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Institution-Driven Competition: The Regulation of Cross-Border Broadcasting in the EU

Alison Harcourt

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This Working Paper has been written in the context of the 2001-2002 European Forum programme on "Europe in the world: the external dimensions of Europeanisation" directed by Professor Helen Wallace with Professor Mark Pollack and Professor Jan Zielonka as Associate Directors.

The Forum examined the various ways in which the European Union's policies and practices are exported to neighbours, partners and associates. Over the year Fellows involved in the Forum looked at particular policy issues, particular patterns of association, especially the enlargement process, and some elements of the transatlantic relationship. Papers presented explored the range from substantive policy to broad norms and values as they impact on how the EU addresses the challenge of partnership with third countries.

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Abstract

The regulation of media markets at the national level is under severe pressure, due to technological change, the existence of open markets, and international competition. The European Union's *Television Without Frontiers* (1989) Directive provided a framework which facilitated regulatory competition in the media field, particularly in satellite regulation. The paper will examine evidence of 'investment flight' towards lax regulatory jurisdictions resulting in an erosion of regulatory restrictions on broadcasting at national levels, particularly those relating to content, advertising and ownership. A political backlash, prompted by fears of 'race to the bottom' scenarios, has resulted in efforts at regulatory co-operation at national and European levels. Policy makers have looked towards the European Union level for measure to counteract 'unfair' regulatory competition and provide a European framework for media regulation.

Keywords

Regulatory competition; Media regulation; EU Television without Frontiers Directive

I. Introduction

How do EU Member States react to incentives for regulatory competition? Conventional theories of the race-to-the-bottom or towards-the-bottom assume that governments will engage in regulatory competition when capital is mobile and economic actors are able to engage in regulatory arbitrage. States engage in competition by lowering regulatory standards to attract investment from abroad. This was documented by Cary (1974) who claimed that the small US state of Delaware was successful in attracting companies in this way leading to a 'race to the bottom' in regulatory standards.

Economic theory purports that competition emerges naturally as a result of capital mobility in an integrated market. Therefore regulatory competition is seen to be a natural process driven by market actors. Sun and Pelkmans (1995), in applying the model to the European Union, assessed the efficiency of regulatory competition. They argued that, as EU mandates did not find the most efficient solutions to regulatory problems and were often ineffective, regulatory competition could possibly be used instead of harmonisation of national rules by the EU institutions to achieve optimal levels of harmonisation.

However, Barnard (2000) claims there is little evidence of regulatory competition in the EU by the measure of relocation by companies. Relocation, she shows, is low due to other factors, which have a greater bearing on a company's choice. In a re-examination of the Delaware case, she shows that Delaware's success is not based merely on a lowering of standards but on other historical and institutional factors. In particular, drawing on Romano's work, she shows that the Delaware system offered a case law and judicial system which favoured efficiency which formed a greater incentive to firms. Cary also recognised the role of 'sound court decisions' in enforcing Delaware's regulatory attractiveness. In contrast to Barnard, this paper finds that there is a relatively high degree of company relocation in the EU—in the broadcasting sector. As Romano concluded, relocation is not found to be a result of regulatory competition but due to other domestic factors coupled with judicial decision-making. In particular, the paper finds that the European Court is a key driver of national broadcasting deregulation.

The paper examines the regulation of cross-broader broadcasting to test the impact of capital mobility on the regulatory strategies pursued by EU Member States. The 1989 European Union Television Without Frontiers (TWF) Directive provided a framework for capital mobility within the EU for firms which were previously confined to national markets—television broadcasters. The goal was chiefly to encourage (via deregulation) the exploitation of new technologies (initially cable and satellite broadcasting). By defining television signals as services which required free movement within the internal market, TWF paved the way for cross-border transmission via satellite and cable. According to TWF, a broadcaster could only be regulated by the country of origin and not by the country of reception. This principle was derived from European Court of Justice (EJC) rulings in the 1970s and 1980s.

The TWF Directive created the preconditions for market-driven regulatory competition between Member States. But how did states react? In light of the literature on regulatory competition, the paper discusses 1) whether states engage in regulatory competition when an internal market is created 2) whether states are reacting to preferences of economic actors when deregulating 3) whether economic actors respond to the lowered regulation by relocating their headquarters 4) whether further states enter the game when faced with regulatory competition.

