in the area of new technologies for the production and distribution of audiovisual programmes; teach business, management and legal skills; promote script-writing and narration techniques.

Online training, innovative teaching methods and cooperation between the various operators in the audiovisual industry are encouraged. Exceptionally, initial training involving the industrial sector will be able to receive support if it does not receive any other Community or national funding.

The programme is open to operators from the Member States of the European Union and, according to the agreements in force with these countries, the associated countries of central and Eastern Europe, Cyprus, Turkey, Malta, the members of the European Free Trade Association and the countries which have signed the European Convention on Transfrontier Television. Third countries from Europe and elsewhere may also apply to take part in the programme.

With its MEDIA 2007 programme[112], the Commission intends to continue the EU action taken in the MEDIA I , MEDIA II , MEDIA Plus and MEDIA Training programmes, which have encouraged the development of Europe's audiovisual industry since 1991. The total amount available for this programme is approximately 755 million.

MEDIA 2007 is established for the period from 1 January 2007 to 31 December 2013. The global objectives of the programme are to: preserve and enhance Europe's cultural and linguistic diversity and its cinema and audiovisual heritage, guarantee public access to it and promote intercultural dialogue; increase the circulation and audience of European audiovisual

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[111] Council Decision 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus – Development, Distribution and Promotion) (2001-2005).

[112] Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of the Programme of support for the European Audiovisual sector (MEDIA 2007).

works inside and outside the European Union; boost the competitiveness of the European audiovisual sector in an open and competitive market that is propitious to employment.

4.4 Broadcasting Regulatory Bodies

Broadcasting Regulatory Bodies have different tasks in different Member States but they can summarize as follows: First of all they have regulatory tasks which includes licensing of broadcasting and monitoring, based on legislation and/or the licence contract. Secondly, they have enforcement and sanctioning powers. They also have some specific tasks, such as appointing management bodies of the public service broadcasters. They work for development of media policy and legislative proposals. And lastly, they assign frequencies.

The regulatory bodies' tasks can also be divided in terms of whom they regulate. They regulate: Terrestrial (national/regional/local), cable and/or satellite broadcasters; Public/private broadcasters; Common tasks for all broadcasters, for example, monitoring broadcasters' compliance with legislation, and developing media policy; Specific tasks for private broadcasters, for example, licensing and controlling ownership limits; Specific tasks for public broadcasters, for example, appointing management bodies.

Unlike the print media, broadcasting is heavily regulated. During its early stages, broadcasting was directly influenced and regulated by the State. However, with private players entering the television market, a more complex system of regulation, often called deregulation, was put in place. It took essentially two forms: one was a loosening of political control, and the other one was the opening up of the frequency spectrum to commercial broadcasters, without imposing a public service remit on them (with few exceptions), as is obliged on the public service broadcasters.

The top priority of the broadcasting regulators is monitoring media ownership and promoting competition appear in some cases. In many Member States broadcasting regulators are trying to raise their profile in the media policymaking process, proactively contributing to the initiation of legislation in this field. However, in some countries, especially transition in states, they are not yet a decisive or influential factor in media policy.[113]

[113] Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.45.

With the exception of Germany and Lithuania, where there are separate regulatory authorities for public service broadcasters and private broadcasters, regulatory authorities are commonly in charge of licensing and monitoring both public and private stations.[114] In Bulgaria, Latvia, Poland, Serbia, Estonia and France, the broadcasting councils also appoint some of the managing bodies of the public service broadcasters.[115]

4.5 The Legal Framework

4.5.1 Primary and Secondary Level Legislation

Rules found in the Treaty establishing the European Community are known as "primary level" legislation. The EU has considerable ability to direct its member States' legislation and policy with respect to the economic aspects of broadcasting. In this regard, the EU can take action to foster freedom in the provision of services and to uphold the "right of establishment". Furthermore, the EC Treaty's competition rules enable the European Commission to regulate concentration processes, and state aids, including those in the broadcasting industry. For the EU members, if the question arises whether a broadcaster is applying restrictive practices or is abusing a dominant position, the EC Treaty will be relevant. It also provides the legal basis to examine whether the funding of public service broadcasters through licence fees distorts competition to the disadvantage of private broadcasters, which generate their income by advertising and subscription services.

Concerning the cultural dimension of broadcasting, especially content issues, the regulatory competency of the EU is limited. The EC Treaty article 151 states that *"The Community shall contribute to the flowering of the cultures of the member States it shall take cultural aspects into account in its actions under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."*

However, this same article also explicitly excludes harmonisation measures in cultural policy at the EU level. In practice, therefore, the EU does not have the competence to interfere directly with broadcasting regulation in Member States insofar as such interference would

[114] Ibid.
[115] Ibid.

affect the content of broadcasts. However, the EU has used nonetheless its powers to prescribe content regulation in some areas, particularly concerning such matters as the protection of minors, in the name of achieving a "single market".

At the level of secondary legislation, the directives, regulations and decisions, the main legal instruments are as follows:
a. the "Television without Frontiers" Directive (TWF Directive);
b. the Cable and Satellite Directive;
c. the Regulatory Framework for Electronic Communication Networks and Services (2002);
d. the EC Merger Regulation

Regarding the aim of this paper, I won't analyze all of the secondary legislation. I'll mention the necessary ones in related chapters.

4.5.2 Competition Law

The EC Merger Regulation is one of the main tools of European anti-monopoly law. In today's consolidating market, its provisions are of some significance to the broadcasting sector.

Like any other industry, the broadcasting sector is governed by international, the EU and national general competition law, which aims to safeguard and foster competition in a free market economy, and intervene only to prevent behaviour that is not based on the rules of a free market. For example, as the broadcasting sector consolidates, mergers between different companies have led to the rise of large (and sometimes huge) media corporations.

Competition law acts to intervene at the point where the size of these companies becomes such as to have a detrimental effect on free and open competition. Competition law has also become highly relevant in the bidding wars that often rage around major sporting events, such as the Olympic Games or major football tournaments: here, such law prevents the formation of bidding cartels. Finally, within Europe, anti-competition law is highly relevant to State subsidies in the media sector insofar as these may distort the free market. From time to time, this point is debated in the context of public service broadcasting and the State subsidies received in that sector.

Indirectly, competition law also has an impact on media plurality. The general assumption is that more broadcasters can operate in a market of undistorted competition, and hence that the range of opinions is likely to increase. General competition law becomes relevant as a means of media ownership control to the extent that certain media mergers must be notified to, and approved by, the competition authorities, and that the law is duly implemented in practice.[116]

4.5.2.1 Non-economic Considerations under Article 81

Media policy concerns are not totally absent from the Commission's competition practice. For instance, the Commission exempted the *Eurovision* system on the basis that European Broadcasting Union (EBU) members provide a broader range of sports programmes, including minority sports and sports programmes with educational, cultural or humanitarian content that could not be shown on their national generalist channels. Considerations of industrial policy can also be traced back to the fact that the Commission considered the interests of small members and organizers of minority sports. Therefore, in its decision the Commission did accord significant weight to non-economic concerns and was particularly attentive to the public mission that characterises most EBU members.[117]

The *UIP* (*United International Pictures*) case[118] is another example of how cultural concerns influenced the Commission decision to grant an exemption. Among other concerns, the agreement risked hindering the European film industry and the Commission used conditions to palliate that risk. In this case a prohibition based solely on cultural concerns would not have been acceptable under competition law. The problem was solved by the Commission through the imposition of remedies to protect the European film production industry.

There are very few (and relatively old) decisions where the Commission has prohibited media agreements under article 81.[119] Especially interesting is the *BBB/VBVB*[120] case that dealt with

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116 Ibid. p. 88.

117 This decision was annulled by the Court of First Instance for whom non-economic considerations *alone* were not enough to exempt the agreement. Joined Cases T-528/93, T- 542/93, T-543/93 and T-546/93 *Métropole Televisión SA and RTI v. Commission* (*'European Broadcasting Union'*) [1996] ECR II-649.

118 Commission decision, *United International Pictures (UIP)* [1989] OJ L 226/25. For an analysis see GYRORY (1996).

119 For the period 1972-2002 there are only 5 decisions: Commission decision WEAFilipacchi Music SA [1972] OJ L 303/52; Commission decision *Miller International Schallplatten GmbH* [1976] OJ L 357/40; Commission

book trade restrictions. The Commission approved an agreement that established a system of collective resale price maintenance for book prices operating across national borders to be a violation of Article 81.1. Although an exemption was declined on the basis that the parties could use less restrictive means to improve the publication and distribution of books, the Commission recognised that cultural policy concerns could affect a decision whether or not to exempt an agreement under article 81.3.

In *Eurovision*, *UIP* and *VBBB/VBVB* an explicit reference was made to non-economic considerations. This should be taken as rather exceptional. In most of its decisions concerning the audiovisual sector, the Commission is silent in this respect or refers to the question indirectly. For instance, in *Screensport/EBU* the Commission accepts that the consumer is better served by being able to make an 'informed choice'.[121] In all events, even when the Commission refers to 'cultural' or 'public policy' concerns, it does so incidentally, and at best uses it as an added justification to grant an exemption, but never to prohibit. Therefore, the occasional reference to culture is ornamental rather than decisive.[122]

4.5.2.2 The Commission's Practice under the Merger Regulation

The Commission's most conspicuous interventions within the audiovisual sector have arisen when it has been called upon to assess ventures and alliances under its merger control rules.[123] Since the Merger Regulation was approved, out of 2,350 concentration cases only 18 have been prohibited in their integrity and 169 have been approved with commitments.[124] Five of the prohibited operations concerned the media sector. The ratio 'operations prohibited/operations examined' is therefore much higher in the media (about 9%) than in other sectors (about 1%). These ratios make people think perhaps the Commission treated

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decision *VBBB-Vereniging Bevordering Belangen Boekhandels/ VBVB-Vereniging Bevordering Vlaamsche* Boekwezen [1981] OJ L 054/36; Commission decision *Screensport/EBU members* [1991] OJ L 063/32 on the purchase of sports broadcasting rights; Commission decision *Auditel* [1993] OJ L 306/50.

120 Commission Decision VBBB-Vereniging Bevordering Belangen Boekhandels/VBVB Vereniging Boverdering Vlaamsche Boekwezen (1981) OJ L 054/36.

121 European Commission decision [1991] OJ L 63/32 at par. 73.

122 The Commission has shown particular lenience when the purpose of the agreement was to create a new platform or introduce a new service. This was the case in BDB (See BDB (On digital), Commission Notice, [1997] OJ C 291/11), in TPS (See Commission decision TPS – Television Par Satellite [1999] OJ L 90/6) and BiB (See Commission decision British Interactive Broadcasting/Open [1999] OJ 312/1).

123 ARINO, p.109.

124 Figures refer to cases notified between September 21st 1990 to December 31st 2003. Source: European Merger Control - Council Regulation 4064/89 – Statistics.

dominance in mergers and joint ventures in the media differently than dominance in other sectors. The Commission appears to be especially vigilant when it comes to media mergers and that, at the margin; they are more likely to be challenged. A few cases can be used to illustrate the Commission's desire to strictly monitor the application competition rules to the media sector.

During the nineties the Commission's position on alliances in digital broadcasting markets was fairly restrictive. The Commission appeared reluctant to 'compromise the prospect of competition, however remote, for the possibility of a rapid launch of new digital pay TV [125]services'. Thus, in *NSD*[126], *HMG*[127], *MSG/Media Service*[128] and its sister case *Premiere*[129], the Commission found the parties to be dominant at various levels of the supply chain and feared market foreclosure. As a result, despite the various undertakings proposed by the parties, it prohibited all three mergers. Note that all arrangements prohibited by the Commission had vertical aspects. They concerned transactions involving either integration between a broadcaster and a content provider or between a broadcaster and an infrastructure provider, or all of the above. Issues of access to content rights, access to proprietary technology and use of networks were prominent in all of the decisions.

By contrast the Commission has favoured horizontal pan-European transactions like *BSkyB/Kirch Pay-TV*[130] or *CLT-UFA*[131]. Similarly, no objections were raised when *Richemont* and *Kirch* jointly took control over the Italian pay-TV market through the acquisition of *Telepiu*[132]. *News International* was permitted to acquire an interest in the German free-to-air channel, *Vox*, because it would not thereby acquire a dominant position in the relevant market, its primary interests being in English language pay-TV and newspapers.[133] What all of these decisions have in common is that the activities of the merging companies took place in different national markets. This avoided any risk of overlap or coordination in broadcasting

125 ARINO, p.109.
126 Commission decision Nordic Satellite Distribution [1995] OJ L 053/20.
127 Commission decision RTL/Veronica/Endemol [1996] OJ L 124/32.
128 Commission decision MSG/Media Service [1994] OJ L 364/1.
129 Commission decision Bertelsmann/Kirch/Premiere [1999] OJ L 053/1.
130 Commission decision BSkyB/Kirch Pay TV [2000] OJ C 110/45.
131 Commission decision Bertelsmann/CLT [1996] OJ C 364/3. Commission decision Bertelsmann/CLT [1996] OJ C 364/3.
132 Commission decision Kirch-Richemont- Telepiu [1994] OJ C 225/3.
133 Commission decision Bertelsmann-News International-Vox [1994] OJ C 274/9.

activities that are normally national or regional in scope, whilst fostering industrial policy goals.

Lately, the tide seems to be turning and the Commission appears to have significantly departed from established policy. It is now more willing to accept vertical mega mergers (such as the merger between *AOL* and *Time Warner*[134], the take over of *Universal* by *Vivendi*[135], or the merger between *Telefónica* and *Endemol*[136]) and to make extensive use of conditions and undertakings. More recently it has even sanctioned the creation of *de facto* monopolies in certain national digital markets. This has been the case in the Italian digital pay-TV market, where after several frustrated attempts to join forces, *News Corporation* and *Vivendi*, finally reached an agreement in October 2002, whereby the Australian media group acquired sole control over *Telepiú* (controlled by *Vivendi Universal*) and *Stream* (jointly controlled by *Newscorp* and *Telecom Italia* on a fifty-fifty basis). The purpose of horizontal concentration was to create a single unified satellite platform (rebranded *Sky Italia*) by combining the business activities of *Telepiú* and *Stream*. *Telecom Italia* would continue to be present via a minority shareholding in *Telepiú.* The Commission's clearance effectively creates a quasi monopoly in the pay-TV market in Italy. The very delicate financial situation faced by both companies seems to have influenced the final decision. The dilemma for the competition authority was 'whether to accept a further "regulated" consolidation through mergers, or to prohibit these mergers and then allow further "unregulated" consolidation as financial losses prompt market exit'.[137]

This operation mirrored one that had taken place in Spain only a few months earlier and that also featured the only two satellite pay-TV platforms and the incumbent telecommunications operator. In May 2002 *Canal Satélite Digital* and *Vía Digital* (indirectly controlled by *Telefónica*) decided, for the third time, to initiate merger proceedings with the view to create a single platform for the provision of satellite digital pay-TV services in Spain[138]. The Spanish competition authority delivered a favourable opinion and imposed 10 conditions. The Council

134 Commission decision *AOL/Time Warner* [2001] OJ L 268/28.

135 Commission decision Vivendi/Canal+/Seagram [2000] OJ C 311/3.

136 Commission decision Telefonica/Endemol [2000] OJ C 235/6.

137 ARINO, p.109.

138 This case had a Community dimension, but was referred to the Spanish authorities in a substantiated decision where the Commission hinted at what direction to take. Case COMP/M.2845 –*Sogecable/Canalsatélite Digital/Vía Digital.*

of Ministers gave the green light to the operation and imposed 24 additional conditions, all of them behavioural. This once again resulted in a quasi monopoly in the Spanish digital pay-TV market.[139]

These are examples of how the Commission has presently given up its determination to promote inter-platform competition, in favour of 'regulated' de facto monopolies within a single platform (intra-platform competition). The Spanish and Italian concentrations may merely constitute the beginning of a wider consolidation trend across Europe.

4.5.3 Sector-specific Media Legislation

Competition law does not regulate content, and it cannot subject operators to rules that aim to promote culturally and linguistically diversified programmes. For these reasons, competition law alone is not considered sufficient to safeguard media pluralism, and has therefore been supplemented by sector-specific media provisions.[140] If competition law alone were to be relied on, the broadcasting sector would be fully open to the free play of market powers. This would incur the risk that only a few strong market players would emerge to dominate the sector and that, therefore, the number and range of broadcast "voices" would be far from optimal, from the point of view of a real pluralism.

Within the EU, the first serious attempts at content regulation of broadcasting came in the early 1980s, as awareness grew of the implications of the serious and increasing audiovisual trade deficit with the United States. In 1984, the European Commission published its Green Paper[141] on the establishment of a common market in broadcasting, in which it outlined its vision for European broadcasting policy.

After the green paper the TWF directive adopted and at the EU level, sector-specific media regulation can be found primarily in the TWF Directive. The directive lays down the minimum standards that the content regulation of television broadcasts by the Member States

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139 After the merger the new entity enjoys 80% of the total pay-TV subscribers, facing competition from cable platforms, some minor competition from digital terrestrial operators and, potentially, from telecommunications operators (that provide audiovisual services through the use of broadband technologies).

140 Ibid. p. 89.

141 European Commission, Television without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable, COM (84) 300, Brussels 14 June 1984.

must guarantee. It was introduced in order to ensure what in the EU parlance is referred to as a "free market" in broadcasting services: a single European market with common legal rules facilitating the cross-border provision of services without any legal obstacles (broadcasting is referred to as a "service" within the EU).[142]

Prior to the introduction of the TWF Directive, it was very difficult for broadcasters in Europe to broadcast across borders, because of the different legal content rules that applied in the various European States. The directive thus seeks to facilitate broadcasting across European frontiers by prescribing similar content rules in a number of areas, and providing that no European country may restrict retransmission or reception of broadcasts emanating from another EU country for reasons falling within the scope of the directive. The main goal of the directive was to facilitate the growth of a strong European broadcasting industry that could provide a counterweight to US programming, which was perceived as a threat to European culture.[143]

4.5.4 Co-regulation and Self-regulation

The binding provisions of competition and sector-specific media law are supplemented by self-regulatory and co-regulatory instruments. Self-regulation concerns measures taken by broadcasters themselves, drawing on their own expertise to develop their own regulation in areas such as journalistic ethics. Co-regulation is a mixture of self-regulation and regulation by an independent overseeing body.

