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GOVERNING THE EUROPEAN AUDIOVISUAL SPACE: WHAT MODES OF GOVERNANCE CAN FACILITATE A EUROPEAN APPROACH TO MEDIA PLURALISM?

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Abstract

This paper explores the notion of media pluralism and its application mainly from the European Union (EU) substantive and institutional law point of view so as to speculate on the possibility for a European approach to media pluralism and on the forms and routes it might take; especially once appreciated the limits and shortcomings of traditional approaches, against the background of the competence debate in respect of media pluralism and media freedom. Thus, the first section offers a theoretical (and slightly historical) background of the notion of media pluralism, in its various dimensions, at EU level. The second section, then, sketches an analysis of the notion of media pluralism, having regard to legal sources of primary and secondary EU law, as well as to the relevant European Court of Justice (ECJ) case law. Finally, a third (and open) section builds on the difficulties in traditional hard-law approaches to tackle media pluralism at EU level, and proposes some speculation on alternative modes of governance for the media at European stage: namely, the cooperation/coordination of National Regulatory Authorities (NRAs) at supranational level. This is reflected in the proposed case-study on the drafting of Article 30 of the Audiovisual Media Services Directive (AVMSD).

Keywords

European Union Law – Media Pluralism – Media Governance – Audiovisual Media Services – National Regulatory Authorities

Introduction*

The aim of this paper is to explore the notion of media pluralism and its application mainly from the European Union (EU) substantive and institutional law point of view so as to speculate on the possibility for a European approach to that matter and on the forms and routes it might take; especially once appreciated the limits and shortcomings of traditional approaches, against the background of the competence debate in respect of media pluralism and media freedom.

Thus, the first section of the paper is purported to offer a theoretical (and slightly historical) background of the notion of media pluralism in its various dimensions, by paying particular attention to its development at the European stage and in the digital age.

The second one is, then, intended to sketch an analysis of the notion of media pluralism in context: the context being the legal sources of primary and secondary EU law that are of relevance for the media pluralism discourse. Attention will be paid also to the relevant European Court of Justice (ECJ) case law.

On the basis of the findings of the analysis showing prevalently shortcomings and limits of the traditional hard-law approaches, the third and final section will introduce one possible alternative (or complementary) approach. This is the role of National Regulatory Authorities (NRAs) for the media (particularly) as for the contribution they play and the support they offer in securing respect and promotion of media pluralism at national and also supranational level; looking, in this last case, at the (possible) developments of the forms of the institutionalisation of their cooperation/coordination for the prospects of a European discourse on media pluralism, against the background of a 'EU Administrative Law for the media'.

As a practical methodological premise, in dealing more generally with media, what I have particularly in mind, however, is television broadcasting (or, in the language of the digital age of convergence, audiovisual media services). Thus, unless otherwise stated, most of the references to media can be read as to television broadcasting (or audiovisual media services) indeed.

Media Pluralism and the European Audiovisual Space: (Re)Launching the Ongoing Debate

Media pluralism: what is at stake?

Nowadays, both at national and supranational level, despite differences in forms, degree and even desirability, regulatory intervention in the media filed is a matter of fact. Any brief survey upon the bulk of regulatory measures in place for the media shows that there are several objectives that different measures in this sector aim to pursue (Barendt 1995: 3-10). Among them, however, media pluralism is by far the most influential, attractive and perhaps the most relevant as well; as it is also, nevertheless, the most intriguing and difficult to clearly define.

Defining media pluralism once and for all is beyond the scope of this paper. What is within that, however, is to try first to offer an understanding of what lies at the very essence of the notion of media pluralism and then to develop and apply that to further investigations within the field of media regulation, particularly at the EU level. In searching for the 'soul' of the notion of media pluralism one

* This paper is part of the research I am conducting at the Department of Law of the European University Institute (EUI), under the supervision of Professor de Witte to whom I am grateful for the constant interest and support. Any mistakes remain my responsibility.

could start from an inquiry about the very nature and usages of the terms 'media' and 'pluralism' first separated and then combined, both at theoretical and practical levels.

From a theoretical standpoint, to begin with 'pluralism', it should be acknowledged that the main difficulty in referring to this notion in clear terms lies in its intrinsic pluralistic and extremely broad dimension. Beyond the play on words, it should be recognised that pluralism consists of different conceptions that operate in and result from the application of this notion in different contexts. As it has been pointed out by Nieuwenhuis, the meaning of pluralism may vary throughout the different disciplines where it is employed (2007). He suggests, indeed, that we can distinguish at least between value pluralism, social pluralism and political pluralism, respectively meaning for philosophical ethics the diversity of conflicting values, for social sciences a society populated by different religious, cultural, ethnic or other groups, and for political science the coexistence on equal footing of different associations and groupings. These different meanings can then be associated to a different emphasis placed in the first case upon individual liberties, while in the latter two upon collective interests. If this is transferred into legal reasoning, what originates is an "ambivalence" (and also a tension) that might be difficult to reconcile. In fact Nieuwenhuis shows how the "different concept may all affect the meaning of pluralism when used in jurisprudence" (2007: 367) by demonstrating, in particular, how that ambivalence is reflected in the case-law of the European Court of Human Rights (ECtHR) when it touches upon several fundamental rights (such as freedom of speech, freedom of association, freedom of religion and belief, education) that are caught by the very wide net of the notion of pluralism. Moreover, the ambivalence can be further strengthened if one considers that pluralism is usually depicted in the ECtHR case-law both as "a characteristic of and a condition for a democratic society" (2007: 369); thus, underlying a passive/descriptive dimension – that is recognising and respecting what already exists in society – and a dynamic/active side – that is the need to pursue and promote the rooting of an essential precondition for democracy. Finally, on the theoretical plane, reconciling the different conceptions of the notion of pluralism is complicated, furthermore, by the tension between the role of the nation State and the one of supranational/international organisations as guarantors/promoters of pluralism in its various dimensions. This, in turn, adds further complexities in shaping a clear and distinct ('universal') meaning for the notion at stake.

When specified by the term 'media', the polysemous notion of pluralism, while on the one hand benefits of some clarification, on the other hand becomes the object of other ambiguities. These are brought about not only by the variety of conceptions underpinning the notion of pluralism underlined above (as they are reflected too in this sectoral application), but also by the term media in itself. Due to the technological progresses and changes in social behaviours, the very notion of *mass media* is everyday more blurring and under attack in its theoretical foundations and boundaries. While the media addressing indistinct masses of population were traditionally identified in newspapers and television (and radio) broadcasting, nowadays these operate in a sector that has increased its boundaries to encompass new delivering platforms (such as satellite or cable television) and even *new media*. These are, for instance, personal computers that grant access to the Internet and the information it contains, and third generation mobile phones apt to broadcast contents as portable television apparatus. Moreover, technological developments have also changed the way of delivering and accessing information and contents of any genres, not just 'merging' the potentials of different media (generating, for instance, on-line newspapers), but also, when applied to traditional media, exploiting their potentials and changing their very nature to a considerable extent (such as the case of the application of digital transmission techniques to television broadcasting and the connected development of new services like video-on-demand ones, suitable for addressing and satisfying individual requests more than masses' expectations).[1] It follows from the foregoing that the notion of

[1] It is under the pressure of technological convergence brought about by the advent of digital techniques that traditional mass communication media (and television broadcasting in particular) are facing a crisis of their identities usually funded on the peculiar nature of the services each one used to deliver. According to Negroponte, "the medium is not the message in a digital world. It is an embodiment of it" (1995: 71), since communications media have now the flexibility to adapt

media pluralism, once elaborated in political and legal reasoning and then rooted in and confined to the field of television broadcasting (and less incisively to newspapers as well) is now capable and often interpretatively stretched to find a broader scope of application. The broadening of its scope of application can then generate further complexities as well as new challenges in manufacturing regulatory measures apt to foster media pluralism within the new media environment; as it will be highlighted later on.

From the practical point of view, moreover, the sometimes said "nebulous" concept of media pluralism creates very much troubles to whoever adventures himself in research on methods and forms of policies and regulatory interventions that deal with that. What appears, indeed, form a review of a vast array of legal sources and doctrinal documents is that these almost equate with different understandings of the notion at stake. The notion of media pluralism, indeed, is frequently pictured with many nuances and often (arguably) assimilated to related, but differently expressed concepts, such as "media diversity", "plurality of the media", "media variety" and "information pluralism". These differences render sometimes particularly cumbersome the research itself of the way for appreciating, interpreting and eventually confronting what different legal texts and different scholars are actually pointing at when they refer to the idea of media pluralism.[2]

Despite all the foregoing, I still believe that there is some room for achieving at least a common understanding of what underpins the concept of media pluralism so as to work with a meaningful tool when using this notion to justify interventions in policy and regulatory terms. Thus, taking into account what has been described above (and also what will be developed over the following pages), despite the surveyed variety characterising the concepts and applications of the notion of media pluralism, I think that its very essence has to be related with the very nature of democracy. For democracy to exist, the recognition of the founding and not just fundamental role of freedom of expression and the derived freedoms to hold opinions, to receive and impart information and ideas is to be ensured; since these freedoms themselves ensure the representation and reproduction of the multiplicity of viewpoints that are present within a democratic society and constitute its connective fabric.[3] To narrow it down more specifically to the media sector, taking into account the key role that indisputably is recognized to the media themselves in the democratic and informational process, "media pluralism should be understood as *diversity of media supply*, reflected, for example, in the existence of a plurality of independent and autonomous media and a *diversity of media contents* available to the public" (*emphasis added*).[4] Therefore, media pluralism becomes a precondition for the existence and exercise of freedom of expression and information, and (also) an instrumental tool for the enjoyment of the right of everyone to be informed. In other words, media pluralism appears as an essential condition for preserving the right to information and freedom of expression that underpins the democratic process, and not just as the outcome of the exercise of those rights. A free, independent and diverse media system, in fact, offers concretely the possibilities to groups and individuals within a

(Contd.)

themselves to the messages they carry. The notorious statement by McLuhan "the medium is the message" (1964: 18) is thus challenged.

2 See Ariño (2005: 151-158). See also Westphal, in particular, where the A. notes that "since [media] pluralism is apparently a very complex concept, there is no simple and short definition of it […]. Therefore, when referring to this concept scholars and legislator as well as the executives should clearly indicate the specific features to which they refer to" (2002: 487).

3 According to Luciani, "la libertà di manifestazione del pensiero e la libertà di informazione […] vengono collocate […] non solo tra i valori *fondamentali* (nel senso di importanti al massimo grado) *nell'*ordinamento, ma anche tra quelli che dell'ordinamento sono *fondanti*" (1989: 606). On the link between pluralism and democracy note also, however, that according to the best political doctrine there is no mutual coincidence between the two: as Bobbio points out, "il concetto di democrazia e il concetto di pluralismo non hanno, direbbe un logico, la stessa estensione. Si può benissimo dare una società pluralistica non democratica e una società democratica non pluralistica" (1984: 48).

4 See Doyle (2002: 12). The A. reports that the abovementioned understanding of media pluralism has been provided by the Committee of Experts on Media Concentration and Pluralism (MM-CM) operating within the Council of Europe (CoE) framework.

certain society to form their ideas and opinions and express them freely, generating, thus, a plurality of viewpoints that enriches each individual and the society he belongs to.[5]

Moreover, media pluralism is connected with factors that have cultural, political, social and even economic nature. Despite, as it has been noted,[6] all these elements appear as "inseparable" parts of the very concept of media pluralism, I believe that the key features of the latter have to be identified in the cultural, political and social dimensions more than the economic one. What is coessential of that notion, in fact, is primarily its political and cultural nature. Then, whether or not a bright line can be drawn between what is definitely political and what is cultural, as well as, more broadly, whether or not is possible to conceptually distinguish between pluralism and diversity – the former being more politically connoted while the later being predominantly rooted in the cultural environment –[7] what eventually emerges, however, is that all these variations originate from and refer to an understanding of media pluralism that focuses on the *qualitative dimension* rather than the *quantitative aspects*. Thus media pluralism is something more than the mere quantitative multiplicity of viewpoints/voices. It is rather their actual qualitative variety and diversity. It is the politically (in a broad sense) and culturally significant diversity and variety of information, contents and events (relevant for the democratic society): a variety and diversity of contents, events and information that should have access to the media and should also be accessible from the media. Regulatory interventions in the media filed, thus, whatever the forms they can take when aiming at fostering media pluralism, they all have to share and be reconcilable in this common understanding of the notion of media pluralism.