The findings in this case are the following: even in the presence of near ideal pre-conditions for aggressive regulatory competition, only two EU Member States, the UK and Luxembourg responded with deregulation. However, it will be shown that these two states did not (initially) deregulate to attract companies from abroad, but rather to promote domestic economic actors which had close political ties to domestic governments. As a result of deregulation, 'investment flight' towards these two jurisdictions is shown to be high—however, this did not drive regulatory competition beyond the UK and Luxembourg. Rather, additional Member States were compelled to deregulate following a series European Court of Justice decisions which reinforced competitive pressures on domestic legislations. The dismantling of national restrictions was sustained through the EJC rulings in the 1990s and 2000s which reinforced the TWF principle that broadcasting be governed by the laws stemming from the state of transmission and not the state of reception. Therefore national deregulation in this field was by no means a natural response to the preference of economic actors.

Despite the fact that deregulation in this field was driven by a combination of domestic factors and court action, a diffuse perception (on the part of policy makers) of unfair, dangerous or unrestrained regulatory competition has triggered attempts at trans-national regulatory co-operation. Extensive deregulation in broadcasting (particularly in rules relating to content, advertising and ownership) has promoted a fear of a 'race to the bottom' and backlash from national interest groups and political actors. This has spilled over onto the European level. The paper concludes with an examination of regulatory cooperation and what form it is taking.

The paper is laid out as follows: Section II will detail national regulatory instruments for media markets subject to 'competition.' It will then outline how the TWF Directive provided a setting for regulatory competition in the sector. Section III will review the response of two Member States, the Luxembourg and the UK, which relaxed regulation for satellite licences. Section IV will detail how the TWF cross-border broadcasting principle was enforced through EJC rulings in the 1990s and 2000s which led to pressure for deregulation in other Member States. Section V will show how fears of a 'race to the bottom' scenarios have met with political backlash allowing for some forms of regulatory co-operation at the European level. Section VI will conclude.

II. National Regulatory Instruments and European Law

Before 1989, broadcasting policy was exclusively the domain of the Member State. In many states, public service broadcasters had national monopolies. In those states with emerging private markets, spectrum scarcity restricted the market to a small number of broadcasters which were strictly regulated. Regulatory instruments were similar throughout Western European states, based on principles discussed and established within the Council of Europe. These regulatory instruments were based upon democratic arguments. Regulation of both the print and broadcast media is seen as aiding the functioning of a democratic system: the goal of which is the presence of an unbiased and accurate media that can guarantee a 'plurality of voices.' This has also been the chief rationale for the maintenance of a public service broadcaster (PSB) which is meant to contribute to the quality of public discourse, promote societal integration, and emphasise news and education, as opposed to entertainment (Voltmer, 2001). In many states, public service broadcasters held exclusive national monopolies.

Humphreys (1996:12) identifies three further rationales for regulation: the technical rationale (the scarcity of frequencies), the monopoly rationale (if a public good is a natural monopoly, there is a requirement for public regulation), and the political rationale. Politicians tend to believe that the media control the minds of voters (even though there are many nuances, and this is often times actually not the case).[1] Therefore, the choice of who controls the media market at national levels is very much a political one. Politicians usually take a hands-on approach to the choice of instruments used to measure the market. This fact is one of the greatest reasons why regulatory competition in this field does not work. Market players who succeed in market expansion are usually those closest to political parties in power. New technologies, satellite and cable in the 1980s and digital in the 1990s, were meant to put an end to spectrum scarcity. This was seen as an opportunity to break political heavy-handedness in broadcasting and create a genuine competitive market. However, national governments clung to traditional modes of control when defining satellite and digital policies. At the same time, as national governments did not relinquish media/cultural policy to the European level, the EC was

[1] There are many academic studies on the media and public opinion. Sociologists tend to argue that individuals and groups have different experiences in socialization and media consumption which affect voting behaviour. See the *International Journal of Public Opinion* research for national case studies.

unable to legislate beyond the minimum standards for broadcasting as it was viewed to be encroaching on cultural policy (exempt by subsidiarity).