Self-regulation is considered to be more effective than binding obligations, as statutory legal frameworks may lack flexibility and adaptability. For instance, through self-regulation, it may become easier to take regional or local conditions into account.

However, self-regulation also carries risks. For example, it may allow strong market players to set up rules that favour their interests to the detriment of competitors and users. The functioning of the internal market could be endangered if the quantity of self-regulatory codes leads to a fragmentation of markets.

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142 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.102.
143 Ibid.

For the EU Member States, the European Commission has set out its general approach to co- and self-regulatory instruments in its White Paper on *European Governance* (2001)[144] and "Better Legislation Action Plan" (2002)[145]. The Commission explicitly recognises and encourages self-regulation in the audiovisual sector.

In the broadcasting sector, self-regulation is already used to a considerable extent. Its main field of application lies in advertising and the protection of minors. Under the Council Recommendation on the Protection of Minors and Human Dignity, concerned industries and parties are prompted to cooperate in drafting codes of conduct in the broadcasting and Internet sectors.[146] In April 2004, the Commission launched a proposal to update the Recommendation, which centred on the development of self- and co-regulatory models.[147] Although advertising is already subject to detailed regulation under the TWF Directive and national laws, broadcasters have set up additional codes of conduct that deal, for instance, with the advertising of alcoholic beverages. Self-regulation also exists with respect to technical standards. For instance, within Europe, agreement has been reached on the use of the digital terrestrial broadcasting standard (Digital Video Broadcasting Terrestrial, DVB-T) in digital terrestrial television.[148]

Finally, self-regulatory mechanisms play an important role in safeguarding editorial independence and in securing editorial standards.[149] For example, the International Federation of Journalists (IFJ) regularly adopts resolutions on a broad variety of topics, such as authors' rights, employment policies in the media, and other freedom of speech issues, which form the basis for self-regulatory mechanisms. With respect to advertising, the principle of self-regulation is also endorsed by global industry groups such as the International Advertising

144 European Commission, European Governance. A White Paper, COM (2001) 428 final, Brussels, 25 July 2001.

145 European Commission, Communication from the Commission. Action Plan "simplifying and improving the regulatory environment", COM (2002) 278 final, Brussels, 5 June 2002.

146 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, 98/560/EC, L270/48, 1998.

147 European Commission, 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, Brussels, 30 April 2004.

148 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.92.

149 Ibid.

Association (IAA). The IAA, on the basis of its own "Declaration on Self-Regulation & Privacy" (2000), assists its national member organisations in implementing self-regulatory mechanisms in this field.

4.5.5 The 'Television without Frontiers' Directive

The basic starting point for the TWF Directive was the emergence of satellite TV in Europe in the late eighties/early nineties. The directive was one of the 279 measures proposed in the Commission's 1985 White Paper on completing Internal Market[150]. In 1984, the Commission sketched the outlines of the Directive in its Green Paper on Broadcasting.[151] This green paper served as a guideline for the 1986 Commission's proposal.[152] In October 1989, the Council finally adopted the 'Television without Frontiers' Directive.[153] Belgium, fearing a bad effect on its language policy, and Denmark denying community competence in the field of television altogether.[154]

Its revision in 1997 brought clarification and new rules, but the scope and extent were not fundamentally altered.[155] In 2002 new initiatives were proposed and currently many European bodies are at work preparing new proposals that will be discussed during the revision process. Public consultation with the aim of establishing the specific needs in order to update the directive was held in Brussels in 2003. Concluding these meetings the European Commission proposed a detailed comparative study on regulatory measures in the media sector. This study and discussion about necessary changes in the directive are scheduled for 2005, together with the 3rd European Audiovisual Conference.

The overreaching goal of the Directive is to create an Internal Market for broadcasting, allowing television programs to move unimpeded across borders.[156] The Directive, in its

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150 Completing the Internal Market, White Paper form the Commission to the European Council, COM (85) 310 final 31.

151 Television without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting. Especially by Satellite and Cable. COM (1985) 300 final.

152 Proposal for a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation of Administrative Action in Member States Concerning the Pursuit of Broadcasting Activities, OJ 1986 C 179/4.

153 Council Directive 89/5527EEC of October 1989

154 This view was also shared by the UK, Germany, the Netherlands and France.

155 ALBARRAN, A.B., MIERZEJEWSKA, B.I., Media Concentration in the U.S and European Union: A Comparative Analysis, 6th World Media Economics Conference, Montreal, Canada, May 12-14, 2004, p. 7.

156 NITSCHE, p.57.

article 2(a), set out as its cornerstone the country origin or Transmission State principle. Member States shall not restrict retransmission for reasons which fall within the fields coordinated by the Directive. If a broadcaster gravely infringes the provision to protect minors in Article 22 and has disobeyed it at least twice a year in the last year, the concerned Member State must notify the broadcaster and the Commission in writing of the alleged infringement and of the state's intention to restrict the transmission on the next violation.

The directive sets out the minimal ground rules: ground rules on which country's law was to be applied, country of origin or country of destination, access to socially important events, European content, advertisement, and the protection of minors. This minimalist line has been maintained through all of the amendments and it is also visible in the communication by the European Commission of last December which sets the framework for the current reform debate concerning the Directive (Communication on the future of European regulatory audiovisual policy)[157]. The current TWF reform is prompted by the emergence of the new services. However, while setting minimal standards, the debate at European level has also enabled a basic consensus on objectives in the media sector to be worked out. These broadly agreed goals across Europe are: plurality, cultural diversity and choice. And those principles would find a firmer grounding in the new draft European Constitution which had failed. Consensus also dictates that this objective should be ensured principally by Member States. There is no EU plurality control, except the one based on competition law. The recent EU White Paper on public services of April[158] has again confirmed this. But it also means that Member States carry significant responsibility for implementing these values in the context of a difficult, highly oligopolistic market across the board.[159]

The Directive includes several provisions that cover public interest issues in a broad sense, in particular, advertising, which is restricted for the sake of the consumer and the protection of minors. The directive contains detailed provisions on the conditions when and how advertising can interrupt programs; for example, news, documentaries and children's

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157 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy (COM(2003) 784, 15.12.2003); available at http://www.europa.eu.int/comm/avpolicy/index_en.htm

158 White Paper on services of general interest, COM(2004) 374, 30.4.2004; available at www.europa.eu.int/Comm

159 UNGERER, H., EU Media Framework, Competition Law and Public Service Broadcasting – Some Comments on the Impact on the Current UK Debate, seminar on OFCOM's Public Service broadcasting Review and the European Dimension, European Media Forum, London, 12 July 2004, p.5.

programs under 30 minutes shall not be interrupted.[160] It also prohibits advertising interfering with human dignity and advertising containing an offensive or discriminatory message.[161] The advertising of alcoholic beverages is strictly controlled and the advertising of tobacco products and prescription drugs is prohibited.[162]

4.5.6 Audiovisual Media Services Directive

The Audiovisual Media Services Directive[163] (AVMSD) adopted in December 2007 aims the realization of an effective single market for broadcasting. This new Directive amends the TWF Directive; The Recommendations for the Protection of minors in an online-environment and European film heritage.

The new Directive, which will replace the TWF Directive, reflects today's realities and provides a vision for the future. It is expected to contribute greatly to the development of Europe's audiovisual landscape and to enable Europe to compete in the digital world.[164] The Directive will ensure that both economic and cultural values are reflected in Europe's audiovisual sector.[165]

There is political agreement for the extended scope of the Directive. Audiences will now benefit from rules on advertising standards, protection of minors and cultural diversity across all audiovisual media services. The new Directive covers not only television broadcasting (i.e. linear services provided for simultaneous viewing of programmes on the basis of a programme schedule) but also with some lighter rules, on-demand services (i.e. non-linear services provided for the viewing of programmes at the moment chosen by the user and at his/her request on the basis of a catalogue of programmes).[166]

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[160] Council Directive 89/552/EEC, Art. 10.
[161] Ibid. Art.11.
[162] Ibid, Art.13, 14, 15.
[163] The new Audiovisual Media Services Directive 2007/65/EC have been published in the Official Journal n° L 332 of 18 December 2007 and have come into force on 19 December 2007. Member States shall transpose it in national law by 19 December 2009 at the latest. In the meantime the provisions adopted in application of the TWF remain fully applicable

[164] http://www.ebu.ch/CMSimages/en/VP_AVMS_05.07_E_tcm6-51870.pdf

[165] Ibid.
[166] Ibid.

The definitions of "audiovisual media services" and "media service provider" have been clarified by using and specifying the notion of "editorial responsibility". This means that the rules of the Directive will also apply to the repackaging of audiovisual content for the general public.

The scope of the new Directive is limited to services which are "television-like", in the sense that audiovisual "programmes" must be "comparable" to the form and content of television programmes. In this respect, care has to be taken in the implementation process so that the future-proof character of the new framework is not undermined by any limitation to traditional television formats.[167]

The Directive brought new terms and applications to the audiovisual sector. The changes made by AVMSD which relate to subject of this thesis are as set forth below:[168]

a) Scope (Art. 1(a) AVMSD): AVMSD covers all "audiovisual media services", which means traditional television as a "linear audiovisual media service" and on-demand audiovisual media services, as a "non-linear media service". These services have to be directed to the general public and intended to inform, entertain and educate (Art. 1(a) AVMSD). The enlarged scope of the Directive responds to the increasing importance and relevance of on-demand audiovisual media services.

b) Graduated regulation: Due to the different degree of choice and control, users can exercise with regard to on-demand audiovisual media services only a basic tier of rules applies to them. There are however stricter rules for television broadcasts in the field of advertising and protection of minors.

c) Jurisdiction (Art. 2 AVMSD) – reversal of subsidiary jurisdiction criteria (Art. 2(4) AVMSD): With regard to satellite broadcasters established outside the Union, AVMSD reverses the subsidiary jurisdiction criteria. In the new Directive the criterion of satellite up-link in a Member State is prior to the criterion that the satellite capacity is appertained by a Member State. That means that when a broadcaster established outside the Union uses a satellite up-link in one of the Member States, that Member State will have jurisdiction. Only

[167] Ibid.
[168] http://ec.europa.eu/avpolicy/index_en.htm

when there is no up-link in the Union, the Member State to which the satellite capacity appertains will gain jurisdiction.

d) Country of Origin Principle: The objective of the TWF Directive and the AVMSD is to create of a level playing field for audiovisual media services by providing a set of rules in the fields essential for their transfrontier provision. This provides legal certainty for providers who easily can determine the rules applicable to them. With regard to the coordinated areas, audiovisual media service providers are only subject to their own Member State's jurisdiction (country of origin principle). In consequence, they will be much open more to develop new transfrontier business models. The country of origin principle as it was established by the TWF Directive is maintained by AVMSD.

e) Derogations to the freedom of reception principle for on-demand audiovisual media services (Art. 2(4)-(6) AVMSD): According to AVMSD, a Member State can restrict the retransmission of on-demand audiovisual media services similar to those established by the eCommerce Directive[169]. This would for example allow Member States to take measures against certain forms of Nazi-propaganda that are not banned in all Member States.

f) Cooperation and circumvention procedure (Art. 3(2) – (5) AVMSD): The Directive provides for

> *i.* a consultation procedure between the Member State of jurisdiction and the one towards which television broadcast is wholly or mostly directed, which may lead to a non-binding request to a broadcaster to comply with a rule of general interest of the latter Member State, and subsequently
> *ii.* a procedure on the basis of ECJ case law (specifically on circumvention) to allow Member States, under the ex-ante control of the Commission, to take binding measures against service providers that circumvent national rules.

g) Transparency obligations (Art. 3(a) AVMSD): Art. 3(a) obliges all audiovisual media service providers to indicate all relevant data necessary to be identified. This is necessary to ensure that whoever makes the editorial decisions can be held liable.

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[169] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

h) Short reporting (Art. 3(k) AVMSD): In order to promote the free flow of information, Art. 3(k) guarantees to any broadcaster established in the Community access to events of high interest to the public which are transmitted on an exclusive basis for the purpose of short news reporting.

i) European works in on-demand audiovisual media services (Art. 3(i) AVMSD): According to Art. 3(i) Member States shall ensure that not only television broadcasters (Art. 4), but also on-demand audiovisual media services promote European works.

j) Product Placement (Art. 3(g) AVMSD): AVMSD defines for which programmes and under which conditions (e.g. indication of product placement) product placement may be employed. Member State always can adopt stricter rule for media service providers subject to their jurisdiction.

k) Advertising: For television advertising, the qualitative restrictions have been maintained. With regard to quantitative limits and the rules concerning insertion of spot advertising, broadcasters will have more flexibility; however the hourly limit of 12 minutes for spot advertising remains unchanged (Art. 18(1) AVMSD). Together with the rules for product placement, this flexibility will ensure a solid economic basis for the broadcasters, taking into account consumers' interests.

l) Codes of conduct against advertising for "unhealthy" food and beverages in children's programmes (Art. 3 (e)(2) AVMSD): Art. 3 (e)(2) AVMSD obliges Member States and the Commission to encourage media service providers to develop codes of conduct regarding advertising for "unhealthy" food and beverages in children's programmes.

m) Protection of minors in on-demand audiovisual media services (Art. 3(h) AVMSD): Content which might seriously impair the development of minors only shall be made available in such a way that ensures that minors will not normally hear or see such services. This can be achieved by access codes or other means that would efficiently prevent minors from accessing adult content.

n) Access of people with a visual or hearing disability (Art. 3(c) AVMSD): AVMSD intends to promote the access of people with a visual or hearing disability to audiovisual media services. Member States shall encourage media service providers under their jurisdiction to

ensure that their services are gradually made accessible to people with a visual or hearing disability. The means envisaged would be for instance subtitling and audio description.

o) Co- and/or self-regulation (Art. 3(7) AVMSD): Co- and/or self-regulation have proven to be valuable instruments in some Member States. The AVMSD obliges the Member States to encourage such mechanisms at national level in the fields coordinated by AVMSD to the extent permitted by their legal systems.

p) Independent Regulators (Art. 23(b) AVMSD): Regarding the cooperation between the independent regulators in the Member States, AVMSD obliges them to exchange the information necessary for the application of the Directive among each other and with the Commission.

5) PUBLIC SERVICE BROADCASTING

5.1 General Remarks

Public service broadcasting (PSB) has been praised by the Council of Europe and other international organisations and bodies as a vital element of democracy in Europe and part of its cultural heritage.[170] Yet there is a broad agreement that it is currently challenged by political and economic interests, by the impact of new media platforms, by increasing competition from commercial broadcasters and by other factors.[171] Indeed, there is a deep crisis of identity of public service broadcasting.

On one hand, public service broadcasting is still considered by European policy-makers to be a cultural good, one that must be preserved. However, international and intergovernmental organisations such as the World Trade Organisation (WTO) and potentially the European Commission have criticised the privileged position of the public service broadcasters, which receive public funding while (in most cases) at the same time competing with commercial broadcasters for advertising revenue.

In Western Europe, public service television has stabilised its position on the market for a longer time and enjoys a healthy viewership. Nonetheless, across Europe, media observers and civil society organisations criticise public service broadcasters for their sympathy with political parties and for the "dumping down" of their programming, prompted by competition with commercial broadcasters.[172] In transition countries, public service broadcasting often suffers in particular from a lack of professionalism, an enfeebled sense of mission, a lack of viable funding, political interference with its governing bodies, and low public awareness of public service television's distinctive role. Consequently, in these countries, little is expected from public service broadcasting. In the mid-1990s, with the advent of private broadcasters, the monopoly of the former State broadcasters was dismantled. Since 1995, the audience shares of public service broadcasters saw a steep decline, which has continued until today. In

[170] Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p. 54.
[171] Ibid.
[172] Ibid.

Hungary, the public service broadcaster saw a dramatic drop in viewership between 1995 and 2001 from almost 80 per cent to 13.2 per cent.[173] In 2004, after the entrance of the private station RTL Televizija on the Croatian broadcasting market, the public service television company HTV saw its audience halved. However, in several countries, such as Poland, the Czech Republic, Slovakia, Serbia or Hungary, public service television has recently been picking up.[174]

5.2 Grounds for Public Service Broadcasting

The traditional grounds for governments ensuring the production and transmission of public service broadcasting arise from the perceived social importance of the broadcasting media and their potential influence on values, attitudes, and beliefs.[175] Government policy of promoting PSB, therefore, places greater emphasis on viewers and listeners in their capacity as social beings, citizens, and voters than as consumers. From this perspective, in regulating for the provision of PSB, the state intervenes in broadcasting markets not on the basis of economic criteria, but to achieve social objectives such as the promotion of education, equity, national identity, and social cohesion.[176]

The social objectives of a government's broadcasting policy may include the principle of universality of service whereby broadcasting services of a minimum technical quality are to be provided to all (or practically all) citizens irrespective of their location. The government may also specify the production and transmission of certain kinds of programs considered to be socially desirable (e.g., news, current affairs, documentaries, educational and arts programs) and catered to certain ethnic, cultural, age, or lifestyle minority groups. There may also be "local content" provisions requiring the domestic production of specified proportions and categories of programming.

PSB programs funded by governments in pursuit of social objectives are "merit goods." Governments adopt a paternalistic role by intervening in broadcasting markets and substituting their own preferences for those expressed by individual consumers. In discussing

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173 Ibid.