The notion of media pluralism and the regulatory instruments to ensure it: united in their plurality

Within the European space, first and foremost, the notion of media pluralism is rooted in the constitutional heritages of several Member States (MS). Indeed, its origins can be traced back to the case-law of the constitutional courts mainly of Italy, France and Germany. Starting from the early 1960s, in dealing with cases (predominantly) concerning challenges brought primarily by the emerging private broadcasters against the well established public national monopolies of television broadcasting, each one of those courts endorsed and elaborated the notion of media pluralism – reaching however a common understanding on this –[8] as a distinct legal principle of constitutional status.[9]

It is indeed in considering the peculiar nature of broadcasting – as not just an economic activity but also as a relevant vehicle for enhancing democratic participation and promoting culture – and in balancing, then, among different constitutional rights involved in it – mainly between freedom of expression and freedom of economic initiative – that the constitutional courts of the aforementioned countries developed the notion of media pluralism as an integral part of freedom of expression itself. Thus, since from the same constitutional traditions freedom of expression emerged very much in its positive dimension, implying an action/obligation from the part of the State to ensure the preconditions for all to freely forms and express publicly their opinions, media pluralism was recognized itself as the object of this positive obligation to act and as an objective on the pursuit of which public regulatory interventions could find sound justification.

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5 As Sartori puts it, in differentiating pluralism from tolerance, "la differenza è che la tolleranza rispetta valori altrui, mentre il pluralismo afferma un valore proprio. Perché il pluralismo afferma che la diversità e il dissenso sono valori che arricchiscono l'individuo e anche la sua società politica" (2000: 20).

6 See Westphal (2002: 487).

7 See Klimkiewicz (2005) and Hitchens (2006: 8-9).

8 See Kremmyda (2004: 40-45).

9 On the details concerning the developments of the respective case-law of the constitutionals courts of the abovementioned countries, see (for Italy) Cheli (2007); (again for Italy and also France) Craufurd Smith (1997: 151-168); and (also for Germany) Kremmyda (2004: 38-51).

However, in other fora, a different understanding of freedom of expression – and particularly the derived freedom of information – and media pluralism has led to different interpretations of their relationship; and, hence, to a different appraisal of regulatory interventions to foster media pluralism. As Craufurd Smith has shown, this is the case, for instance, of the ECtHR (1997: 174-183) [10]. The ECtHR, while endorsing the notion of media pluralism, interpreted it mainly as a potentially legitimate ground for justifying restrictions on freedom of expression rather than a constitutive element of the latter. Indeed, in interpreting Article 10 of the European Convention on Human Rights (ECHR) the ECtHR, despite leaving some room for supporting the foundation within that Article of an individual right to receive information – what definitely national constitutional courts did in interpreting equivalent national constitutional provisions – [11], so far has only clearly taken the view that pluralism can be a legitimate exception to the principle of freedom of expression. Thus, notwithstanding the recognition of a certain margin of appreciation on the part of the States when they decide to enact regulatory measures based on the principle of media pluralism, since such measures are considered as limitations to a fundamental right, they have to be narrowly interpreted and strictly scrutinized under the parameters of necessity and proportionality.[12]

Nevertheless, more recently, the ECtHR appeared to have reached a rather pro-active approach towards the realisation of media pluralism. Developing its case-law on freedom of expression and television broadcasting regulation (in particular, concerning structural rules on the allocation of broadcasting frequencies), the ECtHR has stated that, according to Article 10 ECHR, States have, in addition to their negative duty of non-interference, "a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism"[13] and grant to broadcasters effective access to the audiovisual market so as to ensure diversity of the overall programme content, reflecting as far as possible the different opinions in society. Thus, according to the ECtHR, providing the theoretical possibility for operators to access the market or the mere existence of several channels is not sufficient to ensure what the ECtHR identifies as "true pluralism in the audiovisual sector in a democratic society". In fact, positive intervention in appropriate and effective forms is encouraged and almost mandated whenever necessary to ensure the objective of securing media pluralism.

Beyond this extremely relevant but theoretical dispute, if one looks in more practical terms at the regulatory instruments through which protection and promotion of media pluralism have usually been conceived and afforded, it is possible to group them within two main (but flexible) categories: usually labelled, respectively, as internal pluralism measures and external pluralism ones.

Internal pluralism and content regulation

The category of internal pluralism predominantly encompasses measures that relate with what is broadcasted. Thus it can be reconducted to the broader category of content regulation.[14] However, internal pluralism or pluralism *within*/*in* every single media outlet is terminologically used to refer cumulatively (and can be achieved by resort) either to obligations concerning programme requirements – as measures favouring the diversity of opinions accessing a media outlet, the balanced and not partisan presentation of information, the granting of a balanced accessing time to different religious and political formations, the release of contents produced by diverse or independent authors,

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10 For in depth and updated analysis of ECtHR case-law on freedom of expression see Oetheimer (2007).

11 See Barile (1984: 239-240).

12 On the interpretation of Article 10 and the case-law of the ECtHR, with particular focus on the room for justifications for licensing provisions on television broadcasting, see among many, Janis *et al.* (2008: 301-305).

13 See Case *Centro Europa 7 SRL and Di Stefano v. Italy*, App. No. 38433/09, 7 June 2012, § 134.

14 For a thorough discussion of all types and forms of content regulation for the media in place at European level, see, among many, Holoubek *et al.* (2007), especially ch. 3 and 4 relating, respectively, with sector-specific regulation at infrastructure and content level.

and even the broadcasting of a plurality of programmes of different genres for satisfying different tastes – or structural obligations in a narrow sense – such as the composition of bodies responsible for managing the broadcasting outlet or selecting the contents to be broadcasted by the latter. Altogether, these are measures aiming at achieving the broader political and cultural diversity of content starting from each individual media outlet.

Traditionally, the concept of internal pluralism has been primarily shaped for and targeted to the providers of Public Service Broadcasting (PSB) – *alias*, in the majority of cases, the former national monopolists – by stressing their key role in addressing the social, democratic and cultural needs of each society and focusing in particular on certain measures that are more suitable to achieve the PSB purposes as delineated at national level by laws or regulations conferring, defining and organising the PSB remit.[15] However, some internal pluralism measures (in the broader sense, as pointed out above) are already applied also to private channels (e.g., broadcasting contents generated by independent producers, granting access to content of major relevance for the general public); while others (e.g. the provision of information in unbiased and neutral way, time-sharing of access by different political and religious groups) could be extended to them as well, especially when the measures belonging to the next category do not really succeed in their mission.

External pluralism and structural regulation

Within the category of external pluralism are generally located measures that relate to the structuring of the overall media environment. Thus, this category can be reconducted to the one of structural regulation in a broad sense. External pluralism or pluralism *of* the media is linked not only to regulatory measures imposing constraints on media ownership and control – such as ownership constraints either mono-media or cross-media, prohibitions of control by foreign investors or by special entities such as public institutions, limits on the number of broadcasting licences or (alternatively) on market shares –, but also to other constraints such as 'must carry' rules requiring certain television channels to be carried over certain networks for guaranteeing the universal accessibility of the former, and limits on advertising shares and revenues. Altogether, the aim of this kind of measures is to impede the formation of and tackle dominant positions (generally presumed to be as such detrimental to media pluralism) and to structure the overall media market so that this could offer to citizens the fullest range of cultural and political views expressed in society. Indeed, the application of such measures is purported to spread variety across the diversity of several, independent and autonomous media outlets, and, thus, to consign to viewers an overall pluralistic media system.

This set of measures generally dates earlier in comparison with most of the measures for internal pluralism listed above. In general, it was first put in place when private television broadcasting channels arose and started operating together (and competing) with public broadcasting companies, generating the so-called "dual system" that is usually considered as such as a further contribution to the attainment of the objectives related to media pluralism. Anyway, targeted prevalently to private broadcasters so to 'compensate' and 'counterbalance' internal pluralism regulations for public ones, structural regulation was subsequently extended (in certain forms) also to the latter. Moreover, along this line, external pluralism measures have increasingly been strengthened to tackle growing phenomena of concentration affecting the media sector and to govern the overall renovated media environment. In certain cases, this set of measures became increasingly believed and employed as a means to achieve media pluralism even up to the point of resorting predominantly to it at the expenses of many internal pluralism measures.[16]

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[15] On the broad topic of PSB, for an European and comparative perspective on actual status of PSB, see European Audiovisual Observatory (2007); Prosser (2005); and Harrison (2003), that shows how PSB can survive and adapt its remit to the new technological context.

[16] See Barendt (1997-1998: 75-77).

The necessary interrelationship between the two dimensions

Media pluralism analyses very often privilege the aspect of external pluralism and structural regulation.[17] Among the many factors that can determine this inclination certainly there is a perceived difficulty to effectively enforce content regulation as well as its inadequacy to deliver efficient results in most cases. Thus, when compared with internal pluralism measures, content regulation is frequently conceived only as a suppletive and additional set of measures. Moreover, the preference for structural regulation comes also from the pragmatic element of the necessity (and the difficulty) to measure the accomplishment of a satisfactory level of media pluralism; this being an operation perceived as necessary before opting for regulatory intervention and choosing the suitable regulatory tools for performing it. While it appears extremely cumbersome to measure the satisfaction of internal pluralism/predominantly qualitative objectives, measuring what are perceived more as quantitative/external pluralism objectives, notwithstanding the variety of (and often the difficulties in operationalising) the criteria and indicators that can be adopted for estimating them, is usually depicted as a route capable of delivering more concrete results.[18]

Nevertheless, I share the views that represent external and internal pluralism measures both altogether as non substitutable and rather complementary tools for achieving the unique general objective of media pluralism as identified above. As stated by the European Commission (the Commission), "although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. Media ownership rules need to be complemented by other provisions".[19] In fact, although the specific and direct objectives pursued by these two sets of measures are different, thus justifying the distinction into two categories,[20] both content and structural regulation, however, find their *raison d'être* and coexist in the overall general objective they both aim at pursuing. Furthermore, both internal and external pluralism measures are necessary in the media markets as these stand nowadays throughout Europe: that is to say in broadcasting markets still characterised by "dual systems" where media pluralism objectives are to be performed not only by all the operators (i.e. PSB and private media companies) in a balanced way according to their nature, but also by the broadcasting sector as a whole.

The EU and the launching of a debate on media pluralism: when and why?

The abovementioned findings are shared not just at national level, but also at international – reference here is in particular to the activity of Council of Europe (hereinafter, CoE) – and at EU level.[21] At the EU stage, in fact – as it will be shown in the section below –, along the development of a European audiovisual law and policy, the notion of media pluralism, articulated in the two dimensions of internal and external pluralism, has been endorsed and re-launched since the early 1990s – thus almost

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17 As pointed out by Ariño, "in the global context media pluralism has come to rely almost exclusively on the plurality of ownership, in other words, external pluralism, whilst the traditional role of public service broadcasting (and the internal pluralism model) is increasingly questioned in a multi-channel environment" (2005: 154).

18 See Polo (2007). In general, the measuring of audience (instead of market) shares seems to be the best suited indicator, since it is adaptable to the needs of the new technological landscape.

19 See Commission Staff Working Document - Media Pluralism in the Member States of the European Union, SEC(2007) 32, p. 5.

20 However, in extending the analysis of content and structural regulation also to the American case, Barendt argues that "there may be a fine, perhaps imperceptible, line between structural regulation and general programme standards" (1997-1998: 82) and that "the difficulty of drawing any bright line between the categories of *structural* and *contents* regulation" is due to the fact that "some type of regulation can be characterised as both structural and content in character, while others might be said to be structural in form but content-based in overall aim" (1997-1998: 94).

21 As (re)stated recently by the EP in a Draft Report on concentration and pluralism in the media in the European Union (2007/2253(INI)), "any consideration of media pluralism must take into account both pluralism of ownership (external pluralism) and pluralism of content (internal pluralism)".

in parallel to its development at the national stage. Since that time, however, the different EU institutions have approached that notion from diverse perspectives.[22] In particular, while the European Parliament (EP) in its various resolutions (and even in reports issued in the 1980s) dealing with that matter has shown great attention to the cultural dimension that lies at the roots of media pluralism and has spurred to directly act in this direction, the Commission, on its part, has chosen to focus in particular upon the external pluralism/media ownership/media concentration dimension as this appeared more closely connected with the internal market project (and thus also more strongly rooted within EU competences).

