EU Audiovisual Policy, Cultural Diversity and the Future of Public Service Broadcasting

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Introduction

Since the 1980s in the audiovisual sector new forms and arenas of regulation have developed, as policymakers have sought to adapt to new market and technological realities: principally, globalisation, trans-frontier broadcasting by satellite, and the digital convergence of broadcasting, telecoms and the internet. One key element of regulatory change is the European Union’s (EU) accumulation of regulatory influence in the audiovisual field, in part to re-establish problem-solving capacity that is escaping the national level as the result of the new technologies (satellite broadcasting, etc.). At first sight, the regulation of cross-border broadcasting appears to be an excellent example of the EU’s development as a ‘regulatory’ political system (Majone 1996; Harcourt 2005: 7).
This chapter examines this process of the EU’s accretion of influence, asking whether its role in the audiovisual field has been ‘deregulatory’ or ‘re-regulatory’. Precisely, it explores the hypotheses: (1) that the EU has the capacity either to amplify or to moderate deregulatory competition (‘racing to the bottom’) among its Member States; but (2) that it has an inherent deregulatory bias. The chapter highlights the distinction between the EU’s powers of negative integration, notably the market making powers that EU institutions wield from the economic goals enshrined in the Union’s treaty base, and on the other hand, the EU’s potential for positive integration, notably the harmonisation of market correcting rules. The chapter suggests that, in the politically sensitive audiovisual field, EU ‘negative integration’ appears to be far easier to achieve than positive integration. The chapter focuses on policies to promote public service goals in broadcasting, notably national (and social) cultural diversity and media pluralism.

**The Analytical Framework**

Globalisation is often seen as naturally encouraging a (de)regulatory competition (see e.g. McKenzie and Lee 1991) between ‘competition states’ (Cerny 1997), which are eager to retain and attract investment within their regulatory jurisdictions. Some public lawyers and political scientists have argued that, from the perspective of the public interest, this can lead to a ‘race to the bottom’. Policymakers engage in regulatory competition where economic actors can choose locations on the basis of their relative regulatory attractiveness, referred to as ‘regulatory arbitrage’ in the political economy literature; regulatory competition may lead policymakers and regulators to lower regulatory standards in order to maintain investment or attract it from abroad and to promote national champions, the so-called ‘Delaware effect’ (after
the U.S. state that attracted firms by offering lax incorporation standards). However, not all political scientists are convinced. David Vogel (1995), for example, suggests that there is nothing inevitably ‘deregulatory’ about regulatory competition, which under certain circumstances may actually drive regulatory standards upwards, the ‘California effect’.

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

A diversity of EU media policies exert an impact – direct or indirect – on cultural diversity and the fulfilment of public service goals in broadcasting. Thus, EU policies regarding the regulation of the European audiovisual market determine the increasingly commercial international context within which national cultural policies
for broadcasting and public service broadcasters operate. The EU’s stance in world trade talks bears on the European countries’ ability to protect and promote cultural production and, ultimately, concerns the long-term future of state aid (i.e. licence-fee) supported public service broadcasting. The EU’s policies regarding the ‘convergence’ of broadcasting, IT and telecoms, under the impact of digital technologies, provide another important constraint on public service goals in broadcasting and media pluralism. Here, EU policies regarding access for public service broadcasters to digital networks might prove to be very important. EU competition policy, some say, places a question mark over the future funding basis of public service channels.

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

Complex though the EU policy process is, one general hypothesis promises to provide some clarity. Fritz Scharpf (1997, 1999) has argued that EU ‘negative integration’ is easier to achieve because the Commission and the European Court of Justice can rule unilaterally on market-making and competition related matters, whereas the harmonisation of market correcting rules – ‘positive integration’ – is rendered more difficult to achieve because of the need for agreement in the Council of Ministers and Parliament. Negative integration has generally been deregulatory, in the sense of removing rules that obstruct the free movement of goods and services and impede competition in the single market. Positive integration implies EU regulatory harmonisation, in other words a re-regulation, generally to provide common ‘market correcting’ measures. With this in mind, the following shows that the complexity of EU audiovisual policies can be clarified by plotting the EU’s audiovisual policies diagrammatically in terms of the degree to which regulatory capacity has shifted to the EU level, or not (for a comparison with telecoms, see Humphreys 2004: 114).

**Figure 8.1: National and European Capacity for Regulation**

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<th>European capacity high</th>
<th>National capacity</th>
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<td>Single audiovisual market (negative integration)</td>
<td>GATT/WTO negotiations (shared competence between EC and Member States)</td>
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European capacity low

- Anti-concentration rules and cross-media ownership (failed EU positive integration)
- Broadcasting content regulation/international commercial broadcasters
- National audiovisual production support schemes
- Broadcasting content regulation/public service broadcasting
- Conditional-access regulation