174 FRANZKE, p.26.

175 BROWN, A., Economics, Public Service Broadcasting and Social Values, Journal of Media Economics, Volume: 9, Publication Year: 1996, p.6.

176 Ibid.

the government financing of public television in the United States, Levin[177] used the term *merit programming* and advanced three reasons for the public financing of merit programs on television.

The first is a cultural elitist view by which it is deemed that the welfare of viewers is enhanced by the provision of certain programs that would not be supplied in response to market demand. The cultural elitist view is that even if people want comedy/variety shows, we should give them Shakespeare, which they may never come to like or watch in the face of alternatives, but which will make them 'better people' when they do (gratifying our elitists in the process).[178]

Levin's second justification for merit programming is a variation of the infant industry argument; merit programs may eventually become economically viable in their own right after viewers have been exposed to them for some time.[179]

The third point is essentially the minority interest argument already mentioned and concerns programming "directed to limited ethnic, intellectual, social, or cultural groups".[180]

In addition to the social/merit goods rationale, there are arguments for the provision of PSB arising from the economic analysis of broadcasting markets. This, in turn, is founded on the "public goods" nature of broadcasting programs. Radio and television programs come very close to being pure public goods.[181] The expense of producing or purchasing a program is a fixed cost. Once the outlays for a program have been incurred, its original cost is independent of both the number of stations that acquire the rights for its broadcast and the eventual size of its viewing or listening audience. Similarly, for a station, once any program has been purchased (or produced by the station itself), its cost is unaffected by the number of listeners or viewers who choose to receive it. Moreover, the reception of a television or radio signal by one person within a broadcast market does not prevent it from being received by another.[182] Therefore, the marginal cost to a broadcaster of providing the transmission of a program to an additional listener or viewer within any broadcasting market area is literally zero.

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177 LEVIN, H. J., Fact and Fancy in Television Regulation, New York: Sage, 1980, p.44-46.
178 Ibid. p.45.
179 Ibid.
180 Ibid.
181 Ibid. p. 48.
182 Ibid.

An unregulated, all-commercial system of broadcasting will result in market failure. Certain minority tastes and specific programming preferences of viewers would not be catered to, whereas some other program types would be overprovided. That is, the market would not generate the production and transmission of certain types of programs for which, if given an opportunity, society would be willing to pay. This problem can be alleviated, but not overcome, by the removal of any artificial barriers to entry into commercial radio and television.[183] The policy implications are twofold: Governments should allow unrestricted access to commercial broadcasting markets and, with or without unrestricted access; some form of government intervention in broadcasting may be justified to ensure the production and transmission of PSB programming.[184]

Economic analysis thus complements the traditional social rationale for the provision of PSB. The economic rationale for PSB takes the familiar form of government intervention to address market failure.[185] Even with social and economic rationales, however, it is a value judgment as to whether governments should intervene in broadcasting markets to ensure the provision of PSB. As in all cases of market failure, there is the possibility that a response by government may lead to "government failure" that is, the cost of government action exceeding benefits.[186]

If a government decides that it should ensure the provision of PSB programming, the relevant issue becomes a choice among the alternative arrangements. There are four possibilities[187]: (a) the establishment of a state broadcasting corporation, (b) the allowance for the provision of PSB by a community broadcasting organization, (c) the regulation for the presentation of PSB by commercial broadcasters, or (d) a combination of any of these possibilities. Most developed western countries have established centralized state broadcasting corporations that are financed either directly by the government or by charging a license fee to the owners of radio receivers, television receivers, or both. The exception to this approach is the United States, in which public broadcasting is based on a large number of geographically dispersed community organizations.[188] The weakness with the U.S. approach is common to the financing of any public good by voluntary payment from community members, the free-rider

183 Ibid. p.50.
184 Ibid.
185 BROWN, p. 9.
186 Ibid, p.10.
187 Ibid.
188 Ibid..

problem whereby the recipients of the services provided have no inherent incentive to contribute in proportion to the true valuation they place on them. It is notable in this regard that public broadcasting in the United States relies on government subsidization for a substantial proportion of its funding.

5.3 Public Service Mission and Obligations

Public service broadcasters everywhere have a number of obligations based on three main principles: programming tailored to public service broadcasting, impartial and accurate information, and universal access.[189] Public service broadcasters are required in most of the countries to do the following[190]:

i. to air independent, accurate, impartial, balanced, objective news and information;
ii. to ensure diversity of programming and viewpoints;
iii. to broadcast a certain proportion of news, cultural, artistic, educational, minority, religious, children's and entertainment programming;
iv. to promote local culture and values;
v. to produce and broadcast programmes relevant for all the regions in the country;
vi. to provide free-of-charge airtime for public interest announcements, such as healthcare, road safety and urgent messages of State authorities.

Commercial television stations are usually bound by a set of general broadcasting obligations, such as avoiding incitement to ethnic hatred and violence, or airing erotic programmes only at late hours. Beyond these, public service television broadcasters must follow more guidelines and operate within a legally established remit. In most of the countries monitored, there are some common obligations for both public and commercial television stations, but these vary significantly.

Public service broadcasters are commonly obliged also to air programme strands that do not necessarily appear on commercial television, especially cultural and educational programming, programmes for minorities and regional news. The obligations imposed on public service television broadcasters show a common understanding that public service

[189] Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p. 57.
[190] Ibid.

television is more than a medium of communication and should fulfil a much wider social role.[191] Its mission includes the promotion of local culture, traditions and values. In some countries, legislation emphasises this role. In Turkey, the public service broadcaster TRT is obliged to pursue the national goals of the country, based on the reforms and principles of Atatürk, the founder of the modern secular Turkish State.[192] In Poland, the public broadcaster is required to respect the Christian system of values and strengthen family ties.[193]

However, the obligations imposed on public service broadcasters are for the most part broadly or vaguely worded, leaving wide room for interpretation. In the UK, the BBC only has to show "a reasonable proportion and range" of output for Scotland, Wales, Northern Ireland and the English regions.[194] In Croatia and in Bosnia and Herzegovina, public service broadcasters are required to air "adequate" shares of information, cultural, educational and entertainment programming.[195] In the Republic of Macedonia and in Serbia, there are obligations for the public service broadcasters to provide programming for national minorities in their languages.[196] In general, public service broadcasters devote insufficient time to cultural or minority programming or air these programmes at unattractive hours.

Some Western European countries present more complex models of public service obligations. In France, each of France Televisions' three channels bears specific public service obligations. France 2 and France 3, for example, are required to provide free airtime to political parties represented in Parliament and unions and professional associations considered to be nationally representative, based on rules established by the country's general broadcasting regulator, the High Council for Broadcasting (CSA).[197]

France must air religious programmes, and all three public channels must regularly broadcast programmes on science and technology.[198] Although many of these programmes are run at

191 Ibid. p.58.
192 Serim, p. 46.
193 Ibid.
194 WARD, D. editor, The Key Role of Public Service Broadcasting in European Society in the 21st Century, Center for Media Policy and Development, 2004, p.78.
195 Ibid.
196 Ibid. p.80.
197 Ibid.
198 Ibid.

late hours, the imposition of a more detailed set of public service obligations has helped France Televisions to gain a more distinctive voice in the French broadcasting scene.

All terrestrial broadcasters in the UK have public service obligations. This is the uniqueness of the British model of broadcasting, with the BBC having the most responsibility as the main public broadcaster, followed by Channel 4.[199] ITV and Channel 5 have fewer obligations, covering regional productions and minimum programme requirements, which include current affairs and news. Both the BBC and Channel 4 receive frequencies at no cost in return for their public service obligations.[200]

5.4 The Role of Public Service Broadcasting

As stated by the recent Commission communication on services of general interest in Europe: "The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection".[201]

Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. 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.

As stated by the high-level group on audiovisual policy chaired then by Commissioner Oreja, public service broadcasting "has an important role to play in promoting cultural diversity in each country, in providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying, democratically and free-of-charge, quality entertainment"[202].

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[199] Ibid. p.81.
[200] Ibid.
[201] COM 2000(508) Final, p. 35.
[202] "The digital age European audiovisual policy. Report from the high-level group on audiovisual policy", 1998.

Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately ensures that all citizens participate to a fair degree in public life.

The role of the public service in general is recognised by the Treaty. The key provision in this respect is Article 86(2), which reads as follows: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

This provision is confirmed by Article 16 of the EC Treaty, concerning services of general economic interest, which was introduced by the Amsterdam Treaty and entered into force on 1 May 1999 - Article 16 states: *"Without prejudice to Articles 73, 86 and 87, and 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".*

The interpretation of these principles in the light of the particular nature of the broadcasting sector is outlined in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty, which, after considering "that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", states 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, 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 the remit of that public service shall be taken into account".*

The importance of public service broadcasting for social, democratic and cultural life in the Union was also reaffirmed in the Resolution of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25 January 1999 concerning public service broadcasting. As underlined by the Resolution: *"Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting". Moreover, public service broadcasting needs to "benefit from technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age". Finally, "public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences*"[203].

Given these characteristics, which are peculiar to the broadcasting sector, a public service mandate encompassing "a wide range of programming in accordance with its remit", as stated by the Resolution, can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism.[204]

It should be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a role in achieving the objectives of the Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes.[205]

5.5 Public Service Broadcasting at Crossroads

From the end of the Second World War until the late 1970s, public broadcasting organizations had stood in powerful, flexible opposition to commercial systems, and they dominated the cultural geology of the societies from which they had been formed. (The only major exception to this pattern was in the United States, where public broadcasting had been much slower to develop and had far fewer resources.) By the closing years of the 1980s that structure was

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203 OJ 30, 5.2.1999, p.1.

204 Communication from the Commission on the application of State aid rules to public service broadcasting, (2001/C 320/04).

205 Ibid.

widely seen to be crumbling. Public broadcasting institutions and the notion of cultural and political discourse that surround them seemed everywhere to be under attack.[206]

The first impact on PSB has been that, in the post-war period, the cost of operating broadcasting organizations has increased significantly in real terms. The introduction of television in the 1950s and the switch from black and white to colour television in the 1970s both required substantial capital expenditures. Concurrently, the real cost of producing programs, especially for television, increased in most countries.[207] The introduction of television and the subsequent upgrade to colour were a boon for commercial stations, which earned large amounts of advertising revenue and became "licenses to print money." At the same time, state broadcasters had to pry increasing amounts from governments in an attempt simply to maintain their audience shares.

The second concern for public broadcasters, which reinforces the first, has been the worldwide trend toward a reduced role for government, a concomitant decrease in public expenditures, and the widespread adoption of the "user pays" principle.[208] Public broadcasting organizations have been a prime target for funding cutbacks by governments looking for areas to reduce expenditures. In particular, during the inflationary periods of the 1970s and early 1980s, governments tended to restrict the level of funding to public broadcasters by reducing in real terms the charges for license fees payable by viewers and listeners.

A third pressure on public service broadcasters has been the recent opening up of the radio spectrum in many countries to facilitate the licensing and operation of an increased number of terrestrial, advertiser-supported radio and television stations.[209] This has been a part of the global phenomenon toward deregulation of markets and an expanded economic role for private enterprise. As indicated previously, a greater number of stations have the beneficial effect of reducing the level of economic inefficiency inherent in commercial broadcasting but, at the same time, has some tendency to reduce audience numbers for public broadcasters.

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206 Ibid.

207 BLUMLER, J., Public service broadcasting before the commercial deluge. In J. Blumler (Ed.), Television and the public interest: Vulnerable values in West European broadcasting (pp. 7-21). London: Sage, 1992, P.9.

208 Ibid.

209 Ibid.

The fourth and most significant impact has been in the form of new broadcasting technologies.[210] Cable, satellite, and microwave distribution systems and digital compression each provide the means for a substantial expansion in the number of television channels that can be made available to viewers. Moreover, advances in subscription technology have facilitated direct viewer payment for programs. Pay-TV reduces the audiences of traditional public service broadcasters as well as those of advertiser-supported broadcasters. The loss of part of their viewing audience tends further to undermine the entitlement of public broadcasters for the maintenance of the level of their funding. Radio is similarly affected, although probably to a lesser extent than television. Although much pay-TV programming consists of movies, sports, and other non-PSB material, in multichannel systems specialized pay-TV offerings include material traditionally the province of the public broadcasters' nature, science, arts, music, documentary, news, and children's programming.[211] The findings of a recent study of U.S. television programming "suggest that many of the objectives of public television are being met by cable television. ... Virtually every type of programming offered on public television is not only available on cable television but in greater quantity as well".

The combined threat to the traditional providers of PSB posed by these forces is considerable and is likely to continue. The arguments of public broadcasters for the maintenance of their levels of public subsidy will be weakened to the extent that the sizes of their audiences diminish and that PSB types of programs become available from commercial providers.[212] Moreover, at least a percentage of pay-TV subscribers will be less inclined to pay license fees and taxes to finance public broadcasting stations, which will account for a smaller proportion of available channels and less of their viewing time.

Over the past decade, public service broadcasting has been praised and criticised in roughly equal measure. Considered by the European political elite to be an essential part of European cultural identity, public service broadcasting has been supported by European political bodies. In the Protocol on the system of public broadcasting attached to the 1997 Treaty of Amsterdam, public service broadcasting is considered to be *"directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism"*. The Protocol contains the provision that if it will be left to the competency of

210 Ibid. p.13.
211 Ibid.
212 Ibid.

member States to provide for the funding of public service broadcasting "for the fulfilment of the public service remit"[213]. In 2005, at its Seventh Ministerial Conference on Mass Media Policy (Kiev), the Council of Europe reaffirmed the importance of public service broadcasting *"as an element of social cohesion, a reflection of cultural diversity and essential factor for pluralistic communication accessible to all*[214]". At the same time, the European Commission stressed the point that the State aid to public service television must pass the proportionality test, which means that this aid must not exceed the net costs of the public service mission.[215]

On the other hand, public service broadcasting has come under pressure from the WTO, which has called for total liberalisation of the audiovisual market, which would mean the elimination of preferential treatment for the public service broadcasters. At the same time, the World Bank argued in a 2002 study that public service obligations can be fulfilled more efficiently by private broadcasters.

Private broadcasters also impugn the model of financing the public service broadcasters, which, they claim, is unfair to private competitors. They have repeatedly accused the public service broadcasters of "buying" audience shares with State or taxpayers' money.[216] However, a recent review of public service broadcasting around the world, carried out by the international consulting company McKinsey, for the British body Ofcom, concludes that there is no evidence that commercial funding is commonly "crowded out" by high levels of public funding.

A number of state broadcasters have experienced real reductions in their funding levels in recent years.[217] Most have responded by implementing internal cost efficiencies that have usually involved staff reductions and provided for greater centralization of decision making

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213 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October, C 340, 10 November 1997, Protocol No. 9 on the system of public broadcasting in the member States, C340/109, available at http://europa.eu.int/eur-lex/en/treaties/selected/livre545.html (accessed 30 July 2005) (hereafter, EU Protocol on Public Broadcasting (1997)).

214 Council of Europe, "Integration and diversity: the new frontiers of European media and communications policy. Adopted texts", Seventh European Ministerial Conference on Mass Media Policy, Kiev (Ukraine), 10-11 March 2005, Resolution No. 2, Cultural diversity and media pluralism in times of globalisation, p. 7, available at http://www.coe.int/T/E/Human_Rights/media/MCM%282005%29005_en.pdf (accessed 30 July 2005).

215 Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p. 60.

216 Ibid. p.61.

217 BLUMLER, p.13.

and program production and transmission. Another response has been greater entrepreneurial activity by public broadcasters, typically in the form of sales of programs to foreign broadcasters and the marketing of program-related merchandise. In an attempt to reduce programming costs, a number of public broadcasters have also entered into co-production arrangements with foreign commercial and non-commercial broadcasters.

5.6 European Policy Approach

Across Europe, public service broadcasting is an inherent component of the media landscape. Public service television programmes account for significant audience shares in member states, over 40 per cent in France, Germany, Italy, Poland and the UK, in 2003.[218]

Unlike commercial broadcasters, many public service broadcasters are partly or entirely funded by way of a licence fee, which must be paid on a monthly or annual basis by every television household. In the UK, BBC programmes must be completely free of advertising. In other countries, in consideration of this privileged funding, special restrictions apply as to the amount of advertising and sponsoring in public broadcast television programmes. For example, in Germany, ARD and ZDF may not feature any advertising after 20.00 on weekdays and all day on Sundays.[219] Public service broadcasters are also subject to specific requirements to offer a broad diversity of programming, including educational, cultural and news elements, pursuant to national law.[220]

Public service broadcasting is explicitly acknowledged under both Council of Europe recommendations and EU law. In a separate protocol, *"considering that the system of public broadcasting in the member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism",* the contracting parties to the EU's Amsterdam Treaty agreed that each member State shall generally have the sole competence to provide for the funding of its public broadcasting system, subject to certain conditions. This reflects the European understanding of public broadcasting as an important element of the culture and the political system of democracy of each member state.[221] The

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218 Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p. 117.
219 Ibid.
220 Ibid.
221 Ibid.

independence of public service broadcasting from Government influence is furthermore addressed in a specific Recommendation by the Council of Europe's Committee of Ministers, which provides that *"the (national) legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy"*.

5.7 State Aid

Since its inception, television broadcasting has been provided mostly by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained as a way to ensure the coverage of a number of areas and the satisfaction of needs that private operators would not necessarily fulfil to the optimal extent.[222]

This increased competition, together with the presence of state-funded operators, has led to growing concerns about a level playing field, which had been brought to the Commission's attention by private operators. The vast majority of the complaints allege infringements of Article 87 of the EC Treaty in relation to the public funding schemes established in favour of public service broadcasters.[223]

The EC Treaty includes Articles 87 and 88 on state aid and Article 86(2) on the application of the rules of the Treaty and the competition rules in particular to services of general economic interest. The Maastricht Treaty had already introduced an article which defines the role of the Community in the field of culture (Article 151) and a possible compatibility clause for state aid aimed at promoting culture (Article 87(3)(d)).