Examples of national regulatory instruments used to govern broadcasting markets are the following: restrictions on media ownership (limitation of shares in a media company, limitation of multiple ownership, and limitation of cross-media ownership between press and broadcasting), limits on audience reach and audience share, the number of public service broadcasters, the number of licences issued to national broadcasters, rules on media content, percentage requirements for news and documentary programming, minimum quotas for European and national content, time devoted to minority audience programming, right of reply rules; prohibition of pornography, limitation of television violence, prohibition of incitement to racial hatred, youth protection, copyright, advertising standards, advertising time, advertising breaks, and programme sponsorship rules.

In its policy documents, the European Commission identified many of the above regulatory instruments as presenting obstacles to sector growth. For example, Section 17 of the 1994 Bangemann paper on *Europe and the Global Information Society* (CEC, 1994), states:

> In addition to ownership controls to prevent monopoly abuse, most countries have rules on media and cross media ownership to preserve pluralism and freedom of expression. In practice, these rules are a patchwork of inconsistency which tend to distort and fragment the market. They impede companies from taking advantage of the opportunities offered by the internal market, especially in multimedia, and could put them in jeopardy vis-à-vis non-European competitors […] The Union will have to lead the way in heading off deeper regulatory disparity. In so doing it will reinforce the legal security that is vital for the global competitiveness of Europe's media industry. The Group believes that urgent attention should be given to the question of how we can avoid divergent national legislation on media ownership undermining the internal market.

Some regulatory instruments were harmonised at the European level by the TWF Directive. These are as follows: the majority proportion of transmission time should be reserved for European works (originating from Member States) excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping; 10 per cent of transmission time or alternatively 10 per cent of programming budget should be reserved for European works created by producers who are independent of broadcasters; interruption of films by advertising should be limited to once every 45 minutes; the exclusion of advertising during news, current affairs programmes, documentaries, religious programmes and children's programmes (when the duration is less than 30 minutes); the prohibition of advertising cigarettes, and other tobacco products; prescription medicines, and medical treatment; the limitation of advertising time to 20 per cent of the daily transmission time and 20 per cent within a given clock hour; the protection of minors; and prohibition of incitement to hatred on grounds of race, sex, religion or nationality. TWF did not handle politically sensitive areas such as PSB funding, media ownership or the licensing of private broadcasters. Neither did it set minimum standards for content which have proved the most subject to erosion by deregulation.[2]

Two key aims of the TWF Directive were the promotion of new technologies—particularly cable and satellite transmission—and the consolidation of European markets. It was envisioned that *regulatory competition* would lead to a removal of restrictions on the broadcasting industry at national levels, and the fortification of strong European media firms able to compete globally. The goal was the consolidation markets on a European scale culminating in the creation of 'European champions.' In this respect, further concentration of European media markets was perceived positively as fulfilling an policy designed to make the industry more competitive.[3]

[2] Examples of national rules on content would be watersheds (i.e. after 9 p.m.) for the showing of programming containing violence and sexual behaviour, rules on the portrayal of sexual conduct, crime reporting, rules and limitations on 'phone-in' programs, chatshows, religious programming, rules on the use of hidden microphones, to name a few.

[3] For case studies of other utilities/public good sectors, see J. Hayward 1995. *Industrial Enterprise and European Integration. From National to International Champions in Western Europe*. New York: Oxford University Press.

In order to promote cross-border transmission, the Directive contained a typical 'single market' clause that stipulated that a broadcasting company may only be regulated in the country of transmission, not reception. The reasoning behind this, was that a company would not be subject to many different laws in countries of reception and would only have to deal with one regulatory authority. It was this clause that triggered regulatory arbitrage as it rendered national law ineffective vis-à-vis foreign broadcasts. It had the consequence that companies moved their headquarters abroad to Member States with lower restrictions to avoid national media laws. In practice, national laws, particularly those on ownership and content, which were not covered in TWF, were therefore rendered useless against foreign broadcasts.

III. Regulatory Competition: Initiatives of Luxembourg and the UK

Luxembourg

Regulatory competition theory assumes that states relax legislation in order to attract companies from abroad. The cases of UK and Luxembourg do not confirm this assumption as both states deregulated to please domestic economic actors close to governments in power. The advent of satellite broadcasting simply increased the pressure on domestic governments to deregulate in favour of domestic companies.