**Negative Integration: Television Without Frontiers.**

EU negative integration in the audiovisual field was achieved formally by the enactment of the 1989 Television Without Frontiers (TWF) Directive (Council of the European Communities 1989), creating the legal framework for a single European audiovisual market. There were a number of pressures behind the formulation of TWF during the 1980s apart from the obvious one of the EU’s ‘1992 Single Market Initiative’. A key factor was technological. The spread of cable and (the arrival of) large-scale satellite broadcasting undermined the ‘scarcity of frequencies’ rationale for public service broadcasting monopolies. Across Europe, governments re-regulated broadcasting to allow private commercial companies to enter the sector. At the same time, trans-frontier satellite broadcasting – notably, by means of the Luxembourg based SES-Astra satellite series – offered commercial broadcasters an opportunity to circumvent restrictive national regulation. The weakened regulatory capacity of its Member States provided a rationale for the EU to become the locus of at least some
regulatory policymaking in the audiovisual field (Humphreys 1996: 169-170). Satellite broadcasting also appeared to promise the creation of a pan-European audiovisual market, attracting the interest of important transnational and supranational actors (Krebber 2002). Internationally, ambitious commercial companies wanted to exploit the economies of scale and scope promised by a ‘single European market’ (or, more accurately, its three principal linguistic markets: English, French and German). The Brussels-based European advertising lobby saw Europeanisation as a way of achieving liberalisation of advertising regulations in the Member States. Liberalisation was favoured by ‘media-exporting’ Member States with strong media industries, notably the U.K., Germany\(^3\) and Luxembourg (given the latter’s role in satellite broadcasting and the strong international orientation of its domestic broadcaster, CLT). For their part, Commission officials drafted the TWF Directive in the belief that EU market liberalisation was required in order to create the kind of economies of scale and scope for European companies that might boost the international competitiveness of the European audiovisual industry \textit{vis a vis} that of the U.S.A.. Moreover, during the 1990s, the Commission came to deem the audiovisual sector, now ‘digitally converging’ with telecoms and the internet, to be of high strategic importance for Europe’s competitiveness in the emerging ‘global Information Society’ (Humphreys 1996: 293-294).

The authority of the European Court of Justice (ECJ) was indirectly of key importance in paving the way for the Commission to liberalise the sector. The process of producing the TWF Directive had actually been preceded by two key ECJ rulings\(^3\) – in 1974 and 1980 – on specific competition issues. Crucially, these rulings had defined broadcasting as a tradeable service subject to the EC treaties and specified the illegality of any discrimination against broadcasting services from other Member
States. In its 1984 Green Paper on ‘Television Without Frontiers’ the Commission referred to these ECJ rulings to justify its involvement in the sector on economic grounds, since culture was not yet recognised as an area of EU activity (which was an innovation of the 1992 Maastricht Treaty) and, at the time, the development of an EU audiovisual policy was still contested (Krebber 2002: 86-7). Through drafting the TWF Green Paper and subsequent Directive, the Commission played the role of a very active ‘policy entrepreneur’, exploiting to the full its power to set the agenda and formulate policy. Moreover, at a key stage during the negotiations, the Commission employed the threat of infringement suits regarding free movement of services, non-tariff barriers and competition issues against hesitant Member States in order to exert pressure on them to accept its proposals for TWF (Krebber 2002: 115-116).

Nonetheless, given the need for the intergovernmental negotiation of a minimum of harmonised rules for an internal audiovisual market, the negotiations in the Council of Ministers were laborious. Not until 1989 – five years after release of the Green Paper – was the market-liberalising EU Television Without Frontiers (TWF) Directive (Council of the European Communities 1989) finally enacted.

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

The main thrust of the 1989 TWF Directive was plainly deregulatory, the removal of national legal and regulatory barriers from a single European audiovisual market. Harcourt (2002, 2005) has suggested that TWF, and the ECJ’s related interventions, actually provided a stimulus for an element of (de)regulatory competition within Europe, as certain Member States sought to exploit the opportunities presented by the new EU legal context of a single European market to attract media investment, by providing a suitably relaxed regulatory environment for satellite broadcasters. Luxembourg, with a very light regulatory regime for broadcasting, was conspicuously successful in building up its satellite broadcasting industry (notably the SES-Astra satellites) and attracting international media business. So was the U.K., which introduced a very light regulatory regime for satellite broadcasters during the Thatcher era. This view is supported by Levy’s (1999: 34-35) suggestion that companies could obtain an ITC licence ‘more or less on demand’, making the country an attractive location for ‘TV stations keen to beam their signals into neighbouring EU territories while escaping the tighter regulatory regime that was often applied to them in those states’. Harcourt (2005: 28) observes that ‘the UK’s lax regulatory regime for satellite broadcasters had created a situation of regulatory arbitrage in Europe. A significant number of broadcasting companies had relocated to the UK, away from their original locations’. Similarly, Ward (2002: 62) suggests that the U.K. government thus promoted the London market for TV production.
Cultural Protectionism: Quotas and Subsidies

However, it is important to understand that the 1989 TWF Directive was a political compromise between economic liberal and culturally protectionist-minded Member States. Although the Directive was mostly deregulatory, it contained two protectionist measures to reduce the cultural and economic impact of U.S. audiovisual imports. Article 4 stated that a majority of broadcasting time (not counting news, sports, games, advertising and teletext) should be reserved for ‘made-in-Europe’ programmes. Article 5 specified that broadcasters should reserve at least 10 percent of their programming budget or transmission time for European works created by the independent production sector. These measures were promoted by France, supported by Spain, Italy and Greece (Krebber 2002: 99). However, these countries were disappointed by compromises made during the enactment of TWF and tried to strengthen the measures when the Directive first came up for revision in the period 1995-7. In particular, both articles had been weakened in order to soften the objections of ‘liberal’ Member States, notably the U.K., Germany and the Netherlands. To be precise, the articles included the words, ‘where practicable’ and, furthermore, the quotas were only regarded as ‘politically binding’ rather than judiciable before the ECJ (Krebber 2002: 109 and 117).