In addition to these articles about general state aid rules, Germany has initiated a Protocol annexed to the EC treaty by the Treaty of Amsterdam, Protocol 9 on the System of Public Broadcasting in the Member States. The German government was seeking clarification that it

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[222] Commission communication on the application of state aid rules to public service broadcasting OJ. C 320 of 15.11.2001.
[223] Ibid.

was exclusively for the Member State to define the public service mission of the national broadcaster and thus also its finding. However, the success of the Protocol is doubtful. The Court of First Instance did not choose to refer to the Protocol, only the Commission in *BBC News 24* expressly acknowledged that the Member States' competence to define public service remit in any economic sector was confirmed by the Protocol. [224]

At the level of secondary legislation, the present communication is to be seen in the context of the " Television without Frontiers" Directive, which aims to coordinate certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, and in the context of Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

In recent years, public broadcasters throughout Europe have found themselves increasingly challenged by their commercial competitors with recourse to the EC Treaty State aid regime. Private broadcasters in various member States have filed complaints with the European Commission, seeking clarification on whether the licence fee schemes constitute State aids, which are incompatible with the provisions of the EC Treaty.

The dispute starts with the question of whether the licence fee can be qualified at all as State aid within the meaning of Article 87(1) of the EC Treaty. According to this provision, any aid shall be incompatible with the common market if it is "granted by a member State or through State resources in any form whatsoever and distorts or threatens to distort competition by favouring certain undertakings insofar as it affects trade between member States". In response, the public service broadcasters and Member State governments argue that licence fees do not provide an economic advantage to the public broadcasters, because they merely compensate the broadcasters for the additional costs that result from the public broadcasters' fulfilment of their special obligations, under the Protocol on the system of public broadcasting in the member States appended to the Amsterdam Treaty.[225]

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224 NITSCHE, p. 152.

225 Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p. 118.

In addition to this debate, there is also controversy as to whether the granting of State aid could be justified under the EC Treaty.[226] Under the EC Treaty, certain State aids are considered to be compatible with the common market for promoting culture (Article 87(3)d), and State aids can be justified when granted to undertakings that are entrusted with services of general economic interest (Article 86(2)).

One should keep in mind that the application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The EC Treaty includes Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. Whereas the Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and an interpretative protocol on the system of public service broadcasting, the Treaty of Maastricht had already introduced an article which defines the role of the Community in the field of culture (Article 151) and a possible compatibility clause for State aid aimed at promoting culture (Article 87(3)(d)). The European Parliament and the Council have adopted 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[227]. The Commission has adopted Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings[228]. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules.

The European Commission has made clear that it regards licence fees as constituting State aid within the meaning of Article 87(1) EC.[229] In its view, the only option to declare them as compatible with the EC Treaty's State aid regime lies in a justification under Article 86(2). However, the requirements that the Commission refers to, in order to approve licence fee schemes as justified under Article 86(2), are high. The Commission expects public broadcasters to fulfil the following three conditions which will be explained in 4.7.3.

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226 Ibid.

227 OJ 298, 17.10.1989, p.23, as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p.60).

228 OJ 195, 29.7.1980, p.35, as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p.75).

229 See: European Commission, Communication from the Commission on the application of State aid rules to public service broadcasting, C320/5, Brussels, 15 November 2001, para. 16 *et seq.*, (hereafter, European Commission Communication on State aid); European Commission, Decision of 19 May 2004 on measures No. C 2/2003 (ex NN 22/02) implemented by Denmark for TV2/Danmark, C(2004) 1814 final, para. 56 *et seq.*

The first requirement constitutes the most crucial point in order to ascertain whether the authorities provide more compensation than is strictly necessary for the net costs of public service broadcasting. Here, the Commission is pressing to apply the Transparency Directive[230] to public service broadcasters, on the grounds that member States are only likely to achieve compliance with the State aid regime if the public service remit is defined more precisely, and if the financing of public service broadcasters is regulated more transparently. This poses a challenge to the public service broadcasting systems of various member States, because it is in particular the precise determination and definition of the public service task that is often (still) lacking.

The Commission has taken specific action in this regard. On 3 March 2005, the European Commission announced that it was requesting the Netherlands, Ireland and Germany to clarify their policies on the funding of public service broadcasters. In the case of Germany; the Commission has launched an investigation with respect to ARD and ZDF[231]. Following complaints from German private broadcasters, the Commission approached the German Government with a detailed questionnaire concerning the funding of online services and the acquisition of sports rights by the public broadcasters. The German Government submitted its reply to this questionnaire in May 2005, again stressing its view that the German licence fee does not fulfil the relevant criteria to qualify as a subsidy under EU law. Based on this response, it is now up to the Commission to decide whether it will further pursue the case by opening formal unlawful State aid proceedings. If it does so the outcome of such proceedings might indeed have a significant impact on the fundamentals of public broadcasting, not only in Germany but also in other EU member States. For a decision against ARD and ZDF would undermine the justification for the licence fee and boost the commercial broadcasting lobby's argument that public service broadcasting should be broadly confined to unprofitable niches, excluding it from the most popular and lucrative segments of broadcasting.

Under EU competition rules the issue of license-fee financed PSBs falls under state aid review, Article 87, and Article 86, as applicable. The Amsterdam protocol has confirmed the

230 European Commission, Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, L195/35, 1980, last amended by Commission Directive 2000/52/EC of 26 July 2000, L193/75, 2000.

231 E 3/2005.

right of Member States to choose their PSB-order. However the Altmark ruling[232] by the European Court of Justice set certain strict criteria, in order to safeguard fair competition with the private sector. These are:

i. A clear remit / clearly defined public service tasks
ii. Compensation of PSB-tasks by a licence fee or other state resources must be calculated on an objective basis, and be established in advance
iii. No overcompensation in financing PSB tasks
iv. An effective efficiency control: to be achieved by public tender or by determination of costs on the basis of a "well run company".

5.7.1 Applicability of Article 87(1)

5.7.1.1 The State Aid Character of State Financing of Public Service Broadcasters

Article 87(1) states: "*Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market*".

The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). State financing of public service broadcasters is normally to be regarded as State aid, inasmuch as it meets the above criteria. Public service broadcasters are normally financed out of the State budget or through a levy on TV-set holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources. Moreover, and to the extent that such measures fail to satisfy the market economy investor test, in accordance with the "Application of Articles 92 and 93 of the EEC Treaty to public authorities" holdings'[233] and the Commission communication to the Member States on the

232 Case C-280/00.
233 Bulletin EC 9-1984.

"Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector"[234], they favour in most cases only certain broadcasters and may thereby distort competition. Naturally, the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding.[235]

As the Court of Justice has observed: *"When aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid*"[236]. Thus, State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. According to the case-law of the Court[237], any transfer of State resources to a certain undertaking, also when covering net costs of public service obligations has to be regarded as State aid (provided that all the conditions for the application of Article 87(1) are fulfilled).

5.7.1.2 Nature of the Aid

The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as "existing aid" within the meaning of Article 88(1).

Existing aid is regulated by Article 88(1), which states that: "The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market".

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234 OJ C 307, 13.11.1993, p.3.

235 Aid NN 88/98, "Financing of a 24-hour advertising-free news channel with licence fee by the BBC", OJ C 78, 18.3.2000, p. 6 and aid NN 70/9, "State aid to public broadcasting channels 'Kinderkanal and Phoenix" OJ C 238, 21.8.1999, p.3).

236 Cases C-730/79, Philip Morris (1991) ECR I-1433, paragraph 27; C-156/98, Germany v. Commission (2000) ECR I-6857, paragraph 33.

237 Cases T-106/95, FFSA and Other v. Commission (1997) ECR II-229; T-46/97, SIC v. Commission, (2000) ECR II-2125 and C-332/98, France v. Commission (2000) ECR I-4833.

Pursuant to Article 1(b)(i) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty[238], existing aid includes *"... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty"*.

Pursuant to Article 1(b)(v), existing aid also includes *"aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State"*.

In accordance with the case-law of the Court[239], the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission must take into account all the legal and economic elements related to the broadcasting system of a given Member State. Although the legal and economic elements relevant for such an assessment present common features in all or most Member States, the Commission believes that a case by case approach is the most appropriate.

5.7.2 Evaluation of the Compatibility of State Aid under Articles 87(2) and 87(3)

State aid to public broadcasters must be examined by the Commission in order to determine whether or not it can be found compatible with the common market. The derogations listed in Article 87(2) and Article 87(3) can be applied.

In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.[240] Accordingly, Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Therefore, the notion of "culture" within the meaning of Article 87(3)(d) must be interpreted restrictively. As stated by the

238 OJ L 83, 27.3.1999, p.1.
239 Case C-44/93.
240 Communication from the Commission on the application of State aid rules to public service broadcasting, (2001/C 320/04), p.5.

Commission in its Kinderkanal and Phoenix decision[241], the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture. In this respect, it should be noted that the Protocol distinguishes between the cultural, the social and the democratic needs of each society. Education may, of course, have a cultural aspect.

State aid to public service broadcasters often does not differentiate between those three needs. Consequently, unless a Member State provides for the separate definition and the separate funding of State aid to promote culture alone, such aid cannot generally be approved under Article 87(3)(d). It can normally be assessed, however, on the basis of Article 86(2) concerning services of general economic interest. In any event, whatever the legal base for assessing compatibility, the substantive analysis would be conducted by the Commission on the basis of the same criteria, namely those set out in this communication.[242]

5.7.3 Evaluation of the Compatibility of State Aid under Article 86(2)

The role of services of general economic interest in attaining the fundamental objectives of the European Union has been fully acknowledged by the Commission in its communication on services of general interest in Europe.

The Court has consistently held that Article 86 provides for derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such derogation, it is necessary that all the following conditions be fulfilled:

i. the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);

ii. the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);

iii. the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test).

It is for the Commission, as guardian of the Treaty, to assess whether these criteria are satisfied.

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241 Case C-70/98.

242 Communication from the Commission on the application of State aid rules to public service broadcasting, (2001/C 320/04), p.5.

In the case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Protocol, which refers to the "public service remit as conferred, defined and organised by each Member State" (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting "in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit ... and ... 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 the remit of that public service shall be taken into account" (proportionality).

5.7.3.1 Definition of Public Service Remit

In order to meet the condition mentioned in point 29(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.

Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level. Generally speaking, in exercising that competence, account must be taken of the Community concept of "services of general economic interest". However, given the specific nature of the broadcasting sector, a "wide" definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2).[243] Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.

Similarly, the public service remit might include certain services that are not "programmes" in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.[244]

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[243] Ibid. p.7.
[244] Ibid.

Whenever the scope of the public service remit is extended to cover new services the definition and entrustment act should be modified accordingly, within the limits of Article 86(2).

The Commission's task is to verify whether or not Member States respect the Treaty provisions.[245] As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet, in the wording of the Protocol, the "democratic, social and cultural needs of each society". That would normally be the position in the case of e-commerce, for example. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit.

The definition of the public service mandate should be as accurate as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities.

Finally, the terms of the public service remit should be precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.

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245 See Case C-179/90, Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA [1991] ECR I-5889.

5.7.3.2 Entrustment and Supervision

In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference).

It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitor its application. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community's audiovisual policy in the digital era[246], it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States.

It is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.

In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

5.7.3.3 Funding of Public Service Broadcasting and the Proportionality Test

a) The Choice of Funding

Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

Funding schemes can be divided into two broad categories: "single-funding" and "dual-funding".[247] The "single-funding" category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. "Dual-funding" systems comprise a wide range of schemes, where public service broadcasting is financed by

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246 COM(1999) 657 final, section 3(6).

247 Communication from the Commission on the application of State aid rules to public service broadcasting, (2001/C 320/04), p.8.

different combinations of State funds and revenues from commercial activities, such as the sale of advertising space or programmes.

As stated by the Protocol: *"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 ...".* The Commission communication on services of general interest in Europe clarifies that: *"The choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest".*[248]

While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner.[249] The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.

The Protocol confirms this approach also for public service broadcasting, stating that funding should not "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".[250]

b) Transparency requirements for the State aid assessment

The above-described assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. Separation of accounts between these two spheres is normally already required at national level to ensure transparency and accountability when using public funds. A separation of accounts is necessary to allow the Commission to carry

248 COM (2000) 508 final, p.36.
249 Communication from the Commission on the application of State aid rules to public service broadcasting, (2001/C 320/04), p.8.
250 Ibid. p.9.

out its proportionality test. It will provide the Commission with a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Protocol.

The transparency requirements in the financial relations between public authorities and public undertakings and within undertakings granted special or exclusive rights or entrusted with the operation of a service of general economic interest, are indicated in Directive 80/723/EEC.

The Member States have been required by Directive 80/723/EEC to take the measures necessary to ensure, in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving State aid in any form whatsoever and which carries out other activities, that is to say, non-public service activities, that: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities, are separate; (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained are clearly established.

The general transparency requirements apply also to broadcasters as indicated in the fifth recital of Directive 2000/52/EC. The new requirements apply to public service broadcasters, in so far as they are beneficiaries of State aid and they are entrusted with the operation of a service of general economic interest, for which the State aid was not fixed for an appropriate period following an open, transparent and non-discriminatory procedure. The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services.[251]

In the broadcasting sector, separation of accounts poses no particular problem on the revenue side, but may not be straightforward or, indeed, feasible on the cost side. This is due to the fact that, in the broadcasting sector, Member States may consider the whole programming of the broadcasters as covered by the public service remit, while at the same time allowing for

[251] Ibid.

its commercial exploitation.[252] In other words, different activities share the same inputs to a large extent.

For these reasons, the Commission considers that, on the revenue side, broadcasting operators should give a detailed account of the sources and amount of all income accruing from the performance of non-public service activities.

On the expenditure side, costs specific to the non-public service activity should be clearly identified. In addition, whenever the same resources, personnel, equipment, fixed installation etc., are used to perform public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities.[253]

The above implies that, contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities, while benefiting also commercial activities need not be apportioned between the two and can be entirely allocated to public service. This could be the case, for example, with the production costs of a programme which is shown as part of the public service remit but is also sold to other broadcasters. The main example, however, would be that of audience, which is generated both to fulfil the public service remit and to sell advertising space.[254] It is considered that a full distribution of these costs between the two activities risks being arbitrary and not meaningful. However, cost allocation from the point of view of transparency of accounts should not be confused with cost recovery in the definition of pricing policies.

c) Proportionality

In carrying out the proportionality test, the Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy this test, it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public

252 Ibid. p.9.

253 This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated ton on-public service activities.

254 Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04), p.7.

service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.

On the other hand, there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors.[255] Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster. Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Protocol.

Accordingly, in carrying out the proportionality test, the Commission will consider whether or not any distortion of competition arising from the aid can be justified in terms of the need to perform the public service as defined by the Member State and to provide for its funding. When necessary the Commission will also take action in the light of other Treaty provisions.

The analysis of the effects of State aid on competition and development of trade will inevitably have to be based on the specific characteristics of each situation. The actual competitive structure and other characteristics of each of the markets cannot be described in the present communication, as they are generally quite different from each other. Therefore the assessment under Article 86(2) of the compatibility of State aid to public broadcasters can finally only be made on a case by case basis, according to Commission practice.

In its assessment, the Commission will take into account the fact that, to the extent that State aid is necessary to carry out the public service obligation, the system as a whole might also have the positive effect of maintaining an alternative source of supply in some relevant markets.[256] However, this effect has to be balanced against possible negative effects of the

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255 Ibid.

256 This does not mean that State aid can be justified as a tool, which increases supply and competition in a market. State aid which allows an operator to stay in the market in spite of its recurrent losses causes a major distortion of competition, as it leads in the long run to higher inefficiency, smaller supply and higher prices for consumers. Lifting legal and economic barriers to entry, ensuring an effective anti-trust policy and promoting pluralism are more effective instruments in this respect. Natural monopolies are normally subject to regulation.

aid, such as preventing other operators from entering these markets, thereby allowing a more oligopolistic market structure, or leading to possible anti-competitive behaviour of public service operators in the relevant markets.

The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, ceteris paribus, higher.[257]

5.7.4 Evaluation of the Compatibility of State Aid under Article 86(3)

5.7.4.1 Commission Powers under Article 86(3)

To ensure the efficient application of article 86(1) and (2), the Commission was given the competence to address directives or decisions to Member States. It was claimed that this amounts to discriminating against public undertakings. However, the situation of public and private undertakings is not comparable. Without supervision, Member States could, via the public sector, introduce measures that would otherwise be prohibited by Treaty rules.[258]

Article 86(3) allows the Commission itself to establish, through a binding decision, the non-compliance by a Member State with its obligations. If the addressed Member State disagrees, it must bring an action for annulment of the decision before the Court within the time limit of two months. More extraordinary is the Commission power to adopt directives under Article 86(3), which gives rise to difficult problems of a legal but also political nature.[259]

5.7.4.2 Case Law on Article 86

Cases on public service broadcasting have played an important role for developing the Court of Justice's analysis under article 86. In particular, the famous *Sacchi* judgement[260] can be considered as a leading case. It concerned criminal proceedings in Italy against Guiseppe Sacchi, who operated a private television-relay station. He also possessed premises open to the public, where television sets were used for the reception of cable television, without there having been paid the licence fee prescribed by Italian law. The judgement is material for mainly two reasons. First, it states that television broadcasting 'by its nature' qualifies as a

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257 Difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.
258 NITSCHE, p.139.
259 Ibid.
260 Case C-155/73

service in the sense of the Treaty.[261] Secondly, it emphasises that although Member States may confer exclusive rights on broadcasters and thus remove them from competition, they remain subject to the Treaty provisions referred to in Article 86 as regards their behaviour on the market.[262] In other words, although exclusively is not illegal in itself, the undertaking benefiting from the exclusive right had to comply with the Treaty rules.