The milestone in the debate remains the 1992 Green Paper on *Pluralism and Media Concentration in the Internal Market*[23] where the Commission made quite clear that preserving pluralism in itself is not an EU objective. According to the position of the Commission in this Green Paper, the interest of and the main reason for dealing with media pluralism at EU level would rest predominantly upon the need to ensure the accomplishment and the smooth functioning of the internal market (for broadcasting) – the internal market being in itself, according to the Commission, beneficial to media pluralism goals – potentially disturbed by disparities among national regulatory interventions in the field of (external) pluralism, hence, to be possibly harmonised. That Green Paper has been at the origin of a fervent activity that has led to the production of further discussion documents collecting reactions of stakeholders. Moreover, it has been followed over the time up until now by other pronouncements by EU institutions – such as the EP – all reinforcing their standpoints. In this still ongoing debate, however, it seems that so far the *acquis* is the "inappropriateness" for the EU to launch a concrete and direct initiative (via hard-law instruments) on media pluralism.[24]

Media pluralism and the new audiovisual landscape

Both at national and supranational level, moreover, the debate on the notion of media pluralism and on the regulatory measures promoted or adopted to foster it, is increasingly conducted by focusing on the opportunities that new technologies are generating and on the contribution they can offer to enhance media pluralism itself. Since the advent of digital (satellite, cable, as well as terrestrial) broadcasting technologies and the connected phenomenon of technological convergence between broadcasting and telecommunications, the traditional arguments used for justifying regulatory interventions to secure public interest goals, such as media pluralism, have lost much of their strength. This is the case, for example, of arguments such as, first and foremost, radio-spectrum scarcity and, hence, the naturally limited number of available television channels/broadcasters, but also the strong impact exerted on the public by television broadcasting, or the scarcity and concentration of the available economic resources for running such an activity. Technological convergence, in fact, and the effects of digital compression of broadcasting signals have released great portions of the radio-spectrum, thus leading to the potential increase in the number of TV channels/services to broadcast and of broadcasters as well. Moreover, those technological advances have generated more platforms able to deliver audiovisual contents to the public either in a 'TV-like' manner or in new forms through new personal, 'on-demand' services that can be tailored to the individual requests of the viewers by the viewers themselves; hence, mitigating the impact of television broadcasting on the general public.

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22 See Harcourt (2005).

23 See Commission Green Paper on Pluralism and media concentration in the internal market – an assessment of the need for Community action, COM(92) 1980.

24 Still valid is what has been written by Olla: "le istituzioni comunitarie non hanno ancora maturato un livello di consenso politico necessario e sufficiente al fine di disciplinare in maniera aperta e diretta il pluralismo nei mas media. Nonostante questo vuoto normativo, diverse istituzioni comunitarie hanno contribuito in maniera indiretta alla tutela e al mantenimento del pluralismo. La giurisprudenza della CEG, le decisioni della Commissione in materia di concorrenza, ed i programmi comunitari tesi al sostegno dell'industria audiovisiva hanno indubbiamente contribuito alla tutela di questo valore di fronte alla disarmante assenza di un contributo positivo da parte del legislatore comunitario" (2001: 298).

One should resist, however, to the temptation of hailing at technological advances and asserting that threats to media pluralism have thus been swept away by the panoply of means and forms now available for delivering and accessing audiovisual contents of any genre. The availability of a huge number of channels, indeed, does not in itself mechanically and automatically generate and ensure the availability of different opinions and views through the media; even if, of course, it can significantly contribute to that. Since, moreover, the increased number of television channels does not prevent that these could be controlled by few (if not, in theory, a single) operators (especially if these can concentrate in their hands most of the available economic resources/advertising revenues), the issue of external pluralism, as identified above, will persist.[25] As well as many issues related with content regulation for pluralism (thus, internal pluralism issues) will still hold valid since technological developments do not exhaustively resolve them.

Media pluralism will, thus, remain at the heart of regulation for the media in this new audiovisual landscape since – as noticed above – first and foremost, it is rooted in the value of democracy that it contributes to foster in and realise through the media. Technology, far from being a value in itself, in fact, is only one aspect of media pluralism which, nevertheless, has necessarily to be taken into account by (the evolution of) regulation for the media and audiovisual sector. Moreover, other influential aspects of media pluralism and, hence, of the policy and regulatory interventions towards audiovisual contents and broadcasting activity are the political (in a broad sense, thus connected to democracy) and the cultural dimensions at stake in that principle. As far as the latter, in particular, policies to protect and promote media pluralism are recognized also as an integral part of cultural policies. At EU level, indeed, audiovisual and media policy and regulation have been very much approached and dealt with cultural policies instruments adopted to support and supplement actions taken at MS level. Moreover, as recognised (now) by the Treaty on the Functioning of the European Union (TFEU), cultural policy objectives permeates EU law. According to Article 167 TFEU, cultural objectives, specially the respect and promotion of cultural (and linguistic) diversity as manifested by the multiplicity of the European identities, are always to be taken into account by the Community when acting in every other field covered by EU law.[26]

Drawing in particular from these remarks, one could claim that media pluralism, as understood throughout these pages, in being deeply connected with democracy, is a technologically neutral objective. Far from being a 'burden' of sector specific regulation, the notion of media pluralism, thus, has still a great role to play in the new audiovisual landscape, in building sound rationales and justifications for regulatory interventions in the media sector. It is true, nevertheless, that taking into account the technological advances, sector specific regulation (as shaped in the old analogue environment) needs to be revised, in the perspective (perhaps) of an updated technologically neutral regulation.[27] New, in fact, are the challenges for and threats to media pluralism posed by new technologies applied to the media. [28] For instance, issues such as (the possibility to foreclose) 'access' in all its various declinations – e.g. access to content, as the very scarce resource nowadays, both from the point of view of broadcasting platforms and viewers –[29] become (one of) the subject-matters which media regulation will have increasingly to deal with in the technologically renovated audiovisual landscape.

Thus, media pluralism will still be an objective for regulators to be taken into account when acting in the media filed. Bearing it in mind and looking (here) in particular at the EU dimension, the next

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[25] See Communication from the Commission to the Council and the European Parliament, Follow-up to the consultation process relating to the Green Paper on Pluralism and media concentration in the internal market, COM(94) 353, p. 34.

[26] See De Witte (1995b); Holmes (2004).

[27] For an appraisal of other grounds that still justify regulations, see Goldberg (1998: 298-307).

[28] See Rotenberg (2005).

[29] See Barzanti (2007).

section will offer an overview (in some more concrete terms) of how (so far) such an objective has interacted with and has been dealt with by EU law.

Media Pluralism and EU Law: the Limits of Traditional Approaches, between Respect and Promotion

Media pluralism and EU law: the traces in the Treaty and nearby

In exploring the relationship between media pluralism and EU law, the TFEU can be taken as the starting point. It has to be noticed, first, that within its body, the phrase "media pluralism" has not even appeared until 1997. It was only at that time, with the adoption of the Treaty of Amsterdam amending (also) what was then the Treaty establishing the European Community (EC Treaty), that a Protocol was annexed to the latter, explicitly referring to the notion of media pluralism.[30] In focusing in particular on PSB, this Protocol is mainly purported to offer an interpretative aid for the application of Community competition and state aid law to the funding of PSB.[31] The Protocol highlights the need to strike a balance between the realisation of the public service remit entrusted upon PSB as conferred, defined and organised at MS level and the achievement of the common supranational interest in the efficient and undistorted functioning of the EU internal (broadcasting) market; and, hence, to reconcile the latter with the former.[32] In dealing with such a public service task that has a strong political dimension, the Protocol indicates that the reason for paying this special account to PSB rests upon the consideration 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". Thus, in using the notion of media pluralism – even if without actually defining it – and stressing the important contribution that PSB offers to the maintenance of media pluralism itself, the Protocol recognises the latter (indirectly) as a crucial component in the functioning of the democratic process not only at MS level, but also at the EU one.[33]

The Protocol on PSB is not, however, the only source of primary EU law where the notion of media pluralism is mentioned. In fact, also the Charter of Fundamental Rights of the European Union (hereinafter, the Charter) explicitly points to that notion.[34] In recognising freedom of expression and information as fundamental rights that belong to everyone, Article 11 of the Charter states, also, at paragraph (2), that the "freedom and *pluralism of the media* shall be *respected*" (*emphasis added*).[35]

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30 See Protocol on the system of public broadcasting in the Member States, OJ [1997] C340/109. As for the Treaty of Amsterdam, this annexed Protocol entered into force on 1st May 1999.

31 On this issue, see, in particular, Hobbelen *et al.* (2007) and Craufurd Smith (2001).

32 See, in particular, Mastroianni, where he affirms that "pur in una formula infelice, il testo del Protocollo richiede dunque alle istituzioni comunitarie (in particolare, alla Commissione) un'applicazione delle norme rilevanti del Trattato in maniera da garantire il finanziamento del servizio pubblico di radiodiffusione […]. Viene inoltre richiesto che detto finanziamento non sia tale da incidere sugli scambi in misura contraria all'interesse comune. Non si tratta dunque di un'aprioristica esenzione del comportamento degli Stati nei confronti delle emittenti pubbliche dall'applicazione delle norme del Trattato" (1998: 538). More broadly, as pointed by Weatherill, the Protocol "offers a further example of the anxiety to emphasize the key role of public services, but to admit that their operation cannot be immunised from EC trade law" (2000: 248).

33 See Katsirea (2008).

34 The Charter, first proclaimed in Nice in December 2000, then incorporated (as Part Two) in the Treaty establishing a Constitution for Europe – that did not enter in force – has been finally referred to (as adapted at Strasbourg on December 2007) by Article 6(1) of the Treaty on the European Union (TEU) as a legal source of the "same legal value of the Treaties". Despite the vagueness of the term "value", it could be argued that the main purpose of the provision at stake is to confer to the Charter the same legally binding nature of the EU Treaties.

35 The wording of Article 11(1) of the Charter corresponds to the first two sentences of Article 10(1) ECHR: thus, as stated by Article 52(3) of the Charter itself, in so far as the rights contained in the Charter correspond to rights guaranteed by

As it appears from the *travaux préparatoires* of the Charter, the paragraph (2) was inserted at a late stage in the long drafting process of Article 11. It was indeed contained into an amendment originally providing explicitly for cultural and political pluralism of the media to be *guaranteed*.[36] However, after further modifications, the final agreed and adopted version of Article 11(2) was eventually phrased – as it stands in the Charter – with the significant change of the verb "*guaranteed*" into "*respected*".[37] Thus, on the one hand, the inclusion in the Charter of the principle of pluralism of the media – even if, again, not clearly defined and articulated – can be surely taken as a indicator of its acknowledged relevance as a principle that results from the constitutional traditions common to the MS; and, hence, of the necessity to observe it as a general principle of EU law, as it stems directly from freedom of expression.[38] On the other hand, however, Article 11(2) of the Charter shows (and reinforce) the prevailing attitude of the EU towards media pluralism as a predominantly negative/non-interference/'non-harming' stance rather than a proactive approach to actually and directly guarantee and promote it EU-wide.

This last statement, however, has more nuances that need to be articulated; as it will be done, indeed, later on, focusing in particular on the legal rationales and reasoning that underpin them. Nevertheless, the same statement highlights, once more, the two basic attitudes towards media pluralism: that are, as already noticed above, the passive/respect-oriented approach and the active/promotion-driven approach. I think that, although to a different extent, both approaches, however, are reflected at EU level. Moreover, I think that both can be related, respectively, to the two different routes of the internal market making process springing from the Treaties. These are, on the one hand, the negative integration route founded on the application of the free movement (and competition) rules and the removal of national barriers to trade (and of anticompetitive behaviours of market players); and, on the other hand, the positive harmonisation route based on the adoption of regulatory measures to approximate and uniform justified obstacles to trade integration. Far from being a definitive classification, the following exposition will show that there are interrelations and linkages between the two different strategies for market making and the two different attitudes towards media pluralism. Beyond the complexities and varieties within the different approaches, a common

(Contd.)

the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". In the text of Article 11 of the Charter, anyway, there is no reference to the possibility for the MS to require the licensing of broadcasting, television and cinema enterprises nor to a catalogue of the possible grounds for limiting freedom of expression: as, instead, both elements are expressively stated respectively in Article 10(1), last sentence and Article 10(2) of the ECHR. This gap is filled, however, by the application of the general provision embodied in Article 52 of the Charter. Moreover, as clarified – without, however, any binding legal value – by the Explanations prepared under the authority of the Presidium of the Convention which drafted the Charter (CHARTE 4473/00 CONVENT 49, 11 October 2000), the limitations that may be imposed on the rights recognised in Article 11(1) do "not exceed those provided for in Article 10(2) of the [ECHR], without prejudice to any restrictions which Community competition law may impose on Member States' rights to introduce the licensing arrangement referred to in the third sentence of Article 10(1) of the ECHR".

[36] According to Panebianco (2001: 156), in the language in which it was originally drafted, this limb of the abovementioned amendment, presented by three Italian members to the Convention (namely, Rodotà, Paciotti and Manzella) – the overall amendment suggesting an alternative formulation for the whole Article 11 –, stated that "*è assicurato* il pluralismo culturale e politico dei mezzi di comunicazione di massa" (*emphasis added*).

[37] See Vigevani, in particular where he affirms that "tale modifica rispondeva indubbiamente alla preoccupazione di non legittimare attraverso tale norma una automatica crescita di competenze dell'Unione in questo settore" (2003: 1248).

[38] Moreover, as clarified by the aforementioned Explanations to the Charter, Article 11(2) "spells out the consequences of paragraph (1) regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in case C-288/89 (judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007) [fn 43 *infra*], and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty [fn 30 *supra*], and on Council Directive 89/552/EC (particularly its seventeenth recital) [fn 63 *infra*]". On the connection between media pluralism and the constitutional traditions common to the MS, see Section 1.2, above. On that last respect, note also Article 52(4) of the Charter, stating that "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

bottom-line will be found in the overall difficulties and limitations to develop, so far, sound and far-reaching strategies towards media pluralism at the supranational level, within the European audiovisual space.