Consequently, during its EU presidency in the first half of 1995, France exerted pressure on the Commission to make the broadcasting quotas binding, arguing that the integrity of European culture was at stake. However, stricter protectionism was opposed by key members of the European Parliament and the Council of Ministers. While some Mediterranean Member States supported the French line, northern European Member States led by the U.K. and Germany were strongly
opposed (European Voice, Vol: 1, No: 3, 05/10/1995). In November 1995, the Council voted in favour of a political agreement to leave the rules as they stood, merely agreeing to set up a committee to ensure their proper implementation (European Voice, Vol: 1, No: 10, 23/11/1995). The European Parliament’s culture committee immediately sought to reverse this decision, arguing that the Council had pre-empted Parliament, expressing its opinion under the co-decision rules recently introduced by the Maastricht Treaty. The committee argued, too, in favour of extending the scope of the quotas to new online services like video-on-demand (European Voice, Vol: 2, No: 2, 11/01/1996). In a June 1996 meeting, the Council stood its ground, opposing any change to the quota rules and their extension to new online services (European Voice, Vol: 2, No: 24, 13/07/1996). Notwithstanding its recently acquired co-decision right in this field, the Parliament’s position was far weaker than that of the Council of Ministers. If revisions of the TWF Directive were to go to formal conciliation, and no agreement was reached, the existing terms of the Directive would simply continue to apply. This, clearly, would suit the Council more than the Parliament, which had in fact submitted no fewer than 200 amendments (European Voice, Vol: 2, No: 30, 25/07/1996). The Parliament abandoned its demand for mandatory quotas when a vote in November 1996 failed to gain the support of an absolute majority of all 626 MEPs (European Voice, Vol: 2, No: 42, 14/11/1996).

The quotas issue resurfaced in the debates surrounding the second revision of TWF that commenced in 2002 when the Culture and Audiovisual Affairs Council called for a review of the directive. This was supported by the EP. The Commission duly conducted two rounds of consultation (2003-2004, 2004-2005) and tabled a set of proposals (2006). The main purpose of the revision was to revise TWF to cater for new technological developments (online services, mobile communications, etc) which
were introducing TV like activity through ‘non linear’- in other words, non-scheduled, on-demand rather than scheduled, broadcasting – services. Controversy centred on the question as to whether the Directive should go beyond single market objectives and extend the cultural, social and public interest objectives to the new audiovisual services. Needless to say, France seized the opportunity to seek the extension of the quotas to on-demand services. Predictably, the result was another compromise. The Directive, enacted in 2007, merely called for providers of on-demand services to promote the production of, and access to, European works (Michalis 2007: 219-229).6

Another case of transfer of the French cultural policy model to the EU level resulted from a ‘package-deal’ arising from the negotiations over the TWF Directive (Krebber 2002: 62), namely the introduction of a very modestly funded support programme for European film and TV co-productions, called ‘MEDIA’ (Mesures pour Encourager le Dévelopement de l’Industrie Audiovisuelle). While TWF was a purely regulatory policy, this distributive programme involved subsidising a range of activities, from training through to language transfer and distribution. The first phase was launched by the Commission (DG X) in 1988, financed from the Commission’s own budget. In December 1990, the Council of Ministers adopted ‘MEDIA 1995’ as a fully-fledged five year programme with its own EU budgetary appropriation of ECU 200 million. However, this only amounted to one-tenth of Commission spending on IT research and was less than what the French alone spent on subsidies for film and TV production. The U.K. and Germany in particular were reluctant to allow any higher expenditure (Humphreys 1996: 279-281). In 1995 European Culture Ministers agreed in the Council to increase funding to ECU 310 million for the period 1996-2000 under what was now called ‘MEDIA 2’. The increase in the EU’s budgetary
provision for MEDIA was interpreted by some as compensation to the French for failure to tighten up the TWF protectionist quota regime. The French, however, had called for twice this sum (European Voice, Vol: 1, No: 14, 21/12/1995). Moreover, a French-inspired proposal from the Commission to establish a special mixed private/public loan guarantee fund for European filmmakers was blocked altogether.

As a budget issue, the EU’s contribution to such a fund required unanimity among the Member States. An allocation of ECU 90 million from the EU budget for the guarantee fund was opposed by finance ministers from the U.K., Germany and the Netherlands (European Voice, Vol: 2, No: 24, 13/07/1996). A reduction of the proposed EU contribution to ECU 60 million failed to persuade the three northern European countries, now supported by Austria and Sweden (European Voice, Vol: 3, No: 25, 26/06/1997). The film guarantee scheme foundered against this opposition.

Nonetheless, subsequently, the Member States agreed to allocate ‘MEDIA plus’ for the period 2001-2006 €453.6 million for distributing and promoting European audiovisual works, with a further € 59.4 million for implementing a training programme for professionals in the European audiovisual industry. Upon EU enlargement in 2004, the Commission proposed doubling the MEDIA budget. The current, fourth MEDIA 2007 programme (2007-2013) was actually allocated a budget of € 755 million.

**International Trade and Cultural Diversity**

The French also mobilised the EU to defend these measures against the U.S.A., under the leitmotiv ‘l’exception culturelle’, in international trade negotiations. The Treaty of Rome had given the EU exclusive external competence over the common commercial policy for international trade in goods. Accordingly, where trade in goods was
concerned, Member States were unable to pursue unilateral policies, the European Commission represented the EU in negotiations and, where their approval was required, Member States voted according to qualified majority voting (QMV).