In the *ERT* case[263], the Thessaloniki Regional Court applied for a preliminary ruling in a case involving the Greek radio and television undertaking ERT, which had been granted exclusive rights, and the DEP, a municipal information company. ERT's right also comprised the right to receive and retransmit programmes from other Member States. DEP and the Mayor of Thessaloniki had, notwithstanding the exclusive rights of ERT, started to broadcast television programs. The ECJ held that 'article 86(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 82 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it'. This interpretation leaves not much room to Member States.

Generally, the ECJ has applied Article 86 to public service broadcasters in a way that suggests that in all but the most exceptional cases the burden of proof will rest heavily on a Member State to demonstrate that the particular task assigned to the public broadcaster excludes the application of the competition rules to it.[264] The Court has consistently held that, as far as public broadcasters engage in economic activities, they come within the Community definition of an undertaking. The argument used in *ERT* of 'inevitable abuse' because of structural reasons can also be found in the *Höfner*[265] and *Porto do Genoa*[266] cases and it is confirmed in *Silviano Raso*[267] case. In *Höfner*, the Court held that a Member State violated its duties under the Treaty if it creates a situation in which the provisions of services is limited because the undertaking entrusted with exclusive rights is not in a position to satisfy

261 Sacchi, para 6.
262 Ibid., para 14, 15.
263 Case C-260/89.
264 NITSCHE, p.140.
265 Case C-41/90.
266 Case C-179/90.
267 Case C-163/96.

demand, and in *Porto do Genoa*, it was sufficient that the undertaking was induced to abusive conduct. Moreover, the Court in *Corbeau*[268] found that specific services which can be dissociated from the service of general interest traditionally not offered from the public undertakings do not justify the exclusion of competition. Thus, Member States are not free to extend a monopoly to areas which are not strictly connected to the 'general interest'.[269]

268 Case C-320/91.
269 NITSCHE, p.141.

6) PRIVATE BROADCASTING

6.1 Concentration of Ownership

For the past two decades there has been a constant push towards concentration in media markets as companies have grown either from superior performance or more commonly merger or acquisition to increase economies of scale, exploit new markets and opportunities and generally increase their activities within individual media sectors and across media sectors. This move has been facilitated by a greater degree of liberalisation of the newspaper and radio and television sectors. Consolidation has happened rapidly in the radio and television sectors, where historically spectrum scarcity has meant that only a limited amount of companies have had access to the airwaves resulting in very limited competition in these markets. Even in markets where spectrum has become more abundant this appears to have done little to encourage a greater range of operators on these markets and they are, across the region highly concentrated markets. In each country a few major companies dominate the commercial television markets. Although the radio sector demonstrates a greater degree of pluralism than the television sector it is also highly concentrated.

The newspaper sector has also witnessed high degrees of consolidation over the past decade in an industry that has witnessed long-term decline in its readership base and increasing competition for advertising revenues from other mediums. Despite the fact that there are literally 1000s of titles across the ten countries covered in this report there are, in each market, a handful of companies that dominate these markets.

Concentration of media ownership and lack of transparency are the main obstacles in building independent and trustworthy private television broadcasters. In some small countries, however, media concentration is seen as the only solution for building sustainable media businesses. The level of concentration is higher in Western Europe than in transition countries, but the consolidation of media outlets is taking place in the transition countries at a faster pace. In other countries, commercial television is financially backed by politicians or is part of larger enterprises, so they function as a tool of pursuing political or business interests.

The most negative development in the commercial television sector since the liberalisation of television has been the steady concentration of ownership, which jeopardises television's diversity and pluralism as well as editorial independence.[270] Media concentration means higher levels of market domination and this means fewer competing suppliers. This is a potential danger because these few hands can use their power for political, personal, ideological or commercial gains.

As it was mentioned before, the past two decades, the media industry has experienced a series of massive mergers and acquisitions, which led to the creation of large media empires across the continent. The local markets disappeared in the hands of a few media groups, which had a negative effect on the principle of plurality. Even though there are anti-monopoly legislations in some countries and the ceilings on ownership are enforced, television corporations tend to take advantage of permissive laws, legislative loopholes or weak regulatory to maintain and even increase their ownership share. They either hide the traces of mechanisms their ownership in foreign jurisdiction that protects their confidentiality, or employ multi-layered, sophisticated ownership structures to avoid any investigations launched by the regulatory bodies.

The level of media ownership concentration is higher in Western Europe than in the transition countries. Italian commercial broadcasting is the most dishonourable example, with the company Mediaset, owned by the Milan entrepreneur and current Prime Minister Silvio Berlusconi, owning all three national commercial television channels in the country, Canale 5, Italia Uno and Rete4.[271] In Germany, the 30 per cent concentration threshold for private broadcasters effectively means that legislators accepted a duopoly in private television, which has been developing since the mid- 1980s.[272] France faces a constant dilemma on how to merge pluralism and diversity in the media with the creation of large French media conglomerates able to compete internationally.[273]

After the opening up of Eastern and Central European markets to private investors, several Western groups rushed into the region and built large television networks. The national

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270 Television Across Europe: Regulation, Policy and Independence Overview, EU Monitoring and Advocacy Program (EUMAP), Network Media Program (NMP), Open Society Institute, 2005, p.68.
271 Ibid
272 Ibid.
273 Ibid.

legislation in the early 1990s forbade foreign ownership in the former communist bloc countries. But now conditions for media ownership are changed and they are more relaxed, with foreign entities allowed to invest directly in the media. Only in Serbia are there still legal limits on foreign media ownership, which is allowed only 49 per cent in the overall founding capital.[274]

The reality is most European firms function in one national market. The largest European multinational company is Bertelsmann, with 24 TV stations and 14 radio stations in ten countries, which makes it the largest TV and radio group.[275] The German-based company also holds stakes in content production, new media, magazine and book publishing, music and media services. Vivendi Universal tried to emerge as a second global media powerhouse, but found itself in a diminishing role by merging its entertainment assets with General Electric's NBC unit.

Other big European media groups are unable to globalize their activities on a larger scale. Due to very segmented media markets with language differences, small size of the national markets, various socio-political traditions and the strong presence of local players, European media are not concentrated on an international level. We are witnessing increasing activities of top communication industry firms on the European markets.[276]

6.2 Cross-ownership

The activities of media firms need not be confined to a single sub-sector of the industry; frequently they span several of these. The development of 'empires' that spread across newspaper and magazine publishing, books and films or television and the internet is a widespread phenomenon evident in virtually all developed media economies. The ongoing globalization of media markets and convergence in technology between different sectors of the media and between media and other industries have caused many media firms to adapt their business and corporate strategies accordingly.[277]

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274 Ibid.

275 ALBARRAN, A.B., MIERZEJEWSKA, B.I., Media Concentration in the U.S and European Union: A Comparative Analysis, 6th World Media Economics Conference, Montreal, Canada, May 12-14, 2004, p.6.

276 Some examples include Time Warner opening new theme park near Madrid, MTV Networks Europe expanded its offer of local versions in every European country, etc.

277 DOYLE, (2003), p. 66.

Convergence and globalization appear to have encouraged trends towards concentrated cross-media ownership, with the growth of integrated conglomerates (Time Warner/AOL, Pearson, Bertelsmann, etc.) whose activities span several areas of the industry. Highly concentrated firms who can spread production costs across wider product and geographic markets will benefit from natural economies of scale and scope in the media. Enlarged, diversified and vertically integrated groups seem well suited to exploit the technological industries. These market changes, when combined with the public-good characteristics of media, provide what appears to be a compelling explanation for why profit-maximizing media firms should pursue strategies of empire-building.[278]

There are several reasons why managers try to expand the firm. One of the reasons can be because salary levels for senior management[279] are quite closely linked to the scale of a firm's activities.[280] Another reason why managers try to build empires may be because it makes it more difficult for their firm to be taken over by a predator.[281] Senior managers usually want to avoid takeover and the risk of replacement by a new management team.

Cross-ownership regulations vary widely. In most of the countries within the EU, legislation forbids cross-ownership deals. Usually, a company is not allowed to operate two broadcasters with similar footprints, or broadcasting to households in the same geographical area. For example, operation of two national television stations or two national radio networks are forbidden. Furthermore, most of the countries have legal provisions against joint ownership of print media and electronic media. However, in Bulgaria, Lithuania or Poland there are no limits on cross-ownership.[282]

In recent years, the trend in Western Europe is to build multi-media ventures and it is reaching the transition countries where there are more multi-media mergers now. Even in countries with legal provisions against cross-ownership, vertical concentration has been enlarged as owners use complicated ownership structures to hide their ownership. In Slovakia, despite

278 Ibid.
279 Most firms these days are run by managers rather than by owners (shareholders).
280 DOYLE (2003), p.67.
281 Ibid.
282 ALBARRAN and MIERZEJEWSKA, p.6.

strict legal limitations on cross-ownership, the local media entrepreneur Ivan Kmotrík owns shares in three television stations, and also in the Mediaprint & Kapa Pressegrosso Company, which is the largest newspaper distribution network in the country.[283]

In small countries, concentration of media ownership is often not considered to be a threat. Media policy-makers in Estonia, for example, argue that in such small markets, media companies would not be able to survive if they did not consolidate their various businesses. Yet Estonia presents a considerable vertical and horizontal concentration in the media, with the Norwegian group Schibsted operating the largest media enterprises in the country. Another argument supporting the need for cross-ownership consolidation came from the Polish company Agora which is the publisher of Poland's leading daily newspaper, *Gazeta Wyborcza*, and operator of a network of local radio stations.[284] This is considered as real threat to media pluralism represented by cross-ownership ventures owned by multinational media giants instead of domestic firms.

At least two different kinds of cross-sectoral expansion in the media have been subject to regulatory interventions; 'diagonal' and 'vertical'. Vertical growth involves expanding either 'forward' into succeeding stages or 'backward' into preceding stages in the supply chain. Diagonal or 'lateral' expansion occurs when firms diversify into new business areas: a telecommunications operator may expand diagonally into television, or newspaper publishers may expand diagonally into television broadcasting, or radio companies may diversify into magazine publishing.

6.2.1 Diagonal Growth

Diagonal growth refers to developing the business sideways of 'diagonally' into what may be perceived as complementary activities (e.g. newspapers plus magazines, or television plus radio).[285] In theory, a variety of reasons may exist why firms operating in one industry or sub-sector of activity might move across into another. For example, the perceived availability of higher rates of return in a newly emerging sector of activity may draw entrants from more mature of from declining industries. Other economic incentives include the perceived

283 HENDRIKSE, p.59.
284 FRANZKE, p.43.
285 DOYLE (2003), p.68.

availability, through combining new with existing operations, of either incremental revenue advantages or collective cost-efficiencies by the shared use of specialized resources or expertise.

A focus on one particular type of content may enable the firm to build very strong brands that are more likely to be successful in crossing over from one platform to another. So specialization and the development of recognizable brands (such as Financial Times) make it easier for firms to exploit new vehicles for delivery of media content, such as the internet. Cross-ownership between, for example, newspaper publishing, magazine publishing and book publishing creates potential economies in any processes and inputs that are common to all of these activities, such as printing and purchasing paper.

As regards diagonal cross-ownership, there is little evidence that cross-ownership of broadcasting plus newspaper publishing is likely to yield significant efficiency gains or that it would contribute positively to economic welfare.[286] According to most of the managers in the media sector, the significant advantage of cross-owning television and newspapers appears to be the opportunity to cross-promote products.[287] Many combinations of cross-ownership may provide valuable synergies and cost efficiencies but this is not necessarily true of broadcasting plus newspaper ownership. Even though such cross-ownership might suit the private or strategic interests of individual media firms, there is no compelling public interest case in favour of encouraging such corporate configurations. On the other hand, conglomerate expansion or empire-building in the media, as in any sector of industry, will tend to trigger economic policy concerns related to the need to preserve competition and prevent abuses of market power.

6.2.2 Vertical Integration

The production of any good or service usually involves several stages which can be separated out. A 'vertical supply chain' may be used to represent an industry's activities broken down into a sequence which starts 'upstream' at the early stages in the production process, works its way through succeeding or 'downstream' stages where the product is processed and refined,

286 Ibid. p.82.
287 Ibid. p. 70.

and finishes up as it is supplied or sold to the customer.[288] This provides a useful framework for analysing strategies of vertical cross-media expansion.

For media industries, it is possible to identify a number of broad stages in the vertical supply chain which connects producers with consumers.[289] These include, first, the business of creating media content (e.g. gathering news stories, or making television or radio programmes). Second, media content has to be assembled into a product, for example a newspaper or television service. Third, the finished product must be distributed or sold to costumers. All of these broad stages in the vertical supply chain for media are interdependent: media content has no value unless it is distributed to and audience, and distribution infrastructures and outlets are of little interest without content to disseminate. No single stage is more important than another: all are interrelated. So, the performance of every firm involved in the supply chain will be threatened if a bottleneck develops.

Media firms may expand their operations vertically either by investing new resources or else by acquiring other firms that are already established in succeeding or preceding stages in the supply chain. The activities of the television industry can be vertically disaggregated into several key stages.[290] First, production of television programmes is carried out by programme-makers. Programmes are then sold to 'packagers' who assemble television schedules. Then, the assembled television service, as a package, is distributed onwards to viewers by broadcasters. Some service packagers are broadcasters themselves but others are separate intermediaries, such as the major US networks. The 'distribution' phase for broadcast television can sometimes broken into more than one stage. For example, with the pay-television, distribution (carried out by broadcasters) may be separate from consumer interface (carried out by subscriber management services).

Governments sometimes tended to intervene in the supply chain for television to prevent excessive dominance of the industry. For example in the U.S, these interventions limited the extent of vertical integration between what were then the three major broadcast networks (ABC, CBS and NBC) and content-makers mostly based in Hollywood. These rules limited the extent to which the networks were allowed to share in any profits from secondary sales of

288 Ibid. p. 72.
289 Ibid. p. 73.
290 Ibid.

the programmes they aired, thus effectively preventing these three large corporations from getting involved in the television production business.[291]

A similar kind of regulatory interventions was introduced more recently in the UK. The main television broadcasters in the UK have been required, since 1990, to purchase around a quarter of their programming output from television production companies that are 'independent', meaning not owned by themselves or any other broadcasters.[292]

Interventions of this sort are intended to prevent powerful vertically integrated broadcasting entities from monopolizing the entire supply chain for television. Policy-makers have sought to increase competition within programme-making and to develop separately from the broadcasting sector.

6.3 Media Ownership Regulation

According to the Commission (1994), media industry sector in the European Union is seen as fundamental importance for democracy, freedom of expression and cultural pluralism as well as contributing to technological innovation, economic growth, employment, and functioning as a single market. And according to the Parliament (2003), the audiovisual sector[293] is set to play a considerable role in realizing the objective set out at the Lisbon summit of making Europe the most dynamic, knowledge–based economy in the world.

The EU Treaty allows the EU Member States to put into place their media regulatory framework largely according to their own choice and some of them have put in place very complex and forward oriented systems of regulation. About half of the EU Member States have established intra-media and/or cross media ownership controls, choosing different approaches and/or mixes of limitations on audience shares, share capital, and number of licences held.[294] At the EU level, general market regulation under the form of application of

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291 Ibid. p.74.

292 Ibid.

293 In the EU terms media industry is described by term „audiovisual sector" which comprises of film, TV, radio, home video and other forms of audiovisual production, broadcasting as well as manufacture of audiovisual supports like video cassettes, DVDs etc.(European Audiovisual Observatory 2002)

294 UNGERER, H., Competition Rules and the Media: Are They Determinant of Complementary?, European Union Media Law and Practices Radio and Television Supreme Council and Association of Television Broadcasters, Istanbul, 01.04.2005. p.6.

competition rules emerged as the main prominent instrument for checking market power and foreclosure in media markets that remain highly oligopolistic.[295]

The main goal is to maintain a fair balance within the dual system between public and private broadcasters, and to avoid overt concentration and foreclosure of media markets. All instruments of the EU competition policy are concerned: control of market concentrations; antitrust control, the prohibition of anti-competitive agreements and of abuse of market power with the aim of foreclosing competitors; state aid control, in order to avoid that markets are tilted unfairly in favour of the public broadcaster.[296]

This has meant that both the European Commission, in its role as guarantor of the EU competition order, as well as national competition authorities have emerged as major actors the media arena. With the decentralisation of the EU anti-trust powers under the reform of the EU antitrust regulations as from 1st May of last year, EU national competition authorities and regulators will further increase their role in this area.[297]

It is hard to generalise the nature of existing media ownership legislation throughout Europe, because each media market has its characteristics and accordingly its own rules. However there are two common themes that explain the current controversies in Europe.

First, the existence of restrictions over media ownership in virtually all the EU member states suggests agreement on the need for special rules, over and above any safeguards provided through domestic or EU competition law. A second shared feature is that domestic media ownership restraints within most individual EU member states have come under increasing de-regulatory pressure since the early 1990s.

In Germany, a new Broadcasting Treaty signed in 1996 has relaxed previous restrictions on ownership of broadcasting companies. Likewise, France introduced relaxations on concentrations on ownership in the television and the radio sectors in 1994. But the UK has led the way, as far as de-regulation within the EU is concerned, with the provisions introduced

295 Ibid.
296 Ibid. p.7.
297 Ibid

in the 1996 Broadcasting Act which radically de-regulate previous restrictions on broadcasting and on cross-media ownership.

The prevailing 'patchwork' of different media ownership regulations across Europe has led to concerns, some of which reflect the possibility that regulatory disparities obstruct cross-border investment in European media, and others which arise because of the threat to pluralism posed by the relentless expansion of national and transnational European media conglomerates.[298] Such concerns have led media ownership regulation onto the pan-European policy agenda.