Negative integration and the respect of media pluralism: a Member States (MS) domain?

If one looks, first, at the process of market integration through the application of the free movement provisions, one will note that this process has relevantly affected also the broadcasting (and, more generally, the media) sector, particularly since the 1970s.[39] The recognition by the ECJ in *Sacchi*[40] that "in the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services" and, hence, must be considered as coming within the scope of application of (now) Article 56 TFEU, paved the way for challenges to be brought against many regulatory measures adopted at national level for governing the broadcasting sector: as they were alleged to create obstacles to trade to be removed (unless justified) so to ensure the full realisation of the fundamental market freedoms.

Many of the challenged national regulatory measures related (mainly) to broadcasting, however, were found by the ECJ to be adopted on the ground of the maintenance and the respect of media pluralism. This finding implied, then, for the ECJ an appraisal of the notion of media pluralism.

Media pluralism in the case-law of the European Court of Justice (ECJ)

Within its case-law on that matter, the ECJ has been primarily concerned with assessing whether media pluralism is to be considered as a matter reserved to MS regulatory intervention and what is its relationship with fundamental market freedoms.[41] Looking at the ECJ case-law related to media pluralism, one will note, in general, that despite the many judgments dealing with this matter, a definition of media pluralism is not provided by the ECJ, differently from what appears from national constitutional courts' case-law as well as ECtHR relevant judgments (as recalled above). However, the ECJ has developed its own understanding of media pluralism by paying extensive reference to the national and, in particular, ECtHR existing case-law. Thus, the ECJ has (almost at any relevant time) affirmed that ensuring media pluralism is connected with freedom of expression, as protected by Article 10 ECHR, which freedom is one of the fundamental rights guaranteed by the EU legal order (via Article 6 TEU provision).

Moving from this general remark, I will highlight, in particular, three main points that represent different perspectives in the appraisal of media pluralism by the ECJ.

First, in the several occasions the ECJ has been offered to deal with media pluralism within the context of the application of free movement rules (and freedom to provide services in particular), it has elaborated a consistent set of case-law. In this set of cases, media pluralism is generally classified as a ground upon which certain national measures resulting in impediments to trade can be justified. This appears already from the very first set of judgments on that matter; and lasts up until nowadays. In all these rulings the ECJ, indeed, while excluding the possibility to read media pluralism within one

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[39] This does not come as a coincidence, since it is in that period that mainly due to the development of the cable and satellite transmission technologies, broadcasting activities acquired (*de facto*) a potentially growing tans-national dimension.

[40] Case 155/73, *Sacchi*, [1974] ECR 409, § 6. In the judgement it is stated also that "it follows that the transmission of television signals, including those in the nature of advertisements, come, as such, within the rules of the Treaty relating to services […]. On the other hand, trade in material, sound, recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods" (§ 6-7).

[41] For a deeper analysis of the ECJ case-law on this respect, see Barzanti (2012; forthcoming).

of the strictly interpreted grounds for justification listed (now) in Article 52 TFEU,[42] explicitly recognizes it as part of a cultural policy that may constitute an overriding requirement relating to the general interest which, then, justifies a restriction on the freedom to provide services.[43] While affirming that measures that amount to non-discriminatory restrictions on the free movement of services, but seek to achieve the objective of safeguarding media pluralism, may nevertheless be justified, the ECJ has not renounced to asses them in the light of a strict proportionality and necessity test. As a result of this scrutiny, many of such measures have been found not to be actually justifiable.[44] In so doing, despite the recognition of media pluralism as (part of) a policy domain to be reserved to MS and to be respected and not hindered by market integration, the ECJ has frequently and increasingly actively interfered in it.[45]

My second point is that in its case-law on media pluralism the ECJ has also stressed the fundamental right dimension of media pluralism (as mentioned above), especially in relation to freedom of expression, and has then recalled that fundamental rights form indeed an integral part of the general principles of law, the observance of which it ensures.[46] Accordingly, in ensuring the exercise of the fundamental market freedoms, the ECJ has guaranteed also the respect of the fundamental right to freedom of expression and the maintenance of media pluralism connected to it. Thus, in balancing different fundamental rights and principles – none of which is regarded as absolute – the ECJ has demonstrated that there is no such an absolute trade integration taking place at the expenses of other policy preferences. This shows, furthermore, that trade law is permeated by and need to be reconciled with wider values that have to be respected in the application of the former.[47] Media pluralism is one of these values. Moreover, the value of media pluralism, as it is now explicitly embodied (also) in the Charter, could affect even more the nature of the abovementioned balancing exercise that is a stake when the ECJ judges the compatibility of trade restrictive national measures

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42 See Case 352/85, *Bond van Adverteeerders v. Netherlands*, [1988] ECR 2085, particularly § 38-39, and Case C-211/91, *Commission v. Belgium*, [1992] ECR I-6757.

43 For example, see Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda*, [1991] ECR I-4007, concerning certain restrictions imposed on the re-transmission of advertisements contained in radio and television programmes broadcasted from other MS; Case C-353/89, *Commission v. Netherlands*, [1991] ECR I-4069, concerning the obligations to use the services of a national undertaking for the production of radio and television programmes; Case C-23/93, *TV10*, [1993] ECR I-4795; Case C-11/95, *Commission v. Belgium*, [1997] ECR I-4115, concerning the introduction of a preliminary license system for cable re-transmission of televised programmes broadcast from other Member States, particularly § 54; and finally, for a recent example, see Case C-250/06, *UPC*, [2007], concerning the obligation imposed on Belgian cable operators to broadcast, in the bilingual region of Brussels-Capital, television programmes transmitted by certain private broadcasters designated by the authorities of that State (the so-called 'must carry' rules, for which see later on).

44 For an example of measures found not to be objectively necessary to safeguard the legitimate objective of media pluralism, and, hence, the suggestion of alternative measures to pursue the same objective see Case C-288/89 *Gouda*, fn 43 *supra*, § 24-25; for a positive example, see Case C-148/91, *Vereniging Veronica Omroep Organisatie*, [1993] ECR I-487, especially at § 9-13.

45 Furthermore, as a recent example of the ECJ interpreting (now) Article 56 TFEU and then interfering with national measures founded (also) on the objective of safeguarding media pluralism, see C-380/05 *Centro Europa 7*, [2007]. In this case, the ECJ indirectly, but manifestly interfered (pro-actively) with a certain Italian policy towards media pluralism, by challenging the compatibility with Community law of regulations governing the process for granting broadcasting licences, on the basis of the lack of objective, transparent, non-discriminatory and proportionate criteria within them; but did not even mentioned the notion of media pluralism.

46 See Case C-260/89, *ERT*, [1991] ECR I-2925, § 41.

47 For a concrete example of that in the ECJ case-law, see Case C-368/95, *Familiapress*, [1997] ECR I-3689; concerning an Austrian ban to market magazines containing prize crossword, where the balancing exercise involved, indeed, the free movement of goods – the goods being a German magazine with crosswords, to be sold in Austria –, the freedom of expression (from the part of the publisher of the German magazine) and the maintenance of pluralism (of the Austrian press).

with the law on free movement.[48] And this could possibly lead also, in the future, to have from the ECJ a more detailed and precise definition and appreciation of the notion of media pluralism itself.

The third and final point on the relationship between negative integration and media pluralism as emerged in the case-law of the ECJ is that the realization of the former (and of the freedom to provide services in particular) in the media market and the maintenance of the latter are often seen as reciprocally instrumental and thus almost coinciding.[49] This interpretation stems from the reading of the freedom to provide services in the field of television broadcasting (in particular) as a specific manifestation of freedom of expression grounded in the principle of pluralism.[50] The consequence of the development of such an argument would be, in the very end, reconsidering the process of negative integration more in terms of a proactive attitude towards the maintenance of media pluralism.

Therefore, from a complementary combination of these three perspectives, despite some possible contradictions, what emerges mostly is that, so far, for the ECJ media pluralism appears predominantly as an effect of the full application of the free movement of services provisions and the realisation of the internal market.

The limits of competition law: general remarks

The creation of a single European market depends not only on the removal of national obstacles to trade, but also on the prevention of the behaviours of market players that can partition the market itself and undermine its efficient functioning. Thus, by tackling such behaviours, EU competition law has a great role to play in the realisation of the internal market.[51]

The same holds true obviously for the internal market for broadcasting. Moreover, the application of competition rules (namely, Articles 101 and 102 TFEU) within this specific market can play a fundamental role also in guaranteeing the respect of media pluralism: above all, for example, in favouring liberalisation, in preventing the abuse of dominant positions, in tackling horizontal and vertical concentrations that can foreclose access to the market especially by new players and, in the language of the digital age, in removing obstacles to access to content and platforms for operators in the renewed value chain of the broadcasting sector. All of these market hindrances and foreclosures are, indeed, evidently detrimental to media pluralism. In removing them, thus, competition law can contribute in safeguarding the latter.

Moving from these (and other similar) findings, there are many who argue for competition law instead of ad-hoc regulatory interventions to have a crucial and primary role to play in securing the objective of media pluralism. The ones who argue for competition law to have such a role, usually describe media pluralism either as almost a 'spontaneous' result delivered by the undistorted functioning of a market not to be unnecessarily over-regulated[52] or, although a political more than an economic objective, as a result, nevertheless, whose realisation today (and in the near future) will depend first of all on the outcome of the market forces. [53]

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48 More broadly on that (and on the relevance of the Charter in the internal market making process) see Weatherill (2004).

49 Beyond the case-law, the same position emerges also from the Communication from the Commission to the Council, Television Without Frontiers, Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable, COM(84) 300 final, p. 149; and from the Green Paper on Media Pluralism, fn 23 *supra*, p. 71. In the academic literature, see Schwartz (1990).

50 See, for example, Case C-260/89, *ERT*, fn 46 *supra*. For a recent account of this position, see the Opinion (especially § 39) of AG Poiares Maduro of 12 September 2007 in Case C-380/05, *Centro Europa 7*, fn 45 *supra*.

51 As a background for the following considerations, see Nikolinakos (2006).

52 See Zeno-Zencovich (2004: 43).

53 See Polo (2007).

However, if one agrees with the premises (and the development) of this paper and, thus, shares the understanding of media pluralism provided above, one would also agree, then, that competition law instruments as such, despite their indisputable usefulness, are limited tools in contributing to the achievement of media pluralism, in particular in its (coessential) qualitative (and not just quantitative) dimension underlined above. The attainment of this objective, indeed, will require actual (and qualitative) policy choices to be taken, aiming at the protection and promotion of (the diversity of) political and cultural values that market mechanisms and competition law instruments alone cannot ensure. [54] Notwithstanding the fact that competition law is unavoidably influenced by and has to take into account, to a certain extent, sector-specific policy choices characterising the markets where it operates, first and foremost, however, it appears to be driven by efficiency arguments. These arguments limit the scope and the effects of the applications of competition law (and of its delivered results) in guaranteeing the respect of those policy objectives. In the broadcasting market, for instance, where the maintenance of pluralism is a sector-specific policy choice which implies (among others also) the need to preserve a non-concentrated market structure and, thus, to tackle dominance *per se*, efficiency driven competition law mechanisms will have a limited room for manoeuvre and a limited role to play in guaranteeing media pluralism; as they will not lead automatically to intervene against dominant positions as such.[55]

Moreover, (other) limits of EU competition law in guaranteeing the respect of media pluralism are shown, for instance, in the case of mergers control. The Merger Regulation,[56] indeed, at Article 21(4), in establishing Commission's sole jurisdiction for mergers having a EU dimension, allows MS to interfere and take appropriate measures in such merger cases where a legitimate interest – other than those taken into account by the Merger Regulation itself – which needs to be protected, such as the "plurality of the media", is at stake. This provision – despite it has never been used so far – implicitly reinforces the classification of media pluralism as a MS policy domain; but also implicitly recognises the limits of Community competition law instruments, such as mergers control, in safeguarding and effectively ensure the respect of media pluralism.[57]

Positive harmonisation and the promotion of media pluralism: room for EU intervention?

If one then turns to the process of market making through the enactment of common rules to structure it and govern its functioning, one will note that influential pieces of harmonised legislation concerning media services (and, particularly, television broadcasting) regulations are in place at EU level.

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54 Moreover, as pointed out in the Green Paper on Media Pluralism, fn 23 *supra*, "Community competition law will serve the interests of pluralism only if the situation raises problems which can be expressed in its terms. But that is not always the case" (p. 83); and it goes on by saying, more broadly, that "although there is a convergence between them, competition and pluralism are fundamentally different things. Effective competition is concerned with economic behaviour of undertakings, while pluralism is concerned with the diversity of information" (*ibid*).