However, the issue of competence for trade in services was less clear and led to tensions between the Commission and the Member States during the Uruguay Round of the GATT. The Council disputed the Commission’s right to conclude agreements relating to services. The Commission requested an opinion from the European Court of Justice, which specified in its 1994 Opinion (ECJ, 1994) that the Community and its Member States shared competence to conclude the new General Agreement on Trade in Services (GATS). Accordingly, the Commission could still represent the Community in negotiations but the Member States had to be constantly informed and negotiating positions and any decisions would have to be agreed unanimously. The GATS 1993 was actually signed by both the Commission and the Member States in Marrakesh in April 1994 (Young 2002: 41). This need for a common position among the Member States enabled France to enlist the EU in defence of the Europeans’ right to apply protectionist programme quotas and to subsidise audiovisual production through national and EU TV audiovisual support funds. To date, the French ‘protectionist’ position with regard to the right of European countries to implement audiovisual quotas and subsidies has been the official EU position.

However, there have been pressures to modify this stance. By no means all Member States are culturally protectionist. There are complaints from certain European as well as U.S. media companies with transnational operations about European cultural protectionism. The Commission is internally divided on the issue. There has always existed the danger that further audiovisual liberalisation might end
up being part of a package deal on trade. The long-term prospects for a continuation of *l’exception culturelle* appeared to weaken when the European Convention on a treaty to establish a constitution for Europe proposed to move towards an exclusive competence for the EU for all external trade matters and to decide any issues by QMV, a position that was advocated by External Trade Commissioner Pascal Lamy (*European Voice*, Vol. 9, 2003). However, on French government insistence, an article was inserted into the draft constitution (European Convention 2003: 217, para 4) which – by requiring Council unanimity for the negotiation and conclusion of external agreements in the field of cultural and audiovisual services – effectively retained the Member State veto. This draft was submitted to the European Council in Rome on 18 July 2003. The draft treaty was subsequently subjected to a tremendous amount of detailed elaboration in the IGC, but the article survived in the final adopted version (Title 5, Chapter III, Article III-315). Notwithstanding the subsequent stalling of the Treaty process following the French and Danish referendums, the European Union has continued to provide – if not an uncontested *exception culturelle* enshrined in international trade law – at least some measure of ‘French-inspired’ protection against the far-reaching cultural policy deregulation desired by the U.S. government and commercial interests.

**Competition Policy**

EU competition law, particularly since the enactment of TWF, has very significantly expanded the EU’s scope for media regulation. Indeed, Levy (1999: 81) has observed that ‘the operation of European Community competition policy has already had more of an impact on Europe’s broadcasting industry than any of the European regulation specifically targeted at the sector’. In Levy’s view, ‘EU competition policy will
continue to be the dominant mode of European-level intervention in the digital TV market for some time to come’. This is because, under EU competition law, the European Commission has direct authority, without needing the approval of the European Council or the European Parliament, to make decisions that are subject only to review by the ECJ. Following the 1989 TWF Directive, the number of European media mergers and joint ventures increased dramatically and the European Commission Competition Authority’s involvement in media decisions increased commensurately (Pauwels 1998; Levy 1999; Harcourt 2005). Harcourt (2005: 41) reports that between 1989 and 1999 the Commission made over fifty formal decisions, including a relatively high number of negative merger decisions: 8 as compared with 11 negative decisions of a total of 1,104 merger decisions in all sectors. The Commission also made its influence felt through a number of significant informal decisions, such as when it suggested that the British satellite broadcasting company BSkyB should be excluded from British Digital Broadcasting (BDB) when the U.K. regulator, the I.T.C., was issuing digital terrestrial broadcasting franchises in 1997 (Harcourt 2005: 41).

European competition decisions have impacted on the audiovisual sector in a number of distinct ways. Important decisions have been made about the acquisition and sale of rights to key kinds of programming, such as sports programmes – DG Competition’s concern here being to ensure fair access to such content. Some of the Commission’s earliest decisions went against the then-dominant positions of public service broadcasters in the rights market place, leading Collins (1994: 155-156) to suggest that DG IV appeared to be embarked on an ‘implacable pursuit of the public service broadcasters’. However, more recent decisions have gone against commercial broadcasters. The Commission has intervened on a number of occasions to enhance
competition in the programme supply market (e.g. in the case of the distribution of U.K. Premier League football rights). However, how far competition law can protect media pluralism more generally is questionable. As Gibbons (2004: 65) notes, there has been no real attempt to address the ‘most critical bottleneck for the purposes of promoting media pluralism’, which is the ‘bundling of a programming package’ by market dominant commercial operators (see below).

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

Contradictory signals have come from within the Commission about the future of public service broadcasting. On the one hand, there have from time to time been noises seemingly questioning the public service broadcasters’ traditional comprehensive remit (i.e. to provide sport, films, and other entertainment, as well as programmes that commercial broadcasters are less disposed to offer) and their possibilities for expansion into certain new media ‘markets’, notably online provision. A number of commentators
and policy protagonists have expressed concern about the deregulatory potential that EU competition policy holds for traditionally comprehensive ‘European-style’ public service broadcasting (Harrison and Woods 2001: 498-9; Meier 2003: 337-8; Wheeler 2004: 350). On the other hand, as Ward (2002: 97-110) makes clear, most of the specific rulings that the Commission Competition authorities have made thus far regarding the development of new media services (notably niche TV channels, such as 24-hour news services and children’s channels) by the public service broadcasters have been in their favour. Moreover, on the initiative of European Parliament strongly supported by the Member States, the EU’s commitment to protect a broad ‘European-style’ concept of public service broadcasting has been enshrined in treaty law in the form of a protocol on this subject, appended to the 1997 Treaty of Amsterdam. The Protocol states:

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of the Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of that public service shall be taken into account11.