A first step was taken by the Commission with the publication of a consultative Green Paper on media concentrations and pluralism[299]. This Paper reviewed existing levels on media concentration in Europe and suggested three possible policy options: firstly, no action at the pan-European level; secondly, action to improve levels of transparency; thirdly, positive intervention, by a Regulation or a Directive, to harmonise media ownership rules throughout the member states. After many years passed from the publication of this Green Paper, no final agreement has yet been reached as to which of these options would serve the needs of the European Union.

In spite of the obstacles and objections to the advancement of a pan-European media ownership policy, DG XV managed to take a small step forward in July 1996 with the first draft of a possible EC Directive on Media Pluralism.

The Commission's proposals involved a 30 per cent upper limit on mono-media ownership for radio and television broadcasters in their own transmission areas. In addition, the draft Directive suggested an upper limit for total media ownership, i.e. ownership of television, radio and/or newspapers, of 10 per cent of the market in which a supplier is operating. All market shares would be based on audience measures, i.e. calculated as a proportion of total television viewing, radio listenership or newspaper readership within the area in question,

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298 DOYLE, Gillian, From Pluralism to Ownership: Europe's Emergent Policy on Media Concentrations Navigates the Doldrums, The Journal of Information, Law and Technology, 1997 (3), http://elj.warwick.ac.uk/jilt/commsreg/97_3doyl/, p. 4.

299 CEC, European Commission (1992), Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action, COM (92) 480 Final, Brussels, 23 December.

with consumption of each single type of media (television, radio or newspapers) divided by one-third for the purposes of assessing a supplier's overall share of the total market. The proposed derogations would allow member states to exclude public service broadcasters from these upper limits, if they so wish.

A revised set of proposals put forward by DG XV in spring 1997 has introduced two small but significant modifications. First, the title of the proposed Directive has been changed from "Concentrations and Pluralism" to "Media Ownership" in the Internal Market. This signals a move to deflect the focus away from pluralism (where the Commission's competence would be in question) towards the aim of removing obstacles to the Internal Market.

Secondly, a 'flexibility clause' has been introduced. This adds, to the proposed derogations, the flexibility for individual member states to exclude any broadcaster they wish from the (unchanged) upper limits, provided that the broadcaster in question is not simultaneously infringing these upper thresholds in more than one member state and, also, provided that other 'appropriate measures' are used to secure pluralism. 'Appropriate measures' might include establishing, within any organisation which breaches the limits, 'windows for independent programme suppliers' or a 'representative programming committee'[300].

The current situation in Europe favours transnational media corporations, while small and medium enterprises are bound by (in some cases) very strict national legislation. Increasing competition and non-transparent transnational ownership structures contributed to the use of antitrust legislation among legislators in the European states. In many states, an audience share approach is being employed.[301] This reflects the real influence of a company in a relevant market, and at the same time it is neutral to the number of licenses which one broadcaster can hold and allows its international development. Some countries have recently been considering the introduction of media ownership regulatory model based on a general clause of investigation in media sector. A Media Concentration Committee in Sweden made a proposal to the Government, suggesting that mergers and acquisitions of media companies should be subject to both competition legislation and to specific Media Concentrations Act.[302]

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300 CEC (1997), Explanatory Memorandum, (Media Ownership in the Internal Market), DG XV, February.
301 ALBARRAN, MIERZEJEWSKA, p.7.
302 Ibid.

Such solution would provide a mean of possible prohibition of mergers that impede free exchange of opinions and comprehensive information.

6.4 The Importance of Regulating Media Ownerships

Promoting free speech is one of the principles in all European Constitutions. By allocating ownership among many, rather than a few, the rule ensures the widest possible dissemination of information from diverse and antagonistic sources allows a range of viewpoints to be heard. Since requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices, it is important to gather this information independently owned media outlets.[303] The relaxation of ownership regulations can be very dangerous to increase media concentration. Although competition rules are considered with public interest, it is not a complete answer to the problem of media concentration.

Airing different views on different issues of the day from diverse media sources serves public interest. A functioning democracy needs information source diversity because it helps political participation and debate about policy, special norms, and cultural values.[304] Since open debate is an important part of our democracy, the media plays a vital role in society. Separately directed media outlets are better able to offer diverse ideas, opinions and information. Such media outlets offer unique perspective that is important sources of information to the public.

The weakening of ownership restrictions or deregulating it means more industry mergers and the creation of media giants. Then these media giants are able to dominate markets and thereby gain bargaining power over advertisers. To keep ownership rules strong ensures the acts of broadcasters and the print media are respectful to competition rules.

The trend toward media affects the industry in many ways. Each segment of the media is becoming to be dominated by a small number of large and integrated corporations. At the

303 AARONS, C.Judith, Cross Ownership's Last Stand? The Last Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule, HeinOnline 13 Fordham Intell. Prop. Media&Ent. L.J 317 2002-2003, p.336.
304 DOYLE (1997), p.7.

same time, because of economies of scale, it is difficult for business people to enter into the media industry.

Separation of ownership between the print and broadcast media is important also. If there is no separation, it is likely that those sectors will act as a check and balance against each other.[305] The problem with the movement toward media concentration is that it has led to placing the power of informing people in a few hands.

Proponents of the rule's repeal have raised the argument that allowing print and broadcast combinations would enable both media to reduce expenses. Admittedly, a concentrated industry may yield cost savings because it operates more efficiently than one with a larger number of owners. However the important point is protecting the public interest. If a few media giants control most of the major print, broadcast, cable and other media that most of the public relies on as their main source of information, opinion, and creative expression, then this fundamental pillar of democracy is likely to be seriously weakened.[306]

6.5 Public Service Broadcasting: An Essential Element for Media Diversity

The private sector alone cannot guarantee a pluralistic media landscape. In a context of increasing concentration in the media, accelerated by digital developments, the role of public service broadcasters becomes crucial, as a counter-balancing factor and to ensure social and democratic cohesion. Therefore, by promoting legislative measures on media ownership in the private broadcasting sector, it is equally important to strengthen and support the role of public service broadcasting.

The ongoing concentration trend in the commercial media requires a balancing weight on the other side: public service broadcasters. This means that the existence of a few dominant companies can only be tolerated if public service broadcasters have a strong and independent position.

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305 AARONS, p. 337.
306 Ibid, p. 338.

A public broadcasting system detached from State influence is absolutely essential to provide diverse information, culture and content to all citizens.[307] Only in such a way the plurality of cultures in Europe can survive. This has been repeatedly acknowledged by the Council of Europe and the European Union, and is reflected in the Protocol to the EC Treaties on Public Service Broadcasting, as well as in major decisions of the EC institutions, for example the Communication of the European Commission clarifying the application of State aid rules to public service broadcasting.

Publicly funded, non-commercial broadcasting organisations need to be internally pluralistic in order to ensure their optimal role for media diversity. Public service charters, editorial agreements and bodies representing the public interest are beneficial to foster internal pluralism. The media output of these broadcasters can make a significant contribution to political and cultural pluralism, as well as serve as a vehicle for the expression of minority cultures.[308] The fulfilment of the public service mandate also requires professional management and governing bodies.

The contribution of public service broadcasting to general interest objectives is acknowledged by most member States which, for example, impose must-carry obligations of public service channels on cable operators. In countries where digital terrestrial TV is being introduced, transmission capacity should also be reserved for public service broadcasters on the networks, as some countries have already done.

The extension of must-carry rules to all delivery platforms would obviously have a positive impact on pluralism, although the key factor should remain that public service programmes can be easily received by all users: if this is ensured, for example, by means of terrestrial delivery, then extension of must-carry rules to all platforms might not be so necessary.[309]

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307 BRUCK, P.A., DÖRR, D., FAVRE, J., GRAMSTAD, S., MONACO, R., CULEK, Z.P., Media Diversity in Europe, report prepared by the AP-MD, Media Division Directorate General of Human Rights, Strasbourg, December 2002, p. 16.

308 Ibid.

309 Ibid. p. 18.

Extending must-carry rules to certain programmes services of a private nature would also seem justified if the latter were of general interest, if they fulfilled a public service mission and met clearly defined general interest objectives.[310]

In conclusion, public service broadcasters should be strongly supported in the context of digitalisation and market concentration: they should have legal, technical and financial security to adapt to the competitive pressure from private broadcasters. In this respect, they should be able to co-operate with other operators in the media field, with a view to developing new media services and content, thereby contributing to media diversity. This might also require the reorganisation of public service broadcasters for the realisation of their overall mandate.

6.6 Regulatory Instruments

Governments employ a wide range of regulatory instruments that aim to guarantee media diversity and by this very fact attempt to militate against concentration of ownership. However, although all the many countries have provisions to ensure plural media markets, the methods used as well as the framework within which media concentration is regulated vary considerably. In a highly dynamic market this is a consequence of the diverse market conditions in the different countries and the different approaches taken to the media sector in general by policy-makers.

The approach to concentration in the newspaper and broadcasting sectors is perhaps an anomaly grounded in the historical development of the press and the restricted capacity of airwaves available for radio and television services that has legitimised a greater degree of state regulation. As multi-channel television and digital radio increasingly extend to a wider public there will be persuasive arguments for instruments that encourage companies to expand into new areas of the media industries and a greater degree of cross-media ownership may be expected. However, due to the importance of the mass media in the social and political life of the population it is unlikely that restrictions will be totally lifted, as the rationale for rules

310 (cf. Article 31 of the Directive of the European Parliament and Council on Universal Service and Users' Rights related to Electronic Communications Networks and Services)

limiting the market share of companies in the media industry remain largely unchanged by current developments in technology.[311]

The instruments employed by the ten countries in the broadcasting sector range from ceilings for market share that a broadcaster is allowed (and traditionally in Italy, financial ceilings) and diversity in terms of shareholders (France) to less media-specific rules that are built on the concept of retaining fair competition in markets.[312] In some cases there are special provisions for mergers or acquisitions involving media companies (UK); in other cases the media fall within the same competition rules as any other industrial sector.[313]

Competition policy has become a growing part of this overall regulatory framework as any merger or acquisition in the media industry today involves a set of economic considerations of the impact on the nature of the market under review. The competition authorities are therefore likely to play an increasing role in determining the levels of market concentration in the media sector.

6.7 Media Concentration and the Application of EU Competition Rules

The major concern associated with concentrated media ownership is its impact on competition. Competition is generally regarded as an essential means of fostering economic efficiency and of averting abusive behaviour by dominant firms. In essence, competition, the presence of several competing suppliers, helps to ensure that firms keep their costs and prices down, which encourages a more efficient use of resources. If there are few or no rivals in a market, then suppliers can more easily get away with offering goods and services that are costly or inferior. Competitive pressures arouse managers to improve the performance of their firm relative to rivals and this, in turn, benefits consumers and society at large.[314] Monopolistic firms, whether in the media or in other sectors, are usually seen as less efficient than competitive firms. Monopolists may suppress new innovatory products and may, sometimes, engage in unfair competition.

311 WARD, David and Netherlands Media Authority, A Mapping Study of Media Concentration and Ownership in Ten European Countries, 2004, p. 25.
312 Ibid.
313 Ibid.
314 DOYLE (2003), p.32.

The EU rules governing the control of concentrations between undertakings apply to the communications and media sectors in the same way as to any other field of economic activity, notwithstanding the explicit powers reserved for Member states under the EC Merger Regulation to take action to protect media plurality.[315] The Commission now has more than ten years experience in dealing with media mergers, beginning by the way with its prohibition of a concentration (Bertelsmann/Kirch). More recent decisions include for instance, the authorization with conditions, of the Newscorp/Telepiu merger which related to the Italian pay-TV market, and gave rise to the creation of Sky Italia. Competition policy has traditionally worked on the assumption that the efficiency of markets depends directly on their competitive structure and, especially, on the extent of seller concentration. So, competition policy may sometimes involve 'structural' interventions, attempts to bring about market structures which are less concentrated, on the assumption that this will ensure good behaviour by competing firms and promote improved industrial performance.[316]

In most of the European countries and elsewhere there are special on media ownership, but they usually owe their existence to concerns about pluralism and not competition. Media ownership restrictions are generally intended to protect political and cultural pluralism which, as a policy objective, is quite different from promoting competition.[317] Nonetheless, ownership limits intended to preserve pluralism may, at the same time, also serve to prevent the development and subsequent possible of excessive market power by dominant media firms.

The trend towards concentration in the European communications and media sectors during recent years 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.[318] 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

315 LOWE, P., Media Concentration & Convergence: Competition in Communications, Speech by Director General for Competition, European Commission, Oxford Media Convention 2004, speech as delivered on 13/1/2004, p. 7.
316 DOYLE (2003), p.33.
317 Ibid.
318 Ibid. p. 8.

limited number of media companies to curtail media pluralism, diversity and freedom of information.[319]

The distinction between these two different aspects of media concentration is obviously important. The first is purely economic and market-related; the second pertains to the fundamental democratic values. More importantly, the control mechanisms regarding media pluralism continue to rest primarily with national regulators on the basis of the various national media concentration laws.

The Commission, by means of its merger control activity, is primarily called upon to prevent distortions of competition resulting from the creation or strengthening of dominant positions in the media markets. In the current climate of technological convergence, digitalisation and rapid emergence of new media markets the trend towards vertical integration can be damaging to competition. There is always the risk that new media markets are either rapidly monopolised by strong players already active in traditional media or that the new markets cannot even develop because key inputs, such as premium content, particularly rights on recent films or on major sports events, are inaccessible for potential entrants and remain bundled in the hands of a few, often vertically integrated, companies.[320]

The Commission seeks to ensure that media companies do not engage in anti-competitive agreements with other companies or abuse their market power to the detriment of competitors and consumers. Practices which give rise to concerns are for example leveraging market power from traditional onto new media markets or foreclosing these markets by barring access to premium content needed by potential entrants. The granting of long-term exclusive licences for premium content to a single dominant operator can produce these anti-competitive effects.

Notwithstanding the strict limitation of the Commission's competition law enforcement activity to the economic side of communications and media, it is fairly obvious that curtailing market power, keeping markets open and enhancing competition in these areas also promotes media diversity and plurality.[321]

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319 Ibid.
320 Ibid.
321 Ibid.

Moreover freedom of opinion and information as well as diversity and pluralism in the media, are enshrined in Article 11 of the EU Charter on fundamental rights and Article 10 of the European Convention on Human Rights. Needless to say, the Commission has to take these fundamental principles into account in all areas of its activities. In addition part and parcel of the European media landscape is the coexistence of private and public broadcasting which is governed by the so-called Amsterdam Protocol.

7) BROADCASTING IN TURKISH MEDIA

7.1 General Remarks

Since the signing of the Treaty of Rome in 1957, Turkey has sought to become a member of the European Union (then the European Economic Community). During this mostly disappointing and yet unfinished process, Turkey has adopted many economic (like customs union) and political (like human rights issues) laws, rules, and practices of the European Union. The most important economic adoption, though, was the passage of the Law on the Protection of Competition in the Turkish Parliament in 1994. As a consequence of the Law, the Competition Authority, which is the body responsible for applying the Law, was established in 1997.

Competition policy in Turkey began in 1994 with the passage of the Law on the Protection of Competition, Law No. 4054, by the Turkish Parliament. Article 167 of the Turkish Constitution attributed to the government the duty and the responsibility to take measures to provide and improve healthy and regular procedures in money, credit, capital, product, and services markets and to prevent monopolization and cartelization as a result of any activity or agreement in these markets. But there was no separate body in Turkey directly responsible for applying Article 167 until 1997 nor was there a separate law until 1994.

In 1997, three years after the Law was passed, the Competition Authority was established. The Competition Authority is the body responsible for applying the Law. The implementation of the Law by the Competition Authority can be broadly summarized in three categories: competition infringement, negative clearance and exemption, and mergers and acquisitions. The establishment of the Competition Authority is also important for media because after 1997 this Authority became responsible for their anticompetitive actions.

7.2 End of State Monopoly and Period of Multichannel Television

The once simple and monolithic structure of the Turkish broadcasting media was shattered by the mushrooming of private and commercial television and radio stations during the early 1990s. In 1982, there was a single state-run channel, Turkish Radio and Television Corporation (TRT) broadcasting in black and white; in 1989, there were three state-run

channels broadcasting in colour. At the end of 1992, there were six state channels and six private channels, all broadcasting in colour, with several other channels lined up to grab a frequency.[322] The growth in the number of radio stations was even faster: More than a dozen commercial stations went on the air in 1992 in Istanbul to demolish the monopoly that had been enjoyed by the four TRT radio networks till then.

The transformation was unexpected. It took the three major American networks a whole decade to lose one-third of their audience; the TRT suffered much heavier losses in a matter of a few months.[323] According to AGB, which provides ratings data based on measurements taken in Ankara and İstanbul, the total share of the four commercial TV channels, Show TV, InterStar, Teleon, and Kanal 6, was 70.8%, TRT's five channels got a mere 24%, and the remainder went to satellite channels and videos.[324] Among the 15 most highly rated programs during the first week of November 1992 were 10 Show TV programs, 2 InterStar programs, 1 Teleon program, and 1 Kanal 6 and TRT program each.[325] The TRT's loss in advertising was just as dramatic: In September 1992 alone, TRT's combined advertising revenue fell to 32 billion Turkish liras, while Show TV's revenue climbed to 158 billion liras, followed by InterStar at 140 billion liras.[326] Some of the advertising figures for commercial channels can be misleading since they include incestuous transactions within families of companies, yet the advertising community appeared to be convinced that TRT was losing the advertising battle.

The logic of the new satellite technology knew no bounds, diffusing rapidly and leading to the destruction of the traditional structures. There was a gold rush to skim off maximum benefits while the legal vacuum existed. The public appeared to be mesmerized. There was very little policy debate. As agreed by many writers, the policy followed the technology in Turkey.

The TRT, despite numerous efforts to make it more autonomous, remained a state monopoly susceptible to government intervention. It was essentially the voice of the state, the medium for the official definition and interpretation of the central Kemalist bureaucracy that was conveyed to the people. Any challenges to the official ideology were thwarted by a multilevel

322 ROSSANT. J., Turkish Television: Uncontrolled Growth of Private Stations, Türkiye Communications and Broadcast Review, 1992 Autumn, p.24.