Although small in population and size (and hence media market), Luxembourg was allocated an equal number of satellite frequencies as the rest of Europe. As Luxembourg did not have a PSB, the government granted its entire allocation of satellite frequencies to the Astra satellite in 1983 with which Européen des Satellites (SES), Europe's first partly privately-owned satellite television system, was created (the government retained 20 per cent). At the same time, national implementation of the *TWF* Directive required that a media law be introduced in Luxembourg for the first time. Up until 1991, Luxembourg had no media law to speak of.[4] Before, 1991, Luxembourg considered that regulation was inconsistent with its liberal approach and small market size. When Luxembourg introduced its *Electronic Media Law of 27 July 1991,* it introduced restrictions on media markets for the first time.

In order not to discourage foreign investment, these rules applied only to *domestic* radio broadcasts and not to television or broadcasts to other Member States (i.e. from the *Astra* satellite). In addition, companies applying for broadcasting licences transmitted 'via low-power transmitters' (to Luxembourg) had to detail a complete list of their owners and directors, and managers. But less transparency is required from non-domestic broadcasters. Luxembourg therefore set up a different regulatory regime for satellite companies broadcasting abroad than that applied to its domestic media. This enabled Luxembourg to retain control over its domestic market while allowing companies based in Luxembourg to broadcast abroad with very few restrictions.

This policy has proved lucrative for Luxembourg. As the 1989 *TWF* Directive stipulates that a broadcaster can only regulated by the country of origin and not by the country of reception, a number of foreign companies were able to bypass their national legislators by transmitting from Luxembourg using the Astra satellite. A number of companies established themselves in Luxembourg to broadcast to other Member States (some to avoid national legislations, some simply due to domestic spectrum scarcity). Indeed, *Astra* has proved the most popular satellite for European broadcasters, hosting both analogue and digital channels which broadcast to markets in almost all EU Member States, and an

(Contd.)

Hayward has argued that EU industrial policy is mainly distributing incentives for the emergence of European champions in his study of EU electricity, aerospace, air transport, and telecommunications policies (1995). Hayward focuses on the relationship between the European Commission and large firms which he claims mimics state-firm relationships between government and business at national levels.

[4] Rather than creating a public sector broadcaster for such a small population, Luxembourg had instead licensed Europe's first private radio broadcaster, Compagnie Luxembourgoise de Telediffusion (CLT), in 1930, which was later to become a major European player.

increasing number of non-EU states. Chalaby notes that Astra hosts over 1000 television and radio channels to 87 million European households (2002:7).

Significantly, large national players in France (Canalsatellite), Germany (DF1), the Netherlands (NetHold), Spain (Sogecable) and the UK (BSkyB) chose to launch satellite platforms from Luxembourg. The Luxembourg company CLT (now controlled by Bertelsmann) developed into a multi-national company active in French, Belgian, Dutch, German, UK, Spanish and Eastern European television and radio markets via the Astra satellite. Astra hosts digital platforms for Canal Plus in the French, Polish, Spanish and Dutch markets and provides further capacity for Kirch, ARD, ZDF, and ORF-SRG. NetHold (which is based in Amsterdam) transmits PayCo and FilmNet channels (including adult films) to much of northern Europe (e.g. FilmNet broadcasts to Belgium, the Netherlands, Denmark, Norway, Sweden and Finland). A number of single stations are now hosted on *Astra* which broadcast to most of Europe. Significantly, many stations contain content which is strictly regulated at national levels (e.g. chatshow channels, music channels, religious stations, fashion channels, regional channels and 'adult film' channels). As a result, the broadcasting sector became a very important sector of the Luxembourg economy and the biggest tax contributor from 1997 onwards.[5]

United Kingdom

The availability of channel capacity and transnational transmission from Luxembourg had its effect on the evolution of media laws in other Member States. However, Member States did not deregulate to attract investment from abroad. Rather, the pressure from trans-national broadcasts coupled with domestic factors led to regulatory change. The UK case arose out of a domestic political dispute over media ownership. The Conservative government under Thatcher's leadership supported the expansion of Murdoch's News International in both press and broadcasting markets (for detail on Murdoch's press expansion see Doyle, 1995a; 1995b; Hooper, 1996). Press expansion was dependent upon ministerial decision, so this was easily attained. However, allowing expansion in the broadcasting market meant a change to national broadcasting law, which required parliamentary approval, so this was more politically challenging. There were two prime legal obstacles for Murdoch. British law forbid foreign ownership of broadcasters and contained strict cross-ownership rules (i.e. Murdoch had extensive press interests, so could not own broadcasters). The Conservative government did not want to lower cross-media ownership limits at the national level, as that would have meant allowing expansion by the (Labour-supporting) Mirror Group in broadcasting.