The Treaty of Amsterdam also explicitly recognised the importance of public services by introducing a new provision in its Article 16 which emphasises the importance of public services generally and the ability of Member States to provide these services as they see fit, subject to competition provisions (Harrison and Woods 2001)12.
In November 2001 the Commission released a Communication on the application of state aid rules to public service broadcasting (CEC 2001). It cited the Protocol of the Amsterdam Treaty, confirming that the definition of the public service remit is a matter for the Member States. The Communication states that state support for public service broadcasters does constitute state aid in the terms of the EC Treaty and therefore ‘will have to be assessed on a case by case basis’ (CEC 2001: Para 17). But it makes clear that, so long as the remit is clearly defined by the Member State (my emphasis), the Commission has to confine itself to evaluating the proportionality of that aid. The Commission Communication stresses the need for transparency. In the first place, there should be a ‘clear and precise definition of the public service remit’. Secondly, the Communication guidelines make clear that in order to allow the Commission to carry out its ‘proportionality test’ for funding, a separation of accounts between public service activities and non-public service activities must be maintained to ‘provide the Commission with a tool for examining alleged cross-subsidisation and for defending justified compensation for general economic interest tasks’. While the Commission thus accepts the competence of the Member States to define public service broadcasting and also to determine how it is funded, it is evidently crucially important that in future the Member States spell out clearly the remit of public service broadcasting that they deem to be socially, culturally and democratically appropriate. Equally, it is important that they have adequate monitoring and control mechanisms in place to ensure the fulfilment of the public service remit. If Member States do not meet these demands, then they render their public broadcasting services vulnerable to an adverse ruling on competition grounds..

While in nearly all cases so far, the Commission has found in favour of the public service broadcasters, it has also bared its teeth on occasion. In 2004, the
Commission compelled the Danish public service broadcaster TV2 to pay back ‘excess compensation for public service tasks’, thereby showing how seriously it viewed ‘proportionality’. Moreover, complaints against public service broadcasters in Germany and the Netherlands have raised the issue of the scope and financing of their online activities. While the Commission does not question that such activities can be included in the public service remit, it is plainly concerned about their scope and financing (Michalis 2007: 234-6).

Other EU competition decisions have concerned digital alliances between commercial players. Thus, in 1994 and again in 1998, DG IV blocked bids to produce a digital pay-TV alliance by the leading German companies, Bertelsmann, the Kirch group and Deutsche Telekom AG. These commercial interests wanted to establish a digital joint venture to deliver pay-television and other interactive services such as video-on-demand through a proprietorial conditional access system. However, the Commission vetoed the alliance on the grounds that it would pose a threat to an open market in Germany for pay–TV and other future digital communication services.

The Commission justified its decision on the grounds that the alliance would create a dominant position in three markets: First, it would leverage the Kirch group’s already dominant position over German television programme rights and libraries into the pay–TV market. Second, it would create monopoly control over the provision of conditional access and subscriber management systems for pay–TV and other new digital services. Third, the alliance would consolidate Deutsche Telekom AG’s (then) dominance of the German cable market (Humphreys 1996: 285–6). Generally, though, as Ward (2002: 91) has suggested, the ‘regulatory ground [established by the European Commission’s approach to mergers and joint ventures] was favourable to companies looking to strengthen the audiovisual market by building up company
portfolios and expanding the size of production by exploiting cross-border strategies within the common market zone’, the aim being to promote ‘European champions’, like the RTL group (Bertelsmann), Telefonica, and Vivendi. The few cases incurring negative decisions fell foul of the Commission’s policy ‘to promote pan-European market mergers rather than individual market concentrations’ (Ward 2002: 94).

**EU Media Ownership Regulation**

However, the EU has plainly provided little ‘positive integration’ in the audiovisual field. The classic market correcting measure to accompany TWF would be media-specific rules to ensure media pluralism and diversity: such as harmonised rules restricting media concentration. EU competition rulings – for instance against the aforementioned attempts by three of Germany’s largest communications companies to produce a digital alliance – might have the effect of protecting a minimum of media pluralism. However, they are plainly no substitute for more elaborate media-specific rules to protect pluralism and a diversity of media output.

The TWF Directive said little about the problem of media concentration, despite the fact that market liberalisation was bound – indeed, intended – to lead to the expansion of Europe’s largest media concerns. The arrival of new media and, in particular, the digital convergence of the information and communications industries (see below) was also driving a marked trend towards media concentration as large, generally internationally-ambitious, private media corporations sought to exploit new economies of scale and scope. Much of the investment in the new media came from large corporations like News Corporation (Rupert Murdoch), Bertelsmann, Vivendi, Liberty, and AOL Time Warner. The potential dominance of the new digital media landscape by a few powerful international media corporations greatly concerned
European media unions and journalists’ associations, as well as the European Parliament’s culture committee. No matter how competitive the market was deemed to be in purely economic terms, media concentration raised questions of the potential abuse of editorial power by media owners and controllers, the narrowing of the range of viewpoints represented in the media, and at the very least a diminution of the diversity of media content. The Commission was at first inclined to view media pluralism rules as a matter for the Member States. However, it was compelled to give attention to the issue by a succession of European Parliament resolutions calling for EU action. Even then, initially the Commission’s main concern appeared to be that the patchwork of diverse national regulations on media ownership would impede the development of the internal market (Humphreys 1996: 286-293), although over time it came to take the media pluralism issues more seriously (Harcourt 2005).