323 ŞAHİN, H., AKSOY, A., Global Media and Cultural Identity in Turkey, Journal of Communication, Volume: 43, Issue: 2, Publication Year: 1993, p. 32.

324 AGB (1992 November 12)

325 ŞAHİN, H., AKSOY, A., p. 32.

326 ROSSANT. J., p.25.

system of self-censorship. All TV and radio networks operated by the TRT were run from Ankara with little regard for local needs and expectations. This highly centralized scheme was well suited for the administrative system and the central command economy of the country.

Changes in the broadcasting system were expected with the surprise victory of Turgut Özal's Motherland Party in the general elections of 1983. Özal was an unabashed free marketer, a staunch advocate of the free circulation of goods and ideas. He promised wide-ranging privatization of the state economic enterprises. He made no secret of his admiration for all things American, including the commercial broadcasting system.[327] It was assumed, therefore, that once in power, Özal would take steps toward the privatization of the state monopoly on broadcasting to expedite Turkey's economic and cultural integration into the globalization process, which he described as "synchronization with the civilized world".[328]

That did not prove to be the case. The TRT remained untouched during Özal's first term, which ended in 1987. The pressure for allowing private television stations to operate began to build during the early years of his party's second term. The main legal obstacle was Article 133 of the Constitution, concerning the state monopoly. Although Özal's party did not have the two-thirds majority required for amending the Constitution, it could have easily gained the backing of the opposition parties in this matter. In late 1989, however, Özal gave the first signal of the impending change when he told reporters that even though it was unconstitutional to set up private television channels on Turkish soil, there was nothing illegal in broadcasting into Turkey from abroad, like Cable News Network (CNN). A few months later, in May 1990, a company called Magic Box announced its intention to do just that and began experimental broadcasts into Turkey from its transmitters in Germany. One of the partners of the Swiss based company was Ahmet Özal, the elder son of the president.[329]

7.3 The Magic Box Channel

The Turkish audiences largely had been content with terrestrial broadcasting until 1990, although many private satellite dishes were already installed to receive European channels and CNN; also, the Posta–Telgraf-Telefon Genel Müdürlüğü[330] (PTT) had been

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327 ŞAHİN, H., AKSOY, A., p. 33.
328 Ibid.
329 SERİM, Ö., Türk Televizyon Tarihi 1952-2006 (History of Turkish Television 1952-2006), Epsilon Yayınevi, January 2007, p. 227.
330 Mail-Telegram-Telephope General Management.

experimenting with a cable TV project in Ankara to distribute satellite channels. Yet, it was the Magic Box channel, Star 1, which opened Turkey's global media floodgates. The Turkish public and authorities were confronted with a number of unprecedented questions regarding the nationality, accountability, and responsibilities of the Swiss-based station broadcasting out of Germany via EUTELSAT F-10 East. The very legality of Star 1 broadcasts were questioned: Its resemblance to CNN was said to be deceptive since Star 1 programming was specifically aimed at the Turkish audience and was financed through advertising revenues collected in Turkey. Also, it had not obtained official permission from the receiver country, as stipulated by a number of international conventions.

Any pretence at legality became untenable when the dish antennas were abandoned in favour of local transmitters. Ironically, the local antennas were set up by municipal governments that were in the hands of opposition parties harshly critical of the "pirate" operation and its links to the president. The retransmission of broadcast signals clearly violated the Constitution, the Radio Television Act, and the Wireless Act. Yet no effective method of prosecution could be established. The fact that the operation had the blessing of the president dampened the enthusiasm of the law enforcers. The public liked what Magic Box offered them: new and glitzy American series, soccer matches at home and abroad, discussion programs, and talk shows in which hitherto taboo subjects were openly discussed. The municipal governments were pressured by their constituents and sometimes bribed by Magic Box into installing retransmitters. Magic Box, freed from the shackles of satellite antennas, spread like wildfire, reaching much of the country in a matter of a few months.[331] As the state monopoly model was destroyed, the realm of broadcasting opened to commercial and global considerations; in short, a marketplace emerged.

So while the liberalization of the broadcasting system was carried out through deregulation in much of the Western world, Turkey took a shortcut through what might be called delegalization. Once Magic Box went on the air, increasingly greater portions of the broadcasting activity, both at the production and reception ends, were removed from the scope of the old legal system and incorporated into the *extralegal* market. This process of delegalization owed much to the legitimating of the "pirate" operation by certain agencies of the state. For instance, the Turkish Football Federation, a unit of the Ministry of Youth and Sports, signed agreements with Magic Box to sell the right to broadcast Turkish soccer league

331 Ibid. p. 230.

games to Star 1, with devastating consequences for TRT's ratings. The PTT and the TRT were also confused and slow in responding to the intrusion. President Özal, on the other hand, congratulated the new station as an example of successful broadcasting. The press, while criticizing the illegality of the new but obviously hugely popular enterprise, provided ample publicity for Magic Box's programs in its news and entertainment pages. The advertising community, already globalized through its affiliation with international agencies, was more than happy to see the TRT's sometimes capricious monopolistic rules rendered ineffective by competition. Magic Box quickly became a part of Turkey's communications landscape.

Others followed rapidly in Star 1's wake. By the end of 1992, Show TV, Kanal 6, Flash TV, HBB, and the second Magic Box station, Teleon, were also broadcasting into Turkey from abroad. Even though survivability of the existing stations was questioned in light of economic limitations of the Turkish advertising market, others, including the mass circulation *Sabah* and *Hürriyet* newspapers and the conservative *Türkiye* newspaper, were lined up to start their own stations.[332] Prospective broadcasters were caught up in a race to grab as much of the electromagnetic spectrum as possible while the legal void persisted, increasingly leading to reception difficulties and frequency chaos in large cities like İstanbul, Ankara, and İzmir. The pillage of the frequencies on the FM band was just as pervasive, and the consequences for the TRT just as serious. According to a survey conducted in the fall of 1992, the four TRT radio networks were preferred by less than 20% of the Istanbul radio audiences.[333] The once-mighty TRT was broke, having difficulty paying the salaries of its bloated staff. The old order had been destroyed effectively without much discussion of the new one to replace it, no commission reports, no citizen group meetings, and no white papers. It had come from the sky. It had indeed happened like "magic."

7.4 Commercial Broadcasting Marketplace

The satellite-based broadcasting ventures were all commercial, thus introducing a whole new set of issues and parameters. The advertising market nearly doubled in size between 1991 and 1992, responding to the increasing competition in the broadcasting market. The prices of foreign broadcast materials doubled and broadcasting "stars" changed jobs frequently, lured to new channels by astronomical fees and salaries. However, the fate of the newly born commercial broadcasting marketplace remained uncertain. In November 1992, there were six

332 ŞAHİN, H., AKSOY, A., p. 33.
333 Ibid.

commercial and six state channels on the air, competing vigorously for advertising revenue. If we take into account that the total advertising revenue received by television stations was on the order of $400 million in 1992, then the sustainability of commercial television in Turkey becomes rather questionable.[334] The highest earning station, Show TV, was expected to reach a $120 million mark in annual revenues in 1992.[335] In many cases, the financial pressures resulted in cost-reduction schemes that, just as everywhere else, led to importing of cheaper American and Latin American series. Foreign series accounted for more than half the program slots in a week, and all the top 10 most-watched programs were quiz shows and comedies, with the exception of two news magazine programs. Predictably, the logic of the market began to lead to a new kind of homogenization in programming.

The role of the global media in the recasting of Turkish national identity was not confined to foreign programming and iconoclastic domestic programs. The global media were also instrumental in reshaping the format of programs produced in Turkey. The national media channels, whether private or public, in their attempt to embrace difference and to give voice to the particular, increasingly imitated global media channels. This resemblance went all the way down to small details like the way women presenters dressed or the way cameras zoomed in. The global media exercised a hegemonic power by being accepted as the norm.

On the whole, global media channels have had both a homogenizing and a particularizing effect on the Turkish audiences. Global media have played a key role, on the one hand, in breaking up the unitary national culture by feeding the so-called "small worlds" of real Turkey into the larger world of "imagined" Turkey. On the other hand, global media have homogenized difference and particularity by connecting the "small worlds" across frontiers and creating what Anderson[336] calls "imagined communities."

Turkish workers in Germany could tune into the TRT programs and become part of Turkish culture, or the sports lovers can share their passion over the Eurosport channel. It has been suggested that the Turkish guest workers were the pioneering users of satellite dishes in Germany. As small worlds connect, they become master narratives, different from one another only in terms of their focus. In this new cultural landscape a new type of identity,

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334 Ibid. p. 36.

335 Ibid.

336 ANDERSON, B., Imagined Communities: Reflections on the Origin and Spread of Nationalism, Verso, London, 1983.

what Schlesinger[337] calls "identity by choice", is fashioned, where each particular identity establishes global links that transcend territorial boundaries to form new types of communities based around shared values, such as consumption, ethnicity, religion, or gender. In this new landscape, individuals choose their own identities and the communities to which they want to belong. Some authors argue that with greater transnational communication the identities of individuals will not be determined by the nations of which they are citizens but by economic, political, or cultural communities.[338]

Choosing identities through the global media, however, is not a simple matter. Once the taboo bashing is over, the audience may find that there are after all very few choices left to be made. This is especially true in the case of Turkey where the fast commercialization of the broadcasting industry is happening in the totally not legalized environment of cutthroat competition.[339]

7.5 Media Law in Turkey

The principles and procedures relating to the regulation of radio and television broadcasts and the establishment, duties, competence and responsibilities of the Radio and Television Supreme Council is regulated by Law No 3984 on the Establishment of Radio and Television Enterprises and Broadcasts (the "Law") (published in the Official Gazette dated 20.04.1994 and numbered 21911) and some additional regulations including the regulation regarding licensing of cable broadcasting, the regulation regarding licensing satellite broadcasting, and the regulation regarding the administrative and financial requirements of private radio and television enterprises. This Law deals with matters relating to radio and television broadcasts transmitted by any and all techniques, methods or means and by electromagnetic waves or other means under any denotation for reception domestically or abroad.

According to the Law, radio and television broadcasts should be conducted with the understanding of public service. Broadcasts should not violate the existence and independence of the Turkish Republic; the territorial and national integrity of the State, the national and moral of society, the principles, democratic rules and individual rights

337 SCHLESINGER, P., A Question of Identity, New European, 5(1), 1992, p.10.
338 ŞAHİN, H., AKSOY, A., p. 37.
339 Ibid.

stipulated under the Title on General Principles of the Constitution, general morals, social order and Turkish family structure, freedom of expression, and the principle of pluralism in communication and broadcasting, the principle that people shall not be discriminated because of their race, sex, social class or religious beliefs, the principle that broadcasts shall not instigate the community to violence, terror or ethnic discrimination or give rise to feelings of hatred in the community. Broadcasts shall also comply with general objectives and basic principles listed by the Law.

Radio and television broadcasting services are regulated by the Radio and Television Supreme Council ("RTÜK"), which is established as an autonomous and impartial public legal person.

The duties and powers of RTÜK include:

a) Issuing, with standards of impartiality and fairness, broadcasting permits and licenses to applicants who have complied with the prerequisites; allocating channels and frequency bands, with due respect to the use on a time sharing basis in keeping with regional balances of at least 50 percent of the channels and frequency bands included in the national, regional and local frequency plans, excluding those channels and frequency bands used by the Turkish Radio and Television Corporation,
b) Under the provisions of Radio Communication Law No. 2813 of 05.04.1983, issuing of permits for the establishment and operation of facilities to cover broadcast service areas allocated to radio and television enterprises according to national frequency plans for national, regional and local broadcasts and to supervise the compliance of the facilities with the provisions of the Radio Communication Law and with the prerequisites for such facilities.
c) Under the provisions of this Law, to issue licenses for the construction and operation of telecommunication facilities so that, in addition to the radio and television transmitters provided for in the national frequency plan and to the existing telecommunications network between stationary and mobile transmitting units, radio and television enterprises can establish radio link stations for the purpose of linking up with satellites in order to relay their national and local broadcasts,
d) To encourage enterprises to extend their broadcasts to various regions of the country, while observing regional balances in the allocation of time sharing channels,

e) To determine and publicize, while bearing in mind the principles of the European Convention on Trans-frontier Television, the pre-requisites and standards to be fulfilled by public and private radio and television enterprises that intend to transmit from within the country in order to apply for broadcasting permits and licenses,
f) To establish via relevant regulations the preconditions for allocating channels and frequency bands, the deadlines for recipients of allocations to start regular broadcasts, and the broadcasting permit and license fees to be paid by operators of radio and television stations,
g) To decide on the relevant sanctions in cases of violation of the provisions of the Law or of the conditions for frequency allocation,
h) To ensure that broadcasts from or to national territory to be transmitted via satellite conform to national and international rules and standards, and to cooperate to this end with competent authorities in other states,
i) To formulate the rules to be applied to encoded broadcasts and to cable radio and television installations and broadcasts within the framework of this Law, taking care not to leave any surplus capacity in the cable radio and television facilities of the PTT Administration.

7.5.1 Obligations of Private Radio and Television Enterprises

The television enterprises need to obtain separate licenses for each type of broadcasting they provide, such as analogue terrestrial broadcast, satellite broadcast and cable broadcast. Satellite platform operators, although they are not required to obtain specific licenses, are required to (i) submit a notarized undertaking to the RTUK and (ii) obtain a certificate from the Telecommunications Authority showing that they are satellite platform operators.

The enterprises to which the Supreme Council grants broadcasting permits are obliged to extend their coverage to at least 70% of the territory of Turkey and to broadcast at least 80 hours a week by the end of the second year from the date of the permit at the latest. The Law also envisages certain standards and limitations on advertising.

7.5.2 Suspension of Broadcasts

With the exception of court orders, broadcasts shall not be subject to a prior control or suspension, However, in cases of acute necessity for reasons of national security or of a strong possibility that public order may be disturbed, the Prime Minister or a minister designated by him may suspend a broadcast. Radio and television enterprises are obliged to broadcast public announcements issued by the President of the Republic or the Government for reasons of national security, public order, public health or public morals.

7.5.3 Warning, Suspension, Revocation

RTUK issues warnings to those private radios and television enterprises which fail to fulfill their obligations, or violate the conditions of their broadcasting permit, or which transmit programmes that violate the broadcasting rules and standards. The warning shall contain a description of the kind and gravity of the violation and the consequences of its repetition. In cases of repetition of a certain violation, transmission may be suspended up to a period of one year or the broadcasting permit revoked according to the gravity of the violation. The broadcasting permit of any private radio or television enterprise which forsakes any one of the conditions required for a broadcasting permit or which has fulfilled the conditions through fraudulent means shall be revoked by RTUK. Penalties on violations are also listed in the Law.

7.5.4 Regulations

RTUK prepares regulations to stipulate the principles and procedures for the functioning of RTUK and its Secretariat, the conditions for allocation of channels and frequencies, the procedures for inviting and accepting bids for tenders, and the rules and procedures for protecting the rights of copyright holders and producers. These regulations shall come into force upon being published in the Official Gazette.

7.6 Competition Law and Media Concentration in Turkish Media

Competition or antitrust laws are enacted by states around the world in order to provide that market mechanism works properly. So, it could be stated that main objective of the competition law and policy is to achieve 'effective competition' in the market. If there is effective competition in the markets, it is assumed that productive and innovative efficiency will be ensured.[340]

It is not possible to examine every aspect of competition law and policy, so some significant points that are relevant to media will be explored below. Generally, competition law and policy has three main prohibitions:

7.6.1 Agreements between Undertakings

Like Turkish Competition Law Article and EC Treaty Article 81, almost all competition laws prohibit agreements and concerted practices between undertakings, and decisions of associations of undertakings, which prevent or distort competition in the market. Agreements to fix prices, share markets and limit production are some of the examples prohibited by these articles.

If there were no tools to deal with cartels and agreement, media companies could easily coordinate their behaviours. Because of that, these articles serves to diversity and plurality aim directly by requiring undertaking to decide their commercial behaviours independently.

In *BİRYAY*[341] *Case*, Turkish Competition Authority took the decision[342] as follows:

BDD and YAYSAT ruled the %100 of the market for distributing newspaper and magazines. A joint venture of these two companies that called BİRYAY established to distribute some other publications that they do not own. They also planned to take municipal biddings to coordinate the sales of newspapers and magazines in the pull ins. Their sales policy was to

340 Bilir, p.20.
341 BİRYAY is the joint venture of BBD and YAYSAT equally owns.
342 Decision date: 17.07.2000, no:00-26/292-162

prohibit other distributors to sell newspapers and magazines in these pull ins. This concerted agreement infringed article 4 of the Turkish Competition Law by both;

i. partitioning the distribution market for newspapers and magazines and customer publications via BİRYAY jointly set up by them, and

ii. determining jointly the amount of fixed prices and the distribution commissions to be received from the customer publishing houses via the Main Contract of BİRYAY and correspondences through BİRYAY.

Subsidiary dealership contracts concluded by YAYSAT and BBD involve anticompetitive provisions as they grant and exclusive region for one of the parties and restrict the freedom of the subsidiary dealer for resale and to display and sell competing goods, and there for they are contrary to article 4 of the Act.[343]

In BIB Case[344] a joint venture between BskyB, British Telecom (BT), Midland Bank and Matsushita Electronic Europe was assessed under Article 81 of EC Treaty. The joint venture established to provide digital interactive television services. BIB was intended to, become active both on the digital interactive service and the set-top boxes and satellite dishes.[345] Although BT and BskyB were potential competitors in that market and there were restrictive clauses in the agreement, Commission granted exception by imposing some conditions on parties. This case is important that, on the one hand, it shows Commission's tolerant approach in the case of a new service, on the other hand Commission intervenes the agreements by imposing conditions on parties to safeguard competition. These conditions aim to prevent the foreclosure of market by parties.