55 On that respect, there are also more 'technical' limits of ordinary competition law: such as turnover threshold limitations; or the difficulties in defining markets and measuring dominance in cross-media concentrations cases that are, nevertheless, extremely detrimental to media pluralism.

56 See Commission Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1.

57 In general, "European competition law cannot replace – nor does it intend to do so – national media concentration controls and measure to ensure media pluralism. Article 21(4) of the Merger Regulation allows Member States to apply additional controls in order to protect pluralism in the media" (COM Staff Working Document Media Pluralism, fn 19 *supra*). Much more could be said in more details about the relationship between competition law and media pluralism, and the possibilities/desirability/legitimacy and the complexities for competition law to take media pluralism concerns into account; as well as on the Commission' practice under the Merger Regulation and on the application of (now) Article 101 TFEU, especially under the light of non-economic considerations: for an account of the main issues at stake, see, among many, Ariño (2004: 116-122).

We have already seen, however, that broadcasting is not mentioned in the TFEU (nor it was in earlier Treaty versions) as a EU competence. Anyway, as shown above, the broadcasting sector has been deeply affected by the impact of the internal market freedoms. Their application, indeed, has contributed in the creation of a common broadcasting market. The way for regulating this market also by means of harmonised measures adopted at supranational level has been paved primarily by the ECJ. In early cases such as *Debauve*[58]and *Coditel*[59], the ECJ indeed has upheld some national restrictive regulations concerning certain features of broadcasting activity. These measures were assessed not to be discriminatory and intended to serve general interest objectives. As the ECJ (incidentally) specified, the persistence of such measures creating impediments to freedom to provide trans-border television broadcasting services was rendered possible by the absence of any harmonization of the relevant rules on the matter. Thus, moving from this last finding and moved by the need to complete the internal market (even in the field of broadcasting services), the Commission decided to act. It successfully proposed in 1984 to harmonise such relevant rules.[60] As it tried to do again, less then ten years later – in 1992 –, but less successfully, in lunching a debate on the possibility to harmonise other pieces of disparate national broadcasting regulations concerning restrictions on media ownership.[61]

Within the pieces of harmonised legislation actually adopted – but also in the ones proposed and never entered into force – to favour the completion and the effective functioning of the internal market for broadcasting services, however, certain 'compensatory measures', other than the ones directly dealing with proper internal market objectives, have also been included. Those 'compensatory measures' are (or would have been) indeed provisions addressing 'non-market objectives', among which also media pluralism.[62] Thus, the question inevitably arises of the extent to which the EU can act and has legitimately acted on that respect; that being, in our case, the *promotion* of media pluralism. However, on the other hand, it is beyond doubts that any relevant piece of internal market legislation will have (at least) to *respect* (if not take into account and promote) media pluralism as a general principle of EU law, as noted above.

Here below, in overlooking actual as well as attempted EU hard-law interventions to promote media pluralism, I will distinguish between internal and external pluralism measures enacted at EU level, and address them separately; having in the background the competence issue and the (constitutional) limits it poses to the adoption of EU harmonised legislation.

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58 Case 52/79, *Procureur du Roi v. Debauve*, [1980] ECR 833; concerning Belgian legislation used to mandate for a total ban on television advertising, without any discrimination among national/non-national broadcasters.

59 Case 62/79, *Coditel v. Ciné Vog Films*, [1980] ECR 881; concerning Belgian copyright law providing for the possibility to obtain the exclusivity on the broadcasting of films and thus preventing to cable operators the relaying of that film originally broadcasted from another MS.

60 In the words of the Green Paper Television Without Frontiers, fn 49 *supra*, the "simultaneous applicability of the rules of several Member States to the same facts leads in practice to considerable uncertainty in the law and crates serious difficulties. The observance or enforcement of contradictory rules renders in many cases the free movement of broadcasting between Member States impossible. From being the rule, the free movement of service becomes an exception. This makes the harmonisation of such advertising and copyright rules imperative and a matter of urgency. The Court's reference to the approximation of laws is therefore quite unambiguous" (p. 149).

61 See Green Paper on Media Pluralism, fn 23 *supra*.

62 More broadly on the 'contamination' of internal market legislation by non-market values, and on a critical reading of the *Tobacco Advertising* judgment (i.e. Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-8419) on that respect, where it denies the existence for the EU legislature of "a general power to regulate the internal market" (§ 83), see De Witte (2006).

Positive harmonisation and internal pluralism: from the Television Without Frontiers Directive (TWFD) to the Audiovisual Media Services Directive (AVMSD)

As mentioned above, the 1984 initiative to pass a Directive on the approximation of certain national regulations for broadcasting was successful. In 1989, indeed, such a Directive was adopted and grounded on what now is 53 TFEU (and Article 62 TFEU).[63] It was labelled as the Television Without Frontiers Directive (hereinafter, TWFD); almost as to mark – one could infer – that television broadcasting is not only, by its very nature, a trans-border activity physically transcending national borders, but also, then, that some EU competence to regulate for that sector is intrinsic in its trans-border character. In setting out the fundamental principles relating to television broadcasting services within the EU, the TWFD immediately became a milestone of and a point of reference for the EU audiovisual regulation and policy.[64] Closely modelled on and elaborated in parallel with the text of the European Convention on Transfrontier Television,[65] the TWFD took into account the two-sided nature of audiovisual services: between market and culture. Indeed, on the one hand, it favoured the free circulation of television broadcasting services by establishing the 'country of origin principle'[66] and recurring to minimum harmonisation of some divergent national measures (as, for instance, the ones that regulate quantitative and certain qualitative aspects of television advertising). On the other hand, it also introduced some more specific (and content oriented) measures aimed at fostering the protection of minors, respect for human dignity and protection of the consumer. Moreover, against the background of the cross-sectional clause of (now) Article 167(4) TFEU on cultural policy, the TWFD embodied provisions such as the so-called 'European-quota rule',[67] intended to promote the distribution of European television works and independent productions (and indirectly to support both their relative industry);[68] as well as – after being first amended in 1997 –,[69] measures to ensure that events which are regarded by MS of being of major importance for society, could not be broadcasted in such a way that a substantial part of the population of that MS could be prevented from accessing them.[70] These last couple of examples clearly show that the TWFD, beyond its primary purpose to facilitate the free movement of television broadcasts within the EU (both in terms of freedom to

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63 Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [1989] L 298/23. For a first commentary on this Directive, see Tizzano (1990).

64 As a background to that topic, see Harrison and Woods (2007).

65 The European Convention on Transfrontier Television of 5th May 1989, 28 ILM 857 (1989), is an international Treaty, adopted (and amended in 2002), within the framework of the CoE. Despite the shared purpose and many formal similarities with the text of the TWFD, many recognise that while the TWFD is essentially based on the more economic rationale of the internal market making, the Convention is predominantly inspired by the protection of human rights and cultural values which are key areas of concern to the CoE.

66 I.e. broadcasting activities are to be subject to the rules of the country where the broadcaster is established; while the receiving states have to abstain from exercising their control over the former and from restricting reception or retransmission – apart from certain exceptional cases explicitly provided for and following the procedure indicated by the TWFD – in the areas coordinated by the TWFD. In fact, the mutual recognition mechanism applies.

67 Known also, more properly, as the 'European content requirement', Article 4 provides for MS to ensure "where practicable and by appropriate means" that broadcasters devote the majority proportion of their transmission time to European works as defined by the TWFD itself; and, at Article 5, that the same broadcasters reserve "at least 10% of their transmission time […] or at lest 10% of their programming budget" for European works created by producers who are independent of broadcasters. For a thorough analysis of these provisions see De Witte, who points at the effect of such a provision in ensuring "the fair operation of the internal market" (1995a: 119).

68 A direct support from the Community to the European audiovisual content industry comes from the so-called MEDIA programme, grounded on (now) Article 173(3) TFEU (i.e. industrial policy).

69 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [1997] L 202/60. For a comment on this amending Directive and its impact on the original TWFD, see Keller (1997-1998).

70 See Article 3a TWFD, as amended in 1997.

provide services and freedom of establishment), was also intended to promote non-market values, such as internal media pluralism, and protect cultural diversity.

On very much the same direction moves the inheritor of the TWFD: that is the so-called 'Audiovisual Media Services Directive' (hereinafter, AVMSD).[71] This represents in fact the result of a second and more radical amendment to the TWFD, necessary to adapt the latter to the abovementioned technological developments taking place in the media sector, and structure and consolidate (to a certain extent) at EU level one of the two poles of the (future and currently under development) 'law of convergence'.[72] Apart from the relevant changes in the graduated extension of the scope of application to all 'audiovisual media services',[73] but also in the relaxation of more stringent provisions (such as the ones on advertising),[74] as far as the measures intended to promote internal media pluralism, the AVMSD has not only confirmed the ones contained in the TWFD (referred to above). In fact, it has also extended the reach of the 'European-quota rule' and added a measure providing for a right to short news reporting so to ensure freedom and plurality of information.[75] Thus, notwithstanding the language of the abovementioned provisions that appears to be more exhortative than binding; notwithstanding their dubious proportionality and their (indirect) relationship with industrial policy goals ex (now) Article 173 TFEU; and despite the fact that the promotion of media pluralism as such is neither mentioned in the operative part of the AVMSD, nor it was in the TWFD; yet media pluralism is an influential and underlying object that the abovementioned measures aim at achieving.

Positive harmonisation and external pluralism: the competence issue

Furthermore, the EU has tried more explicitly to intervene with *ad hoc* legislation in terms of promotion of media pluralism, when dealing with issues of external pluralism (and the control of media ownership, in particular). Nevertheless, in this field, it has not achieved any satisfactory and concrete result. The main obstacle for the EU to pass a Directive dealing specifically with the issue of media pluralism and concentration has proven to be the lack of a clearly defined competence to act on that respect. But also the lack of actual political determination has contributed, to a great extent, to the failure of the initiative described below. Leaving, however, the political dimension/obstacles on the

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71 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [2007] L 332/27; now, in its codified version, Directive 2010/13/EU of the European Parliament and of the Council, of 10 March 2010, OJ [2010] L 95/1. For a thorough commentary on this Directive, see Mastroianni (2011).

72 On this respect, the AVMSD will represent the core of content regulation (as one pole of the 'law of convergence'); while the so-called 2002 Electronic Communications package and within it, particularly the Framework Directive, i.e. Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33 (now amended by Directive 2009/140/EC of the European Parliament and of the Council, of 25 November 2009, OJ [2009] L 337/37), will be the soul of infrastructural/transmission regulation (as the second pole). See, on that respect, recital (5) of Directive 2002/21/EC, which also significantly states that "the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection". Thus, it seems that electronic communications regulation could serve as an instrument to possibly tackle some media pluralism issues arising from the infrastructural/transmission layer, such as bottlenecks at the level of broadcasting platforms that could be extremely detrimental to external pluralism in particular: for a thorough reflection on this topic, see Ibáñez Colomo (2012). More generally, on the 'law of convergence', see Donati and Morbidelli (2003).

73 For the notion of 'audiovisual media services' see Article 1(a) AVMSD.

74 For a thorough and critical analysis (of an almost definitive version) of the AVMSD and the mixed trends of de-regulation/(re)regulation within it, see Craufurd Smith (2007).

75 See, respectively, Article 13 and 15 AVMSD.

background, I will now give a brief account of the competence issue related to external pluralism matters.

The attempt to adopt a Directive on 'Concentration and Pluralism' or rather on 'Media Ownership'

Indeed, the debate launched in 1992 with the Green Paper on *Pluralism and Media Concentration in the Internal Market* and followed by an intensive consultation process, led eventually – in 1996 – the Commission to propose the adoption of a long-time elaborated Directive on "Concentration and Pluralism in the Internal Market". The aim of this Directive was to harmonise the disparities among national regulations on media concentrations and set common standards for measuring and evaluating them at Community level. While advancing the internal market functioning rationale to legitimise such intervention, the proposal clearly referred also to the need and went in the direction to act to promote media pluralism at EU level. The initiative, however, sank. Even a second attempt to pass such a Directive after having amended it into a more flexible set of measures, and almost freed it to references to the notion of media pluralism – as signalled even by the title, changed into "Media Ownership in the Internal Market" – did not see the light.[76]

In search of a legal basis

Apart from the political obstacles (coming both from MS and within the Commission itself) to the success of this initiative, one could speculate on its limits – as on the ones of any other possible future new proposal to pass harmonised legislation specifically centred on external pluralism measures – from a constitutional law standpoint, looking at the competence of the EU to act and the legal basis upon which grounding the legitimacy of such a piece of legislation. On this respect, Craufurd Smith (2004), indeed, has carefully analysed the several provisions already within the former EC Treaty which could be invoked as a basis for acting in relation to media ownership. In listing all the possible legal bases, one by one, against the background of the subsidiarity principle (now ex Article 5(3) TFEU), the Author excludes the likelihood to resort to any of them for the adoption of a hard-law measure in that policy domain.