A Commission draft directive was finally produced in 1996. This would have restricted any further acquisition by a private broadcasting company that owned channels capturing more than 30 percent of a country’s TV or radio audience and similarly restricted the expansion of any cross-media company (press, radio, TV) with a combined audience share of 10 percent (it did not apply to public service broadcasters). However, the draft directive was shelved before it could become the subject of any negotiation in the Council of Ministers and with the European Parliament (Humphreys 2000: 86-9; for much more detail see Harcourt 2000 and 2005). Divergent positions on media pluralism within the Commission had characterised, and impaired to an extent, policy formulation. Undoubtedly, however, the EC’s ‘non-policymaking’ on the thorny issue of ‘pluralism’ was ultimately to be explained by the fact that it was unable to override both the determined resistance of
influential Member States (notably Germany) and powerful vested interests in the media field (like the European Publishers Council, and large media corporations).

This failure of DG XV to progress harmonisation of media-specific anti-concentration rules designed to safeguard ‘pluralism’ contrasted with the Commission’s relatively active application of general EU competition policy to the media field by DG IV. In itself, this is highly illustrative of the EU’s liberal bias towards negative integration. It exemplifies the difficulty that the Commission encounters in pursuing more interventionist cultural and social policies (positive integration) which confront powerful vested economic interests and challenge Member States’ claims of primary competence for media policy (see Humphreys 2004: 112).

As a result of the EU’s failure to achieve any harmonised baseline rules for media concentration, nothing has prevented a deregulatory ‘race to the bottom’. Such a development was suggested by the marked deregulation of anti-concentration rules in both the U.K. and Germany in 1996, the next stage of which seemed to be heralded by even more dramatic deregulation by the U.K.’s Communications Act 2003. In both countries governments seemed to have accepted the media owners’ argument that deregulation was needed for the international competitiveness of their national media industries. The prospects for restraining any such deregulatory race appear to be highly unpromising. As Gillian Doyle (2002: 94) has observed: ‘At the level of each [European] state, arguments in favour of a more liberal ownership regime are often expressed in terms of the need to match the competitiveness of European media rivals. Similarly, at the European level, greater flexibility is argued for on the basis that the European audiovisual industry encounters great external competition from the American and Japanese industries’.
**Broadcasting/Telecommunications Convergence**

By the latter half of the 1990s, the EU agenda concerning broadcasting-specific regulation, including the way media pluralism might be protected against media concentration, had been overtaken by a policy debate about the appropriate aims and methods of regulation in view of the ‘convergence’ of broadcasting, telecoms, and IT (Humphreys 1999b). By now, technological innovation – notably digitalisation – was breaking down the boundaries between these hitherto largely discrete sectors. Digitalisation means that media can be carried via diverse communication channels, including the internet. Increasing numbers of homes in Europe are connected to high bandwidth networks through which they can receive multimedia, on-demand and interactive ‘new media’ services as well as simple telephony and television. Digital ‘convergence’ of electronic media, telecoms and computing, traditionally sectors with widely varying degrees of sector-specific regulation, produces pressures for more flexible, ‘technology neutral’ regulation. Some now argued that the collapse of traditional boundaries between the telecoms, IT and broadcasting industries meant that that regulation would have to converge, leading to a single ‘horizontal’ regulatory model for the entire ‘converged’ communications sector. Others, however, argued that content regulation, traditionally associated with broadcasting, should be kept distinct from carriage regulation to safeguard non-economic public interest goals.

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

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

DG XIII (Information Society) appeared to favour the third option (Levy 1999: 132). Plainly, its main concern was to break down existing national regulatory boundaries between the broadcasting, telecoms and IT sectors in order to promote investment in and the full exploitation of the new technologies, with a view to their potential major contribution to European economic competitiveness and job-creation. However, DGX (Culture) was more concerned about the implications for broadcasting. During the consultation initiated by the Green Paper, strong support for the continued sector-specific regulation of broadcasting was expressed by many respondents. Notably these were public service broadcasters and Member State governments, who emphasised that broadcasting would continue to have a unique relevance for the expression and formation of opinion, and therefore a ‘fundamental role… for ensuring democratic pluralism, diversity and the sharing of culture’ (CEC
Content regulation was excluded from the new ‘horizontal’ regulatory model for communications infrastructure and services, outlined by the Commission in 2000 and adopted by the Council of Ministers in a series of directives during 2002 (for details, see Ward 2002: 111-124)\textsuperscript{14}.

The new 2002 regulatory package extends the scope of the EU’s pro-competitive ‘1998 regulatory package’ for telecommunications to all electronic communication networks and services. It is intentionally deregulatory in that it abolishes the burdensome old telecoms licensing system, replacing it with a much lighter touch style of authorisation regime for all networks and services providing electronic communications \textit{carriage}, including those (e.g. terrestrial, satellite, cable, etc.) providing broadcasting content. It also aimed progressively to roll back the Member States’ regulation of communications infrastructure and related services as their individual electronic communications markets (e.g. fixed line, cable, mobile, etc.) became competitive. However, because of the Member States’ special sensitiveness about the media, the framework accepts that broadcasting \textit{content} would continue to be regulated ‘vertically’ according to Member States’ preferred socio-cultural models. To be precise, [Article? recital] 5 of the Framework Directive stipulated that:

\begin{quote}
This framework does not… cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community and national level in respect of such services, in compliance with Community law, in order to promote
\end{quote}
cultural and linguistic diversity and to ensure the defence of media pluralism.