The implementation of TWF in 1990 provided the UK government with a window of opportunity. The enactment of the 1990 UK Broadcasting Act included requirements for satellite licences. Section 43 of the 1990 Broadcasting Act applied a *different* regulatory regime to non-domestic satellite services as that applicable to domestic satellite services. Companies whose headquarters were in the UK but broadcasting from abroad (i.e. Sky) were only required to obtain a *non-domestic* satellite licence.[6] Non-domestic satellite licences were exempt from both foreign ownership and cross-media ownership rules and a whole host of other domestic rules. The UK did not even apply TWF provisions to its regulatory regime for non-domestic satellites including rules restricting advertising tobacco products and advertising during children's programming.

[5] SES, which owns the Astra satellites, became Luxembourg's biggest tax contributor in 1997 with a input of LFr2.06bn in taxes. ('Survey-Luxembourg: Space age role for chateau', *Financial Times* 28 May 1997). It is not insignificant that Luxembourg Commissioners Jacques Santer and Vivien Reding were particular sensitive to the arguments of large media companies. Domestic concerns were apparent during key policy debates at the European level (for detail, see Harcourt, 2004).

[6] The 1989 TWF Directive does not stipulate whether or not the location of companies' headquarters are an indication of where they should be licensed. The UK lobbied hard to include this provision in the revised 1997 TWF.

This meant that Sky did not have to respect domestic ownership rules, even, as Lord David Puttnam so succinctly put it, its 'programmes were put together in West London and went up from a BT uplink in East London; because for a millisecond it hit a foreign piece of metal before being bounced back down to Britain, it qualified as a 'nondomestic' broadcaster—thereby not subject to any of the rules and regulations which BSB laboured under' (Puttnam, 2002). By contrast, the BSB company broadcasting from the UK satellite Marco Polo, was subject to the UK's stricter media laws. This rendered BSB less competitive and subject to take-over—by Sky with which BSkyB was formed.[7]

Not only was BSkyB exempt from national laws, but so of course was every other company granted a non-domestic satellite licence by the UK. In practice, the 1990 Broadcasting Act allowed the UK to issue licences to any company that wanted to broadcast via any satellite to any country anywhere in the world. For example, under this law one can purchase a UK licence (for £250) for a channel broadcasting in Arabic to northern Africa states from the Astra satellite.[8] The policy became very controversial for obvious reasons particularly as the ITC provided non-domestic satellite licences to a number of broadcasters which were banned domestically. In particular, the UK's lax restrictions on advertising caused conflict with other Member States. For example, channels with UK satellite licences are advertising alcohol and tobacco products in France, ignoring advertising rules in Germany, and inserting advertising spots into children's programming in Sweden and Norway—against those states' national laws. Williams (2002) observed that over 40 European media companies broadcasting from the UK were actually ignoring TWF provisions on advertising in 2002. Since 1998, there have no longer been 'non-domestic satellite licences', as such, merely 'satellite licences'. However, the UK continues to apply different regulatory regimes to satellite broadcasters than to terrestrial broadcasters. Hence, only terrestrial broadcasters are subject to stricter content requirements. Under EU law, the UK is not (yet) required to apply TWF provisions to satellite providers as they loosely constitute 'new services' with minority audience share.