First and foremost, one could definitely share the view of the Author when she explains, in fact, that (now) Article 114 (as well as Articles 53 and 62) TFEU is to remove obstacles to the internal market and only indirectly, and hence less effectively, can be used to strengthen media pluralism. Nevertheless, one could also claim that while it could be difficult to ground any piece of legislation entirely devoted to the promotion of media pluralism on such a legal basis, on the other hand, as long as the proposed (harmonising) measure will actually contribute, for instance, to eliminating obstacles to the freedom to provide services, or to removing appreciable distortion to competition, and pro-pluralism provisions will be (complementarily) necessary to guarantee the strengthened internal market, in terms of its quality and fair operation, some room for using those provisions could still be found. It remains, however – as one could also infer from the abovementioned ECJ case-law as well as the secondary legislation in force in this field –, that the internal market provisions do not offer a solid basis for the enactment of measures *specifically* centred and devoted to media pluralism as considered beyond the mere economic dimension.

In respect of other legal bases provided for by the Treaties and to be possibly used for the adoption of media pluralism measures, one could completely share, then, the contention of the Author that (now) Article 352 TFEU is "procedurally problematic" to that end and of limited aid "for measures which are all controversial" (Caufurd Smith; 2004: 660); that instead (now) Article 25 TFEU (on Union citizenship) could possibly be used, although it imposes the high threshold of unanimity voting in Council; and that (now) Article 106 TFEU, despite its attractiveness, "cannot be a suitable basis for

[76] See Harcourt (2005: 62-89).

introducing media ownership controls across the commercial and public service media sectors" (Caufurd Smith; 2004: 660).

To the same purpose, I would also point at Article 14 TFEU, providing a legal basis for regulating in the field of services of general economic interest, in general. Even if, perhaps, this provision could be used to act even only sectorially, as for example only in the field of PSB, and even if such an action could then be shaped so to produce some benefits in terms of enhancing media pluralism itself, any initiative grounded on this legal basis would inevitably be limited to PSB indeed, and it would not thus be capable of embracing the whole broadcasting market where media pluralism should be reflected.

Finally, a possible new source of inspiration in the search of a suitable legal basis where to ground a targeted hard-law intervention on media pluralism could be identified in the newly provision inserted by the Treaty of Lisbon and corresponding to Article 11 TEU on the European citizen's initiative. By enabling a significant number of EU citizens from different MS to call on the Commission to propose legislation on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties, the European citizens' initiative may bring to the fore the quest by individuals to ensure the respect of their fundamental right to freedom of expression and information and, thus, media pluralism. Nevertheless, while this provision could perhaps open a new route for normative intervention in support of media pluralism, e.g. serving as the basis for the adoption of measures on ownership transparency (extremely useful although not exhaustive to ensure pluralism), one could not overestimate its possible (material) scope of application for the enactment of other measures in this same domain. In fact, the background against which the European citizens' initiative is called to operate is still dominated by and well routed in the principle of conferral (or attributed competences) whereby if a competence is not attributed to the EU, this has to remain within MS. Here, thus, it seems that the lack of any direct competence from the part of the EU to intervene with targeted media pluralism measures, in particular in respect of its external dimension, is again at stake problematically as before.[77]

Limits and failures of EU hard-law interventions to promote media pluralism: summing up

In brief, to pull the strings of this fairly long excursus on actual and potential hard-law interventions to promote pluralism at EU level within the media (and, particularly, the broadcasting) sector, I think that from the overall portrayed picture those appear to be either limited in their scope and effects – as it is the case of the pro-internal pluralism measures embodied in the TWFD/AVMSD described above – or simply not in place – as it is the case of an EU media ownership regulation and, hence, external pluralism measures. Despite the emerged tendency to positively act in promoting media pluralism and try to build a consistent framework for the regulation of its different but coessential faces, weak solutions are provided and evident regulatory gaps emerge at EU level; all probably due (from a legal standpoint), to the larger extent, to the lack of an explicit and targeted competence on that respect from the part of the EU.

Combining the two dimensions and re-lunching a European approach towards media pluralism: why and in which ways?

The analysis developed so far shows, in the end, that even if, on the one hand, the competences of the EU do not comprise media pluralism *per se*, and that the actions taken so far to secure media pluralism

[77] A very similar reasoning can be applied, *mutatis mutandi*, to Article 225 TFEU that provides for the EP to act by a majority of its Members in order to request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties.

are necessarily limited or even deficient at all, the EU is clearly committed to the issue at stake.[78] Indeed, after the adoption of the AVMSD, the Commission has lunched several initiatives on media pluralism of various nature, among which it is worth recalling the commissioning of a study aimed at developing a monitoring tool that would not exclusively focus on topical aspects (such as media ownership), but also cover combinations of political and media power elements. The detailed study, published in 2009 and grounded on a risk-based approach, elaborates a so-called 'European Media Pluralism Monitor', combining economic, socio-demographic and legal indicators capable of covering issues like media ownership, political pluralism, cultural and geographic diversity as well as media types and genres, in order to offer (at least) a self-assessment tool to mesure actual treats to pluralism in a concrete and objective manner.[79] While, according to the original plans, the study should have been followed by some other proper Commission initiatives (namely, the adoption of a Communication on indicators for media pluralism), nothing has done on this respect. The question, then, remains how the EU can develop its role in better ensuring respect and acting for promotion of media pluralism; and going forward. Or, in other words, the issue is which alternative and complementary routes and forms could be taken/developed for a (more effective) European approach to media pluralism.

The need to develop an approach to media pluralism at the European level comes from the interplay of many factors. One is that the (now) natural cross-national dimension of audiovisual media services and the consequent development of related trans-border markets at the expenses of nation-confined media markets, increasingly render national policies and regulatory strategies not only less apt to govern them and to deliver effective results, but also, if left alone, less incisive and successful in securing highly sensitive and fundamental objectives related to the development of those markets, other than the mere economic objectives. Among those fundamental objectives, as it has been noted several times along this paper, the respect and promotion of media pluralism is of primary relevance. A second factor that suggests for the opportunity to construct a European approach to media pluralism is that the technological developments and the related convergence between formerly separated sectors, such as the telecommunications and the audiovisual ones, are bringing about the increasing correlation and overlapping between their respective (old) regulatory and policy instruments and of their respective objectives used to be secured distinctly by those instruments.[80] Since, then, the EU has a long-standing acquired and strengthened broad competence in the EU liberalized and regulated telecommunication (now, convergent electronic communications) market, at the expenses of MS; and since, moreover, within this sector, the need has emerged to govern at the supranational level in a coordinated fashion certain aspects, such as (certain features of) radio-spectrum management,[81] which have evidently a significant bearing on media (especially broadcasting) policy and regulatory issues, such as, primarily, media pluralism, a more effective EU-wide coordinated approach to the latter will be required; not to make such a delicate democratic issue succumbing to (but rather coexisting with) the prevalently economic efficiency-oriented choices influenced by the needs and requests of the telecommunications/electronic communications network operators and service providers. Furthermore, another factor that suggests the opportunity to develope a European approach to media pluralism could

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78 Or, in other words, "whilst the protection of media pluralism is primarily a task for the Member States, it is for the Community to take due account of this objective within the framework of its policies" (Commission Green Paper on Services of General Interest, COM(2003) 270 final, p. 45). As a background reference, see Di Filippo (2000).

79 See ICRI *et al*., *Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach (Final Report and Annexes: User Guide, MPM, Country Reports), Brussels: European Commission* (July 2009), at <http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm> [accessed 25 May 2012]. See also Valcke et al. (2010) and Valcke and Lefever (2012: 120). For some preliminary observations on the study, see Barzanti (2009).

80 See fn 72 *supra*.

81 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reaping the full benefits of the digital dividend in Europe: A common approach to the use of the spectrum released by the digital switchover, COM (2007) 700 final.

be identified in the need to prevent that national policy and regulatory solutions, especially if predominantly in the hands of national governments and politics alone, could be dangerously influenced by political pressures and then shaped according to contingent and distorted interests; thus threatening the proper and full development of the democratic life of a community in all its cultural, political, social aspects. Finally, a fourth reason for the development of a European approach to media pluralism could be identified in the crucial role that its respect and promotion at European level can play in creating and consolidating a European public sphere, in supporting the political integration process, in bringing the common European cultural heritage to the fore and in strengthening the European identity, united in the diversity of the traditions and cultures of (and within) its MS.

Of course, the primary competence on media pluralism is and will be for MS. The abovementioned findings show, however, that further benefits can come also from their cooperation and coordinate action on that matter at supranational level. The issue, thus, arises of the ways in which this target could be achieved, from a legal standpoint. As we have seen, in fact, it will be difficult to pass something such as an effective hard-law piece of EU legislation directly dealing with this matter. There is, however, a number of other different forms that an approach to media pluralism could take at European level to support and supplement, not to replace, but also to coordinate single MS initiatives to better secure this objective; as well as complementing EU direct/indirect interventions in that respect. Among them, the role that National Regulatory Authorities (NRAs) for the media can play in contributing to securing the realisation of media pluralism should be emphasised; not only at national level, where and when they act individually and separately, but also at the European one, if and when they will manage to coordinate their actions and cooperate to the attainment of that common objective.

Media Pluralism and National Regulatory Authorities (NRAs) for the Media: Room for a European Approach Against the Background of a 'EU Administrative Law for the Media'?

To give a more concrete appraisal to the many issues raised above, especially in the dimension of European media governance and the evolution of EU media law and policy towards the possibility of emphasising the role and room for action of NRAs for the media, I will now, conclusively, turn to a case-study. This will imply the examination of a provision inserted in the AVMSD: namely Article 30 thereof. The following analysis of Article 30 AVMSD will indeed reflect, rephrase, expand and put in context some of the abovementioned points by providing some concrete examples that offer a tangible proof of the discussion upon and the advancing of such issues in the perspective of the EU media governance, nowadays.

Media pluralism and 'EU administrative law for the media': towards the cooperation/coordination of NRAs at EU level – the case-study of Article 30 AVMSD

The provision of Article 30 AVMSD is a novelty introduced by such Directive, since it did not exist in the text of TWFD. Inserted into a special Chapter – namely Chapter XI – that bears as a title "Cooperation between Regulatory Bodies of the Member States", Article 30 AVMSD states that:

> "Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies."

In order to understand the implications of this provision, the following analysis will be divided into two part. The first one will focus on the interpretation of Article 30 AVMSD moving from its originally proposed version and going through all the stages of its drafting process along the co-decision procedure (now, the ordinary legislative procedure ex Article 294 TFEU), emphasising the roles played by the EU legislatures and the consequences in the changes in its wording. The second

part will relate the discussion on Article 30 AVMSD in a broader context, pointing at the substantive issues at stake in that provision.

The drafting process of Article 30 AVMSD

It is interesting to note that quite different versions of Article 30 AVMSD have emerged from the various stages of its drafting process along the co-decision procedure. These different versions are the result, I think, of the different standpoints taken by the co-legislators on the issue involved in Article 30 itself. This appears especially if the various drafts are read in conjunction with the relevant proposed recitals.

In fact, if one looks, first, at the text of Article 30 (former article 23b of Directive 2007/65/EC) as it was originally proposed by the Commission,[82] one will note that the belief the latter manifested in the mandatory language used in framing such provision can be interpreted as a commitment that is not limited simply to bring the matter to the fore; as it is perhaps in the version of Article 30 into force. In its proposal, the Commission, in fact, attempts through Article 30 AVMSD to impose some precise obligations upon MS to confer to their regulatory authorities for the media actual independence from the government as well as from audiovisual service providers. It remains doubtful, however, if it is also possible to derive from the Commission's text an obligation for the MS to establish such authorities in case they do not have them.[83] However, it appears clearly that the Commission addresses also an obligation directly to the regulatory authorities themselves to work in close cooperation with each other so as to ensure the good functioning of the Directive's provisions. As relevant grounds on which to justify the imposition of the aforementioned obligations, the Commission indicates (elsewhere) both that the model of independent national regulatory authorities can actually contribute in ensuring media pluralism and that their cooperation is a factor capable of effectively contributing in guaranteeing "the consistent application of the EU regulatory framework".[84] In addition, the amended proposal reinforces this position of the Commission, moving in very much the same direction.[85]

If one then turns to the text of Article 23b as it came out after the EP first reading, one will see that the latter played a quite ambivalent role through its amendments.[86] On the one hand, indeed, the EP proposed to diminish the binding character of the obligation placed upon MS to guarantee the

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82 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(2005) 646 final, OJ [2006] C 49/37.