It can be concluded that this article is directly or indirectly serving to the diversity and plurality by preventing anticompetitive agreements and by exempting pro-competitive agreements.

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343 Bilir, p.21.

344 Commission decision 1999/2935/EC, IV./36.539, Official Journal 6.12.1999 L312/1.

345 Nitsche, p.101.

7.6.2 Abuse of Dominant Position

Turkish Competition Law Article 6 and EC Treaty Article 82 prohibit the abuse of dominant positions of one or more undertakings. Excessive or predatory pricing, discrimination, leveraging, and tying are the examples of these articles.

When deciding the dominant position of an undertaking (like a broadcaster), Competition Authorities take into consideration different factors like market shares, barriers to entry, and number of competitors. In practice, 40-50 per cent market share is critical to decide dominant position. This means that 'special responsibilities' imposed to undertakings holding dominant position will apply above certain thresholds (at least 40 per cent) that these thresholds are above the diversity thresholds.

The competition law does not intervene undertakings holding dominant position unless they abuse their positions. For example, considering the plurality criteria, there is a need for restriction of ownership when undertaking achieved more that 25 per cent market share even in the case of internal growth or success. In other words, the very rational rule of competition law and economics conflict with the aim of diversity and plurality in the broadcast media.

Like Commission's applications, Turkish Competition Authority also investigated the media company's abusive behaviour. Such as in BIRYAY case, Competition Authority reached the determination of and grounds for the abuse of dominant position under article 6 of the Act.

During the conducts which are the subject of investigation, YAYSAT, BBD and BIRYAY's total market shares for the last five years reached 100 per cent. Therefore, the relevant product market is on an oligopolistic and even a duopolistic nature when it is considered that BIRYAY is a joint venture of YAYSAT and BBD groups.

It is rather less likely for a new undertaking to enter the market due to the fact that there is a very high rate of concentration in the said market and there are not any firms capable of competing with these two companies after concentration. Establishing a distribution company is costly, that is not possible to enter the current networks of dealers and that there is inability to reach enough number of publications to feed the new network of dealership to be set up. As customer publishing houses do not have any alternatives other than distribution companies

jointly set up by firms which they compete in the upper market (publishing market for newspapers and magazines), their bargaining power is very low. Therefore, the price elasticity of demand is very low.

Furthermore, BIRYAY refused to sign contracts, or renew the contracts with some newspapers and magazines for distributing these publications. BIRYAY also wanted to conclude contracts with some other publishing houses under more difficult conditions. It obvious these practices fin in the actions aiming at the distortion of competition in another market in the context of article 6 of the Act.

7.6.3 Mergers

Most of the times mergers, acquisitions and joint ventures are prohibited by competition laws if they create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the market.

Like EC merger control regime, Turkish Competition Law Article 7 and Acquisitions Communiqué No. 1997/1 are important tools to address diversity issues because it considers directly the number of players in the market.[346] Importance of diversity issues has increased in recent years with the waves of mergers and joint ventures between converging sectors. Both Turkish and Commission merger regime sets out so-called 'dominance test' to assess the concentrations. According to this test, if a concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market", this merger will be prohibited. However, again, this criterion of merger control causes critics that it cannot adequately address diversity.

As mentioned before, criteria of finding dominant position conflict with the diversity criteria. Both Turkish and Commission merger regime's main concern in merger cases is to prevent creation and accumulation of a dominant position. Furthermore, if there is a risk for collective dominance, Commission can intervene a merger causing oligopolistic dominance in the market.

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[346] Bilir,p.25.

Concentrations, particularly joint ventures between parties who are in the different stages of value chain in broadcasting sector have increased. In these cases, Commission's concerns are focused on foreclosure of markets and access to bottlenecks. For example, in *MSG Media Services*[347]Commission prohibited the joint venture, which was established by Kirch group, Bertelsman and Deutsche Telekom to provide Pay-TV and related services in Germany, "because the joint strength of two major private broadcasters, together with telekom expertise, would make further market entry impossible and deprive consumers of the benefits of competition between different Pay-TV suppliers".[348] Because of the flexibility of competition law in defining market definition, Commission defined Pay-TV market separately and prohibited merger. This shows the strength of EC competition law that it can control strategic alliances in new markets, which can escape the national media regulation rules to ensure media diversity.

Different from the Turkish merger control regime, Commission's Article 21/3 of merger regime sets out an exception to the so-called 'one-stop-shop rule' that "member states may take appropriate measures to protect legitimate interests". Plurality of media has been counted as one of the legitimate interests of member states in Article 21/3. It means that if approved merger has negative effects on plurality in media in one member state, this member may take appropriate measures in its territory. However, Article 21/3 does not require Commission to consider plurality of media in its analysis and so far no member states have invoked this rule.[349] It is argued that this rule indicates the inadequacy of EC competition law to provide diversity.[350]

7.7 Commission's Evaluation of Turkish Broadcasting[351]

The audiovisual sector is characterised by rapid and steady growth and is currently regulated by the Law on Intellectual and Artistic Works and the Law on Cinema, Video and Musical Works. On the basis of information available to the Commission, however, it is not possible

347 Decision 94/922/EC,
348 Nitsche, p. 117.
349 Nitsche, p. 118.
350 Bilir, p. 26.
351 See: http://europa.eu/scadplus/leg/en/lvb/e20113.htm for more details.

to assess the extent of the harmonisation of Turkish legislation in this field, in particular as far as the TWF Directive is concerned.

According to Commission's words, broadcasting chapter requires legislative arrangement with the Television without Frontiers Directive and capacity to participate in the community programmes. The Television without Frontiers Directive creates the conditions for the free movement of television broadcasts within the EU. It includes basic common requirements concerning jurisdiction, advertising, major events, the promotion of European works, the protection of minors and public order, and the right of reply.

Although not enough information was available to allow Turkey's progress since 1998 to be assessed, the *October 1999 Report* noted that Turkish legislation on the audiovisual media was not compatible with the Community acquis. The *November 2000 Report* emphasised the important changes that had taken place in Turkey's audiovisual sector. However, further efforts were needed in order to achieve alignment with the Community acquis. The *November 2001 Report* highlighted the lack of progress made towards alignment with the Community acquis. The *October 2002 Report* took stock of the progress made by Turkey in aligning its legislation with the Community acquis in the audiovisual field, though it also noted that some important discrepancies remained. The *November 2003 Report* noted that, although some progress had been made (mainly as regards radio and television broadcasting in languages other than Turkish), the alignment of Turkish legislation with the Community acquis was still limited. The *October 2004 Report* emphasised the progress made by Turkey, particularly as a result of the entry into force of a new regulation concerning the broadcasting of television and radio programmes in the languages and dialects traditionally used by Turkish citizens. However, substantial progress was still necessary to align Turkish legislation in the audiovisual field with the Community acquis. The *October 2005 report* pointed out that Turkey's progress in aligning its legislation with the acquis in the area of audiovisual policy remained limited. The *November 2006 report* reiterated the findings of the previous year. It underlined the almost completed lack of progress towards aligning Turkish legislation with the Community acquis in the audiovisual sector. In the cultural field, however, significant progress was recorded with, in particular, participation in the Culture 2000 Community programme and the launching of the procedure for ratification of the UNESCO Convention on cultural diversity.

Commission's evaluation is based on seven subjects. It is useful to take a look at each of these subjects to understand Commission's point of view towards Turkish Broadcasting.

i. Freedom of expression

The 2006 report emphasises that the Turkish legal framework still does not guarantee freedom of expression. Defamation is still a criminal offence carrying prison sentences.

ii. Competitive environment

Turkey has created a competitive environment in the audiovisual sector by legalising private radio and TV.

iii. Broadcasting Act

The act amending the Broadcasting Act (RTÜK Act), which was vetoed by the President in 2001, was re-adopted by the Turkish Parliament in May 2002 and amended in August 2002. A new article provides for the possibility of broadcasting programmes in the different languages and dialects traditionally used by Turkish citizens in their daily lives. Another positive aspect is a new article in the Act allowing the retransmission of broadcasts. The retransmission of BBC and Deutsche Welle programmes has resumed.

Apart from these developments, the content of the act remains identical to that of the act adopted in 2001. It includes provisions on sanctions, the Internet and the composition of the Radio and Television Supreme Council (RTÜK), as well as on ownership, mergers and acquisitions in this area. The act also lays down basic principles that any broadcasting activity must comply with, including a ban on broadcasts which threaten the existence and independence of the Turkish Republic, the territorial and national integrity of the State, or the reforms and principles of Atatürk, or which encourage violence, terror or ethnic discrimination.

iv. Administrative Capacity

In terms of administrative capacity, the new procedure relating to the composition of the Radio and Television Supreme Council (RTÜK), the national regulatory body, provides for a reduction in the role of the Parliament, while the influence of the National Security Council has been strengthened. In 2005, the Turkish Parliament ratified a constitutional amendment

relating to the RTÜK; under this amendment, the members of the Council must be elected by the political parties in proportion to their seats in Parliament. The political independence of RTÜK, which had already been criticised in the past for charges of partisanship, might be weakened as a result. The 2006 report also points out that the issue of the independence of RTÜK remains a cause for concern.

v. Access to radio and TV programmes

Following the Act adopted in August 2002, a regulation on the languages in which radio and television programmes are broadcast came into force in December 2002. The regulation stipulated that programmes in local languages could be broadcast only by the Turkish national radio and television company (TRT). However, this regulation was never implemented. To replace the 2002 regulation, a new regulation concerning the broadcasting of television and radio programmes in the other languages and dialects traditionally used by Turkish citizens came into force in 2004. This regulation extends the possibility of broadcasting programmes in languages other than Turkish to national radio and television channels - in the 2002 regulation, only the public service broadcaster was authorised to do so.

However, such broadcasts are limited to news, music, and cultural programmes for adults. Furthermore, broadcasting time is limited. The Radio and Television Supreme Council decided in 2006 to lift these restrictions as far as music and cinematographic works are concerned but, in fact, these restrictions are still applied by broadcasters. Regional and local broadcasters should be authorised to broadcast programmes in other languages at a later stage once the regulatory authority (RTÜK) has finalised its study on the use of local languages in all Turkish regions.

Educational programmes teaching the Kurdish language or directed at children are prohibited, and programmes must have Turkish subtitles. An appeal against this regulation was launched in 2006. Out of 12 applicants, three have been granted a licence and been able to start broadcasting programmes in Kurdish dialects.

At the national level, TRT broadcasts programmes in a number of languages and dialects other than Turkish (Bosnian, Arabic and Caucasian, for instance). However, broadcasting time is limited and only certain types of programme are transmitted (chiefly news, sport and music).

vi. Alignment with the audiovisual acquis

The level of alignment with the acquis as regards audiovisual policy remains limited to some provisions concerning advertising and protection of minors. The Law on the Establishment of Radio and Television still poses problems in terms of freedom of reception, major events, promotion of European and independent works and restrictions on the share of foreign capital in television enterprises.

vi. Culture

Turkey started participating in the Culture 2000 programme in 2006. It has, moreover, supported the adoption of the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expression, and has launched internal procedures for ratification. The city of Istanbul has applied to become European Capital of Culture for 2010.

8) CONCLUSION

In Western Europe, the liberalisation of most media markets during the 1980s ended the advanced position of public service broadcasters by opening the frequencies to private players. During the 1990s, State television in Europe's new democracies began a steady and still incomplete process of transformation into public service television.

Adapting to the Western European model of organising the broadcasting sector was a precondition for many countries in transition and part of the general "Europeanization" of their political, social and economic life. Now, in most of the European countries broadcasting functions, to a greater or lesser degree, as a "dual" system of public service and commercial television.

The Treaty of Amsterdam has created an obligation that, for any proposed Community legislation, the reasons "shall be stated with a view to justifying its compliance with the principles of subsidiary and proportionality". Hence, in cases as shared competence between the Community and Member State, subsidiary reasoning must be given. If a measure concerns areas within the exclusive competence of the Community, the subsidiary principle does not apply.

The Community competence in the field of broadcasting must be assessed against this background. Since in the Sacchi[352] case, the Court of Justice has consistently held that television broadcasting qualifies as a service in the sense of the Treaty. Insofar as a common market in broadcasting as a commercial activity is concerned, it falls into the exclusive competence of the Community. The Television Without Frontiers Directive[353] was based on (then) Articles 57(2) and 66, with the aim of achieving a common market in broadcasting services. Yet, in the Preamble it is also clarified it is also clarified that the Directive does not interfere with the Member States' responsibility to organise broadcasting.[354] Thus,

[352] Case 155/73 [1974]
[353] Directive 88/552/EC
[354] Ibid.

broadcasting is a service of a mixed nature and the question arises whether this affects the availability of the free movement of services as a legal basis for harmonisation.

In the discussion preceding the adoption of the Directive, it had been submitted that the free movement of services was not a sufficient legal basis because it would disregard the specific cultural nature of broadcasting. This argument is not convincing. Article 151, inserted by the Treaty of Maastricht, expressly provides in paragraph 4 that "the Community shall take cultural aspects into account under other provisions of this Treaty…" and in paragraph 5 excludes harmonisation measures in the cultural field. These provisions read in conjunction can only mean that purely cultural aspects, which are not covered by any other competence, whereas cultural aspects of an economic activity must be considered as inherent part thereof and do not exclude the application of the free movement of services.[355] Given that television broadcasting is not a purely cultural but a mixed activity according to settled case law, the Council correctly based the Television Without Frontiers Directive on the free movement of services.

As a result of this study, it is comprehended that, television remains heavily regulated across Europe since it uses a limited natural resource, the spectrum of frequencies, which is controlled by the State. Another reason why television is heavily regulated is its power over society and politics. The current legislation ensures various degrees of independence for broadcasters in most countries. However, political and commercial pressures on the national regulatory authorities that are in charge of licensing broadcasters are still a fact of life.

Public service television keeps enjoying its special position at the European policy-making level, because it is still considered to be a vital element of democracy and part of the European culture. Yet, the digitalisation and convergence of communication and information technologies, as well as the competition from commercial broadcasters, have created pressure on public service broadcasting across Europe to operate independently of political and economic interests.

Both in Western and Eastern Europe, public service television broadcasters are frequently criticized for their ties to Government and to political parties, and for a growing

[355] NITSCHE, p.179.

commercialisation, with the resulting “dumping down” of general quality, as they try to keep up with the competition from private television broadcasters.

Across Europe, television markets are highly concentrated in terms of ownership and viewership. In most countries, the three largest television channels share the bulk of the viewership. Despite the political declarations against the monopolisation of media markets and legislation to limit such concentration, the ownership of private broadcasters still tend to be highly concentrated. In Western Europe, concentration of ownership is higher than the transition countries. However, in the past decade the Eastern European countries have seen massive mergers and acquisitions, and the establishment of large media groups controlling most of the broadcasting market.

The European Commission thinks that it is difficult to propose any kind of harmonisation of media ownership rules between the EU member States, and has pointed out that the issue should be left to the member States. However the implementation of already existing pan-European standards, such as the EU’s “Television without Frontiers” Directive, is often uncertain or even deficient.

We are living in the age of private broadcasting and commercial media together with the public service broadcasting. However the new technologies and economic development also prepared the grounds of media mergers and joint ventures. Increasing concentrations caused many concerns about diversity and plurality in media. Although competition law is an important part of the regulation, it is not designed to ensure diversity and plurality in media. Competition rules only designed to ensure a competitive market. The result of the competitive media market will be less concentrated and pluralistic media. And in some cases, competition law is not sufficient to address plurality concern if the acts of the media companies are not conflicted with the competition rules. When addressing any concern related to the media companies and the result of their transactions we should keep in mind that competition rules can only solve those concerns in a certain extend because competition rules take into account the economic criteria only.

At the end of this study, it is concluded that the European Union should continue to ensure the existence of independent radio and television broadcasting in the dual system of public and private broadcasters and keep in mind that the duality is an essential element of democracy

and part of the European political and cultural identity. This principle should be sustained as the basis for media policy and legislation. The EU also should ensure that, European media market remains competitive and the new developments do not harm quality and pluralism in European broadcasting.

ABSTRACT

MEDIA REGULATIONS IN EUROPEAN UNION AND THE ROLE OF COMPETITION RULES

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This work has defined the media regulations in European Union and the effect of the competition rules to these regulations. Together with the economic infrastructure of media, the public service broadcasting, private broadcasting and the effects of this dual broadcasting on plurality and democracy is deeply examined. On the other side, Turkish broadcasting is examined very broadly. Media regulations in EU, private and public service broadcasting regulations and the concerns of plurality are the core headings of this study.

Key Words: Media law, European broadcasting, Turkish broadcasting, competition law, media economics, private broadcasting, public service broadcasting.

ÖZET

AVRUPA BİRLİĞİ'DE MEDYA DÜZENLEMELERİ VE REKABET KURALLARININ ETKİSİ

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Bu çalışma Avrupa Birliği'ndeki medya düzenlemelerini açıklamış ve rekabet hukuku kurallarının bu düzenlemelere olan etkisini incelemiştir. Medyanın ekonomik altyapısı da ele alınarak devlet elindeki televizyon yayıncılığı ile özel sektörün işlettiği televizyon yayınları, bu işletmelerin demokrasi ve çok seslilik açısından etkileri incelenmiştir. Avrupa medyası ve televizyon yayıncılığındaki düzenlemelerin yanı sıra Türk televizyon yayıncılığı da genel olarak ele alınmıştır. Medya hukukundaki düzenlemeler, devlet ve özel sektör televizyon yayıncılığı bu çalışmanın temel başlıklarını oluşturmaktadır.

Anahtar Kelimeler: Medya hukuku, Avrupa'da televizyon yayıncılığı, Türk televizyon yayıncılığı, rekabet hukuku, medya ekonomisi, özel televizyon ve devlet televizyon yayıncılığı.