[Article? Recital] 6 specified further that:

Audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors.

Accordingly, the Member States could retain licence requirements for content providers (i.e. ‘broadcasters’). The regulatory requirements they placed on their national broadcasters could be much higher than the EU’s minimum requirements specified in TWF (whose purpose was to render EU markets open to all broadcasters that met the TWF requirements). Moreover, in order to protect the network access of public service broadcasting (content), the Universal Services Directive, a key part of the new EU regulatory package, allowed Member States to impose ‘reasonable “must carry” obligations’ for public service channel transmissions (services that meet ‘general interest’ objectives), on providers of electronic communication networks used for the distribution of radio or television broadcasts (Article 31).

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

**Regulating Access to Digital Broadcasting**

The limits of the EU’s regulatory capacity in the audiovisual sector is further exemplified by the issue of regulating access to the new digital networks, the regulation of so-called conditional access systems (CAS), the ‘digital gateway’ systems which, through desktop boxes, scramble and unscramble TV signals and, together with subscriber management systems, allow only those consumers who have paid for a service to access it. According to a detailed study by David Levy (1999: 63–79), the European Commission, bruised by the disappointments surrounding its interventionist High Definition Television policy, abdicated from the responsibility to regulate for either common standards or access terms for digital TV networks and instead chose to defer to the decisions of an industry grouping – the Digital Video Broadcasting (DVB) project. This group reached agreement only over a common European digital transmission standard, but provided no common standard for conditional access systems. This allowed the market players to develop their own proprietary systems and resulted in the emergence of a fragmented European digital TV market, characterised by incompatible conditional access systems in different national or
linguistic areas (e.g. BSkyB in the U.K. and Ireland). This fragmentation of the European digital TV market clearly went against the grain of the EU’s principal audiovisual policy, namely the creation of a single European market in order to promote a stronger European audiovisual industry (Humphreys 1996: 256–96).

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

Under pressure from the European Parliament, some statutory access provisions were actually included in the EU’s 1995 Advanced Television Standards Directive. Its Article 4 specified that CAS providers should be required to supply third-party access (i.e. including to their rivals) to their conditional access services on ‘fair, reasonable and non-discriminatory’ terms. The Directive also obliged national regulatory authorities to ensure that CAS operators kept separate financial accounts, published unbundled tariffs, and that they should not prohibit a manufacturer from including a common interface allowing connection with other access systems. However, as Levy has commented, the latter stipulation was a far cry from mandating
the inclusion of a common interface. Manufacturers were most unlikely to include a common interface against the wishes of their customers. Moreover, the Directive was ‘so vague as to leave national officials unclear as to what provisions meant, and as to which needed to be written into national law. The result was that national implementation varied hugely’ (Levy 1999: 73). This regulatory deficit on the part of the EU has hardly been remedied by the adoption of its new regulatory framework for the ‘converging’ electronic communications sector (see previous section). The Access Directive of the new framework largely reproduces the relatively weak provisions from the Advanced Television Standards Directive (Humphreys and Simpson 2005: 135-6).

Above all, however, as Tom Gibbons (2004) has argued, ‘the most critical bottleneck for the purposes of promoting media pluralism is the bundling of the programming package. It is this activity, analagous to the editorial decision, which determines what content reaches the audience’. Purely concerned about the relationships between providers of networks, associated facilities and services in wholesale markets (in the case of CAS, the relationship between the controller of the digital gateway and other programme service providers), the EU Access Directive has nothing to say about the relationship between the controller of the digital gateway and the subscriber/viewer. Furthermore, as Gibbons notes, the Access Directive ‘is precisely concerned with problems arising from the dependency on proprietary desk-top boxes… It cannot exert any effect on the contractual bundling arrangements made by the programme packagers, because they are not obliged to offer access to such bundles on fair, reasonable and non-discriminatory terms. That kind of access is presumed to be capable of being regulated by competition law, without such an ex ante condition being applied’. Gibbons illustrates the very limited purchase of the
Access Directive for enhancing media pluralism by reference to the U.K. case, where ‘most [though not all] broadcasters on BSkyB’s digital satellite platform reach the viewers by being included in a BSkyB pay-TV package, so they do not need conditional access services. Similarly, broadcasters on cable systems also reach their viewers via the packaging arrangements made by the cable operators; they do not need any conditional access services’ (Gibbons 2004: 64).

**Conclusion**

Given the fast-moving nature of developments in this field, any conclusions must be tentative. More research remains to be done. Nonetheless, this chapter has explained how the EU has – and is likely to continue to have – a mixed degree of regulatory competence in the audiovisual field. The EU’s influence is greatest in issues concerning the European internal market and competition issues with a Community dimension. Here the EU has direct responsibility. With regard to the internal market, some have suggested that the impact of the EU has been to trigger a ‘deregulatory competition’ among the Member States. While this is plausible, there is a need for more empirical academic research on this particular theme. With regard to competition policy, there is certainly the potential for a negative impact on public service broadcasting. However, to date, the Commission would appear to have proceeded rather cautiously in view of the strong Member State sensitivities on this subject. This caution contrasts with the Commission’s activism against those private sector mergers and alliances deemed to threaten the development of a single market populated by strong pan-European champion companies. Nonetheless, the relationship between the Commission and public service broadcasters is heavily fraught with tension. In Richard Collins’s (2002: 10) words, the ‘structural conflict between the
competition principles of the European treaty and the status and practice of PSB is both inescapable and likely to become more salient'. How this tension will be resolved is open to a considerable uncertainty, despite the Commission’s production of guidelines. The Commission wields considerable discretionary power in making its competition judgements. The pressure from the private sector is bound only to mount with digital convergence.