83 Mrs. Viviane Reding, at the time Commissioner for Information Society and Media, in a speech she delivered the 7 June 2006 within a seminar on "Regulating the new media landscape" with the title "Audiovisual Media Services Directive: the right instrument to provide legal certainty for Europe's media business in the next decade", states that one means to achieve media pluralism is the proper exercise of independent regulatory powers and "therefore the proposal introduces an article which requires Member States to guarantee the independence of national regulatory authorities, without entailing the obligation for Member States to create such authorities"; available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/352&format=HTML&aged=0&language=EN&guiLanguage=en> [accessed 25 May 2012].

84 See Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM(2006) 49 final, par. 3.7.2.

85 See Amended Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("Audiovisual media services without frontiers"), COM(2007) 170 final, OJ [2007] C 181/12.

86 The Commission proposal passed the EP first reading on 13 December 2006, where it was approved with amendments (see Bulletin of the European Union 12-2006, point 1.14.4.) See EP P6_TA-PRO V(2006)0559, at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0559&language=EN&ring=A6-2006-0399> [accessed 25 May 2012].

independence of their regulatory authorities by suggesting the more exhortative and intricate formula that reads: "Member States shall take appropriate measures to establish national regulatory bodies and institutions in accordance with national law". In this version, the previous term "authority" is changed into the wider-ranging expression "bodies and institutions" and, most importantly, the softened obligation is confined to an issue of national law. On the other hand, however, the EP has strengthened the connection between the establishment of such "authorities" (sic!) and their contribution to media pluralism. Furthermore, it even proposes to render explicit the duty of "closer" cooperation among the national regulatory bodies and also between themselves and the Commission, in the operative part of the Directive. Finally, to support the model of national regulatory "authorities" (sic!), the EP proposes an amendment to (former) recital (9) – then disappeared – which links the role of such authorities with the one of key guarantors of fundamental rights, with reference to Article 11 of the Charter.

Finally, if one looks at text of Article 23b AVMSD as elaborated by the Council, one will note that the latter seems to have profited from the erosion of the prescriptive language of Article 23b made by the EP during the first reading to affirm the reluctance of MS to admit Community interference in dictating instruments and forms of implementation of EU media law.[87] This can be seen in the insertion in the final text of the AVMSD of the (former) recital (65) with its reminder of a general principle of EU law: the enforcement and implementation of Community legislation is a MS duty according to the Treaty and for performing it, MS themselves are free to choose "the appropriate instruments according to their legal traditions and established structures".

The effect of the Council approach to the matter behind Article 23b led this provision to be phrased in the vague and sufficiently watered-down language of the approved text of the AVMSD. The only obligation contained in the text of Article 30 as it is into force, is that addressed to MS. They should cooperate in providing each other and the Commission with the information necessary for the application of the provisions of the Directive. The focus is thus shifted: national "competent independent regulatory bodies" are now simply a means by which MS are "notably" invited to achieve the abovementioned end. Reference to independent regulatory authorities has virtually vanished. These are no more the direct addressees of the duty to cooperate. Even the word "cooperation" referring to the relationship to be established among themselves is no longer in the text.

To conclude this part, one could note that the existence, the role and the characteristics of national regulatory authorities have been a point of contention between the co-legislators in drafting Article 30 AVMSD.[88] As a consequence – as shown above – the compromised solution lacks a proper prescriptive force and is rather vague in its actual content. The emptiness and vagueness of Article 30 AVMSD as it now stands, thus, appear to be the direct effect of an inter-institutional debate attempting to find a compromise between different positions.[89]

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87 See Council common position (EC) No 18/2007 adopted by the Council on 15 October 2007 with a view to adopting Directive 2007/…/EC of the European Parliament and of the Council of … amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [2007] C 307E/1.

88 See Bulletin of the European Union 12-2006, point 1.14.4.

89 Further evidence of that comes from the Communication from the Commission to the European Parliament pursuant to the second subparagraph of art 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Audiovisual Media Services Directive), COM(2007) 639 final. Indeed, it is stated in there that "the Presidency proposed reference in a recital referring to the faculty for Member States to create independent national regulatory bodies. These should be independent from national governments as well as from operators. The EP and the Commission found it necessary that the reference to such bodies be included in the operative part of the Directive".

The substantive issues at stake in Article 30 AVMSD

Beyond the history of the drafting of Article 30 AVMSD, a second set of analysis that could be sketched in relation to such a provision is on the forms of media supervision and administrative cooperation adoptable at the EU level to ensure the consistent and effective application of the EU measures relevant in this field as well as the achievement of their objectives.

In particular, given the way the debate on Article 30 AVMSD was conducted, it is possible to identify three main points worthy of further attention.

The first revolves around the question of whether there is a need for national independent regulatory authorities to regulate and supervise the media market and whether the model of independent NRAs works. Looking here at this matter from the EU perspective, however, this point encounters (again) first and foremost the fundamental constitutional issue of competence; differently, for instance, from the CoE approach, where the competence constraints do not operate and a strong but not binding call for establishing such independent regulators has been openly addressed directly to the States parties to this international organisation.[90] As far as the EU, instead, one may question whether this has any power to enact binding provisions mandating for or concerning the structure and organisation of supervisory authorities for the media in the MS: Article 5 TFEU, in fact, is always to be taken into account. Nevertheless, one should consider some recent initiatives promoted by the Commission, such as the study on the *Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive*, that while not aiming nor claiming to the harmonisation in such a field, nevertheless it offers an in depth analysis to rise awareness on the existing and key characteristics of supervisory and regulatory authorities for the media in the MS, as well as on the relevant EU law provisions that can be considered on this respect.[91]

Still from a EU law perspective, on the establishment and functioning of supervisory authorities for the media in the MS, it could be worth investigating the actions already undertaken by the EU on the same respect in the converging (and, hence, very close) field of electronic communications. A closer look at the Framework Directive[92] for electronic communications networks and services reveals that the EU not only manifestly supports national regulatory authorities as an institutional regulatory model for the sector at stake, but makes provision for MS to put in place such NRAs and design them as the main actors to which to entrust monitoring powers regarding market players' compliance with EU legislation. Such NRAs should be also made capable of operating to fulfil the essential task of achieving a consistent application throughout the EU of the regulatory framework for the technologically convergent electronic communications networks and services by cooperating among themselves and with the Commission itself for this purpose; and, hence, contributing to the development of (this branch of) the internal market. Moreover, it could be added here, in very general terms, that through the same piece of legislation the EU creates a sort of "administrative integration" among the processes to be run by NRAs, and hence among NRAs themselves (and the Commission at the apex, holding a veto power), especially when issuing remedies or mandating obligations to tackle

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90 See Council of Europe in its Recommendation No. R (2000) 23 of the committee of ministers to Member States on the independence and functions of regulatory authorities of the broadcasting sector; and more recently, on the same vein, see Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 26th March 2008 at the 1022nd meeting of Ministers' Deputies.

91 The so-called INDIREG study by the Hans Bredow Institute for Media Research *et al.*, published in 2011, is available at <http://www.indireg.eu> [accessed 25 May 2012]. As for the MPM study [fn 79 *supra*], also the IDIREG study elaborates a series of indicators that could be used to self-assess and measure the independence and efficient functioning of regulatory bodies operating in the media sector. These indicators belong to five different dimensions: status and powers, financial autonomy, autonomy of decision-makers, knowledge and accountability and transparency mechanisms, all in relation to independent regulatory bodies and their members.

92 See Directive 2002/21/EC, fn 72 *supra*.

and correct inefficient functioning of the relevant markets under their control. [93] Media regulation concerns are not directly part of this legislation, nor they are directly reflected in the mentioned institutional mechanisms. Nevertheless, it is useful to recall that in the operative part of the Framework Directive (as well as in the recitals) there is explicit reference to the role that the NRAs at stake can play in the promotion of media pluralism.[94]

The second point is related to the debate on Article 30 AVMSD. From the EU perspective, it can be considered whether there is any benefit to be gained from establishing cooperation among the NRAs for the media and in which forms, especially in the prospects of facilitating consistent and effective implementation of EU law measures that deal with market and cultural aspects of media regulation. The exploration could start from what is already in place on this respect. Reference here is to the "contact committee" as established by the TWFD (as amended in 1997) and maintained practically unchanged in the AVMSD.[95] Set up as a forum for systemic contact and deliberation between national regulators and the Commission, the contact committee represents the contribution to the discursive aspect to EU law and policy within the audiovisual sphere with an impact also in its institutional dimension.[96] According to the Commission the contact committee has been proven to work quite well, especially in facilitating "the implementation of the Directive through regular consultation on practical problems arising from its application".[97] Representatives of national governments participate in the contact committee, as do members of competent regulatory bodies. Furthermore, the contact committee stands as a forum for discussion and exchange of views, while it is not entrusted with direct regulatory functions. Similar to the contact committee and in the same vein of cooperation, the European Platform of Regulatory Authorities (EPRA) was set up in 1995 to coordinate the activities of (exclusively) NRAs for the media. The EPRA, however, was set up on a voluntary basis by its own members, outside the EU. There is no funding Community decision nor any other legally binding Community act that mentions the EPRA; nor does the AVMSD. Nevertheless the EPRA is not only financially endorsed by the Community, but also it is looked at with some interest by the Commission as an important forum for discussion and mutual exchange of views on regulatory matters in the audiovisual field. In fact, the Commission even holds the status of permanent observer within the EPRA and actively participates in its meetings.[98] The reason for the attention on the EPRA is that by promoting structured cooperation and information exchange between national regulatory authorities, it reflects primarily national efforts to tackle the shortcomings of the regulatory competition promoted by EU intervention to support the strengthening and competitiveness of the internal market in the media sector.[99]

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93 See Cassese (2003).

94 Art 8(1) thereof states that "National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism". Moreover, see recitals (5) and (31) of the Framework Directive, fn 72 *supra*.

95 See Article 29 AVMSD.

96 See Holmes, where he claims that the contact committee brings "an institutional dimension to the underlying process of reflection set in train by European involvement in television regulation, opening a two-way channel of communication. On the one hand, the group may provide an avenue for national regulators to make their opinions felt at the Community level, ensuring that various conception of national cultural policy prevalent at the national level are not ignored. On the other hand, the emergent breed of independent television regulators, already encouraged by EC competition and state aids rules, may acquire through their affiliation with the Community institutions a more critical perspective which recognises the need to adapt cultural policy to ensure that other public policy objectives are not unduly hampered" (2004: 196).

97 See Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM(2006) 49 final, par. 3.7.1.

98 See Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM(2002) 778 final.

99 See Harcourt (2004: 14).

Thus cooperation, in both its sub-dimensions – i.e. the inter-State, or horizontal, and the States-Community, or vertical, one – appears to already be used in practice to some extent and to have developed quite actively, in certain forms. What is missing, however – and this is the third and last point arising in relation to Article 30 AVMSD – is the institutionalisation of such cooperation within the Community context. In particular, an institutionalised forum for independent NRAs for the media does not properly exist as yet. Nevertheless, any inquiry in this direction has to start by considering that, in the field of electronic communications, a similar institution was set up by a Commission decision creating the European Regulators Group (ERG).[100] The aim of the ERG was to gather NRAs dealing with telecommunications into a common institutional body for facilitating their cooperation, thereby allowing for a consistent and effective implementation of EU law. Even if the ERG was given basically advisory competences rather than proper regulatory powers, it nevertheless exerted an important role in dialoguing with the law-making EU institutions – mainly the Commission – and establishing itself as a central forum for coordinating implementing actions, especially for sector-specific and technical issues. However, its competences in the field of media (and broadcasting, in particular) appeared rather limited, if not completely absent. This poses some problems specially if compared and contrasted with the legislative package within which the ERG founding decision was inserted. The technological convergence strongly supported by the electronic communications legislative framework, in fact, does not seem to match with the kind of sectorial and non-convergent institutional intervention at the EU level represented by the ERG. On this respect, the replacement of the ERG by the newly established Body of European Regulators for Electronic Communication[101] (BEREC) did not change significantly that picture (although this is an issue deserving further in depth attention).

However, it was during the consultation process leading to the adoption of a proposal for the AVMSD that some voices were raised regarding the actual possibility to establish a "permanent 'European regulators group for audiovisual services".[102] Nothing as such has been put in place so far. This does not impedes imagining some institutional convergence that could better provide for an effective governance of the EU media sector and for respect and promotion of the value of media pluralism underpinning the latter. While the way in which such a convergence could take place remains open to discussion and further speculation (outside the scope of this paper), some recent initiatives (such as the abovementioned study on the indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMSD) prove that this route deserve further explorations and trust.[103]

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[100] See Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ [2002] L 200/38; as further amended by Commission Decision 2004/641/EC of 14 September 2004 and by Commission Decision 2007/804/EC of 6 December 2007.

[101] See Regulation (EC) No 1211/2009 of the European Parliament and the Council, of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ [2009] L 337/1.

[102] See Communication from the Commission of 15 December 2003 on the future of European regulatory audiovisual policy, COM(2003) 784 final, par. 3.8. The abovementioned statement follows considerations paid to the functioning of the contact committee ex Article 23a TWFD (as amended in 1997). The issue at stake there is "how national regulatory authorities could be better integrated in the work at European level" so to overcome "the disadvantages of co-regulatory models (fragmentation of markets, etc.) trough different forms of co-operation between co-regulatory bodies". On this respect the co-existence of the possible new European regulator for audiovisual services with the existing contact committee was also addressed. In the same vein, see European Parliament Resolution on the Communication 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), A5-0209/2000, OJ [2001] C 135/181; especially par. 19 thereof where the EP "calls the Commission to ensure Europe-wide coordination between the national regulatory authorities and the audiovisual sector regulators; calls on the Commission to promote the creation of a European body to safeguard Europe-wide transparency in all areas of the audiovisual and multimedia market and to counter market concentrations which may pose a threat to pluralism".

[103] For instance, one could speculate on the necessity of a legal act to steer such an institutional convergence and the forms it might take (i.e., of a soft-law instrument or a binding and more traditional piece of legislation). While the would-be form

Concluding remarks

As this paper has shown, regulatory and policy (as well as judicial) interventions securing the objective of media pluralism have a central role to play in governing the media sector (and the television broadcasting one, in particular). This will be so – even if, perhaps, through new and more updated regulatory and policy measures – also in the digital age, since securing media pluralism implies promoting democracy as well as respecting political and cultural diversity, in and through the media. These are all objectives that go beyond what the developments of technology and the refinements of market mechanisms in and of themselves can provide.

As we have noted also, from the EU perspective, as the law stands to date, media regulation and, hence, the objective of securing media pluralism are for the greatest part a matter of MS competence. On the other hand, however, the interplay between different factors has increasingly pressed for the development of some forms of media regulation at the supranational European level. Technological, economic and political factors, in fact, coupled with the process of European market and political integration are determining the coming into existence of a truly European audiovisual media space, beyond national ones. As a response to that, in dealing with media regulation and media pluralism at the supranational level, traditional hard-law approaches have prevailed so far, from the part of the EU. Nevertheless they have proven to be limited in their scope and incomplete in delivering far-reaching results, due primarily to constitutional (as well as political) limits within which the EU has operated.

The issue, then, has arisen of whether there are alternative and complementary forms and modes to hard-law interventions, so to develop a European approach to effectively and consistently govern the European audiovisual space and securing within it the fundamental objective of media pluralism. On this respect, the last part of this paper has introduced the possibility to focus on the role that independent administrative NRAs for the media can play in (re)launching a European approach to media pluralism, starting form the appraisal of their activities in securing such an objective at national level (especially through the implementation of the relevant national as well as European legislation, and the adoption of regulatory measures); and focusing, then, on the modes and forms of their possible (and actual) coordination/cooperation at the supranational level, especially in the perspective of the development of that approach, against the background of a ‘European administrative law for the media’.

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of intervention eventually chosen would determine some different consequences, the ‘macro-level’ analysis offered here is focused on the fact that the envisaged institutional convergence is very likely to take place and could offer a new way forward in advancing the media pluralism safeguard debate in Europe.

Bibliography

ARIÑO, M. 2005. Regulation and competition in European broadcasting: a study of pluralism through access. Thesis, (PhD). European University Institute.

ARIÑO, M. 2004. 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps', Communications & Strategies, 54, pp. 97-128.

BARENDT, E. M. 1997-1998. 'Structural and Content Regulation of the Media: United Kingdom Law and some American Comparison', The Yearbook of Media and Entertainment Law, III, pp. 75-95.

BARENDT, E. M. 1995. Broadcasting law: a comparative study. Oxford: Clarendon Press.

BARILE, P. 1984. Diritti dell'uomo e libertà fondamentali. Bologna: Il Mulino.

BARZANTI, F. 2012 (forthcoming). 'La giurisprudenza della Corte di giustizia dell'Unione europea in tema di pluralismo dell'informazione', in: PISILLO MAZZESCHI, R. et al. (eds.), Il diritto al pluralismo dell'informazione in Europa e in Italia. Roma: RAI-ERI.

BARZANTI, F. 2009. 'Il pluralismo dei media può essere monitorato?', Key4biz.it, available on <http://www.key4biz.it/News/2009/06/18/Policy/pluralismo_riskbased_framework_Media_Pluralism_Monitor_Fabrizio_Barzanti.html> [accessed 25 May 2012].

BARZANTI, F. 2007. 'Il diritto di accesso ai contenuti nel mercato radiotelevisivo digitale e multipiattaforma', Diritto dell'informazione e dell'informatica, 1, pp. 37-101.

BOBBIO, N. 1984. Il futuro della democrazia. Torino: Einaudi.

CASSESE, S. 2003. 'Il concerto regolamentare europeo delle telecomunicazioni', in: DONATI, F. and MORBIDELLI, G. (eds.), Comunicazioni: verso il diritto della convergenza? Torino: Giappichelli, pp. 33-39.

CHELI, E. 2007. 'Libertà di informazione e pluralismo informativo negli indirizzi della giurisprudenza costituzionale', in: PISANESCHI, A. and VIOLINI, L. (eds.), Poteri, garanzie e diritti a sessanta anni dalla Costituzione (Scritti per Giovanni Grottanelli de' Santi), Milano, pp. 1405-1420.

CRAUFURD SMITH, R. 2007. 'Media Convergence and the Regulation of Audiovisual Content: Is the European Community's Audiovisual Media Services Directive Fit for Purpose?', Current Legal Problems, 60, pp. 238-277.

CRAUFURD SMITH, R. 2004. 'Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship', European Law Review, 29, pp. 652-672.

CRAUFURD SMITH, R. 2001. 'State Support for Public Service Broadcasting: The Position Under European Community Law', Legal issues of economic integration, 28, pp. 3-22.

CRAUFURD SMITH, R. 1997. Broadcasting law and fundamental rights. Oxford: Clarendon Press.

DE WITTE, B. 2006. 'Non-market values in internal market legislation', in: NIC SHUIBHNE, N. (ed.), Regulating the Internal Market. Cheltenham: Edward Elgar Publishing, pp. 61-86.

DE WITTE, B. 1995a. 'The European Content Requirement in the EC Television Directive-Five Years After', The Yearbook of Media and Entertainment Law, I, pp. 101-127.

DE WITTE, B. 1995b. 'The Cultural Dimension of Community Law', in: ACADEMY OF EUROPEAN LAW (ed.), Collected courses of the Academy of European Law. Dordrecht: M. Nijhoff. pp. 229-299.

DI FILIPPO, M. 2000. Diritto comunitario e pluralismo nei mezzi di comunicazione di massa. Torino: Giappichelli.

DONATI, F. and MORBIDELLI, G. (eds.) 2003. Comunicazioni: verso il diritto della convergenza? Torino: Giappichelli.

DOYLE, G. 2002. Media ownership: the economics and politics of convergence and concentration in the UK and European media. London: SAGE.

EUROPEAN AUDIOVISUAL OBSERVATORY 2007. The public service broadcasting culture. Strasbourg: European Audiovisual Observatory.

GOLDBERG, D. et al. 1998. Regulating the changing media: a comparative study. [place]: Clarendon Press.

HARCOURT, A. 2005. The European Union and the regulation of media markets. [place] Manchester University Press.

HARCOURT, A. Institution-driven competition: the regulation of cross-border broadcasting in the EU, EUI Working Papers RSCAS No. 2004/44.

HARRISON, J. and WOODS, L. 2007. European broadcasting law and policy. Cambridge: Cambridge University Press.

HARRISON, J. 2003. 'Interactive Digital Television (iDTV) and the expansion of the public service tradition: A new public service communications template for the digital age', Communications Law, 8, pp. 401-412.

HITCHENS, L. 2006. Broadcasting pluralism and diversity: a comparative study of policy and regulation. Oxford: Hart Publishing.

HOBBELEN, H. et al. 2007. 'The increasing importance of EC state aid rules in the communications and media sectors', European Competition Law Review, 28, pp. 101-115.

HOLMES, J. 2004. 'European Community Law and the Cultural Aspects of Television', in: CRAUFURD SMITH, R. (ed.), Culture and European Union Law. Oxford: Oxford University Press, pp. 169-203.

HOLOUBEK, M. et al. 2007. Regulating content: European regulatory framework for the media and related creative sectors. Alphen aan den Rijn: Kluwer Law International.

IBÁÑEZ COLOMO, P. 2012. European communications law and technological convergence: deregulation, re-regulation and regulatory convergence in television and telecommunications. Alphen aan den Rijn: Kluwer Law International.

JANIS, M. W. et al. 2008. European human rights law: text and materials. Oxford: Oxford University Press.

KATSIREA, I. 2008. Public broadcasting and European law: a comparative examination of public service obligations in six Member States. Alphen aan den Rijn: Kluwer Law International.

KELLER, P. 1997-1998. 'The New Television Without Frontiers Directive', The Yearbook of Media and Entertainment Law, III, pp. 176-195.

KLIMKIEWICZ, B. Media Pluralism: European Regulatory Policies and the Case of Central Europe, EUI Working Papers RSCAS No. 2005/19.

KREMMYDA, P. 2004. Between competitiveness and pluralism: concentration in the broadcasting industry in the EU. Thesis (PhD). European University Institute.

LUCIANI, M. 1989. 'La libertà d'informazione nella giurisprudenza costituzionale', Politica del diritto, pp. 605-623.

MASTROIANNI, R. 2011. La direttiva sui servizi di media audiovisivi e la sua attuazione nell'ordinamento italiano. Torino: Giappichelli.

MASTROIANNI, R. 1998. 'Il Protocollo sul sistema di radiodiffusione pubblica', Il Diritto dell'Unione Europea, 2-3, pp. 533-539.

MCLUHAN, M. 1964. Understanding media: the extensions of man. London: Routledge & Kegan Paul.

NEGROPONTE, N. 1995. Being digital. New York: Knopf.

NIEUWENHUIS, A. 2007. 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', European Constitutional Law Review, 3, pp. 367-384.

NIKOLINAKOS, N. TH. 2006. Competition law and regulation in the converging telecommunications, media and IT sectors. Alphen aan den Rijn: Kluwer Law International.

OETHEIMER, M. 2007. Freedom of expression in Europe: case-law concerning Article 10 of the European Convention of Human Rights. Strasbourg: Council of Europe Publishing.

OLLA, R. 2001. Riflessioni giuridiche sul sostegno europeo all'industria dei programmi audiovisivi. Thesis (PhD). European University Institute.

PANEBIANCO, M. (ed.) 2001. Repertorio della Carta dei Diritti Fondamentali dell'Unione Europea. Milano: Giuffrè Editore.

POLO, M. 2007. 'Regulation for pluralism in media market', in: SEABRIGHT P. and VON HAGEN, J. (eds.), The economic regulation of broadcasting markets: evolving technology and the challenges for policy. Cambridge: Cambridge University Press, pp. 174-180.

PROSSER, T. 2005. The limits of competition law: markets and public services. Oxford: Oxford University Press.

ROTENBERG, B. 2005. The legal regulation of communications bottlenecks in European digital television. Thesis (PhD). European University Institute.

SARTORI, G. 2000. Pluralismo, multiculturalismo e estranei. Milano: Rizzoli.

SCHWARTZ, I. 1990. 'La liberté d'expression (Art. 10 CEDH) et la libre prestation des services (Art. 59 Traité CEE) dans le domaine de la radiodiffusion télévisuelle', in: CASSESE, A. and CLAPHAM, A. (eds.), Transfrontier television in Europe: the human rights dimension = La télévision transfrontière en Europe dans la perspective des droits de l'homme. Baden-Baden: Nomos Verlagsgesellschaft, pp. 165-188.

TIZZANO, A. 1990. 'La Direttiva CEE sulla «Televisione senza frontiere»', in : Il Foro Italiano, 2, pp. 92-112.

VALCKE, P. and LEFEVER, K. 2012. Media Law in the European Union. Alphen aan den Rijn: Kluwer Law International.

VALCKE, P. et al. 2010. 'The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets', Journal of Media Law, 2, pp. 85-113.

VIGEVANI, G. E. 2003. 'Il Pluralismo dei Mezzi di Comunicazione di Massa nella Carta dei Diritti', Rivista Italiana di Diritto Pubblico Comunitario, 5, pp. 1247-1266.

WEATHERILL, S. 2004. 'The Internal Market', in: PEERS, S. and WARD, A. (eds.), The European Union Charter of Fundamental Rights. Oxford: Hart Publishing, pp. 183-210.

WEATHERILL, S. 2000. 'Finding Space for Closer Cooperation in the Field of Culture', in: DE BÚRCA, G. and SCOTT, J. (eds.), Constitutional change in the EU: from uniformity to flexibility? Oxford: Hart Publishing, pp. 237-257.

WESTPHAL, D. 2002. 'Media Pluralism and European Regulation', European Business Law Review, 5, pp. 459-487.

ZENO-ZENCOVICH, V. 2004. La libertà di espressione. Bologna: Il Mulino.

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