This chapter suggests that the Commission has been both a ‘purposeful opportunist’, seeking to expand its influence and if possible its competence in the audiovisual field, and a ‘policy entrepreneur’, grappling with the complexities of international market and technical change. However, there would nonetheless appear to be distinct limits to European Union positive integration in the audiovisual sector because of the power of private media lobbies interested in a weakly regulated European market (see Doyle 2002; Harcourt 2005), and above all because of the politically-sensitive nature of the sector and the Member States’ desire to retain primary responsibility for it (see Levy 1999). The relative weakness of the Commission in promoting positive integration, in the absence of a strong Member State consensus on the need or desirability, is illustrated by the manifest failure so far to achieve harmonised media-specific anti-concentration rules designed to safeguard media pluralism, despite the fact that it remains a much vaunted concern.

Equally, it is manifest in the failure to produce detailed EU-rules on conditional access regulation which would go further than just regulating access to the technology, but also require the controllers of digital gateways to safeguard and promote media pluralism. The contrast with the application of general EU competition policy to the media field by DG Competition is suggestive of a liberal EU bias towards negative integration. This highlights the difficulty that the Commission
encounters in promoting more interventionist cultural and social policies (positive integration) that challenge powerful vested economic interests when there is a lack of Member State support. The Member States have been adamant that the sensitive field of media policy is primarily their field of competence; indeed, the Draft Treaty on the Establishment of a European Constitution defined it as an area where the EU could only take ‘supporting, coordinating or complementary action’. This leaves negative integration, the removal of regulatory barriers to the internal market, as the EU’s main achievement to date.

However, the story has not been completely ‘deregulatory’. EU negative integration in the shape of TWF has been accompanied by one noteworthy measure of ‘re-regulation’, notably the EU-wide adoption of French style culturally protectionist quotas, though – as seen – the French and their supporters in the European Parliament have failed so far in their attempts to have these quotas strengthened. Also, the deregulatory pill of TWF was sweetened a little (for the French) by a (very) modest measure of budgetary support for European audiovisual production. So far, from French insistence, the EU has served as an effective shield for these policies against U.S. pressure in international trade negotiations. Above all, it is noteworthy that the Commission’s competition policy interventions over the launch by public broadcasters of new digital services, including online ones, have so far been supportive of a comprehensive understanding of public service broadcasting. In sum, whether or not the EU’s impact has been deregulatory or re-regulatory is a question deserving of further empirically-orientated academic research. All of the issues discussed herein remain open, in particular the tension between competition policy and public service broadcasting, the long-term external trade related issues, and not least the long-term impact of the digital convergence between media, telecoms and IT.
Bibliography


Member States Concerning the Pursuit of Television Broadcasting Activities,
89/552/EEC. Official Journal of the European Communities, L 298/23, 17/10/89.
Brussels: Convention Secretariat, CONV 850/03.
values on the de-regulation of British media ownership’, Cardozo Arts and
Gibbons, T. 2004. ‘Control over technical bottlenecks – A case for media ownership
Bottlenecks, Vertically Integrated Markets and New Forms of Media Concentration.
Beyond the Market: the EU and National Social Policy. London and New York:
Routledge.
Regulatory Policies Between Pressure and Pluralism. Ph.D dissertation, Manchester
University.
Harcourt, A.J. 2002. ‘Regulatory competition in the EU: a case study in national
media regulation’, seminar on International Regulatory Competition and
Cooperation, Robert Schuman Center, European University Institute,
Fiesole/Florence, Italy, 21 November.

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Humphreys, P. 1998. ‘The goal of pluralism and the ownership rules for private broadcasting in Germany: re-regulation or de-regulation?’, *Cardozo Arts and Entertainment Law Journal*, 16 (2-3): 527-555.


Notes

1 The impact of the EU’s policies on cultural diversity and public service broadcasting is part of a current ESRC-funded project: ‘Globalisation, regulatory competition and audiovisual regulation in 5 countries’, being conducted by Professor P. Humphreys, School of Social Sciences, University of Manchester, Professor T. Gibbons School of Law, University of Manchester and Dr. A. Harcourt Department of Politics, University of Exeter. ESRC Ref.No. RES-000-23-0966. Duration: 1st February 2005 – 31st July 2008. The author acknowledges the input of his colleagues into the research design and would like to thank them for their helpful observations and corrections to this paper.

2 The federal government and national commercial media interests favoured the creation of a single European market, but not the Länder, which feared the impact of Europeanisation on their cultural policy competence.


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

5 Despite producing majority support.

For details, see: www.europa.eu.int/comm/avpolicy/media/index_en.html

See: http://ec.europa.eu/information_society/media/overview/index_en.htm

And also to trade-related aspects of intellectual property rights (TRIPS).

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


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

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


As currently by the ESRC project described in note 1.