Deregulation continued most recently with the 2003 Communications Act which opened the whole of the UK market to foreign owners (including non-EU owners). Press predictions are that Murdoch will buy Channel Five, Viacom[9] will buy the ITV companies, and Clear Channel (another large US company) will buy Capital Radio. Press rumours have indicated that this is a political deal between Blair in order to gain Murdoch support over UK entry into the Euro (e.g. *the Guardian* 07.02). This author is sceptical of these claims. If the UK broadcasting market is to be wholly-owned by US operators, media support of the Euro is not expected to be high, even if the Murdoch media does support it. There are already quite a number of US players in British press and cable markets (Collins, 2003). The latest deregulatory move again reflects an attempt to solve a domestic problem. By allowing non-EU players into the market under the Communications Act, the UK is seeking to attract outside investment to rescue a failed venture (the bankrupt ITV companies) in digital broadcasting, thereby presenting potential competition to the digital monopoly BSkyB.

Even though each deregulatory move was the result of domestic pressures, the UK has at the same time been very effective in attracting foreign media investment. The UK has succeeded in establishing itself a 'global communications hub' (Bromley, 2001). A large number of foreign media companies

[7] Sky bought BSB in 1990 which had launched its own satellite Marco Polo with a domestic satellite licence. The new company BSkyB therefore was broadcasting from both Astra and the UK Marco Polo satellites. This contravened UK law, as the company had both a domestic and a non-domestic satellite licence, and went against international satellite law as well. The issue was not solved until 1998.

[8] Licenses for many satellite broadcasters in Arab countries were issued in the UK and France. This in itself has led to the establishment of 'media cities' in Cairo and Dubai which have attracted Arabic language broadcasters away from Europe (such as Orbit, MBC, Reuters and CNN which were originally in London) (Guaaybess 2002).

[9] Viacom was predicted to buy the flagging ITV companies (following Tony Blair's meeting with Viacom Chairman Sumner Redstone on November 12, 2002). However, ITV has thus far been holding its own since the 2004 Carlton/Granada merger. Viacom already owns MTV, CBS, Paramount film studios, Blockbuster Video, the UCI cinema chain, the Paramount Comedy Channel and all the advertising spaces on London Underground.

have already chosen to base themselves in the UK in both press[10] and broadcasting. As the prerequisite to obtaining a UK satellite licence is that a company's headquarters need to be UK-based, a number of companies have subsequently set up shop in the UK. Quite a number of companies have physically relocated their headquarters to the UK to avoid domestic media legislations. By the end of 2000, 325 non-domestic satellite licences were issued by the UK regulatory authority. The satellite policies of the UK and Luxembourg had a knock-on effect for the rest of Europe.

IV. Actions of the European Court of Justice

The existence of laxer regulatory regimes in the UK and Luxembourg did not automatically lead to a lowering of regulatory standards in other countries. This was only achieved through challenges to national policies brought to the European Court of Justice. Rather than recognising arguments of 'cultural policy' (an area protected by subsidiarity), the Court drove deregulation through a series of rulings on cross-border broadcasting. In its rulings, the Court held up a key principle of the treaties—that services should have free movement within the common market. Even before TWF was enacted, by defining television signals as services, it was the Court that advanced sector deregulation at national levels. Post 1989, it legitimised the right of broadcasting companies to move abroad to bypass national laws.

The first significant ECJ cases dealing with television transmission came before TWF. The 1974 *Sacchi* case declared that broadcasting be considered a tradable service. Therewith the Court claimed the sector as within its jurisdiction of the Treaty of Rome. The 1980 *Debauve* case ensured that broadcasting from one Member State to another was legal. Indeed, it was the *Sacchi* and *Debauve* cases upon which *Television without Frontiers* was legally based.

The 1974 *Sacchi* case[11] was brought by the cable operator, Giuseppe Sacchi, to the tribunal court of the small Italian town of Biella. Sacchi claimed that the national Italian public service broadcaster RAI could not continue its monopoly over advertising revenue as it prevented obstacles to the sale of goods from other Member States which should be permitted to sell through cable television in addition to through the national PSB. The Biella Court firstly refereed the case to the Italian Constitutional Court in 1974, which upheld that RAI could indeed hold a national monopoly. The Biella Court then referred the case directly to the ECJ. It asked specifically whether the movement of *goods* within the common market applied to television signals. The Court did not find that RAI's monopoly restricted the trade of *goods* within the EC, neither did it object to the fact that RAI was acting in the capacity of a monopoly as this was justified under national cultural policy. This case was specific to the Italian market only. However, the case gave it the opportunity to define broadcasting signals as an economic activity, thereby coming under the jurisdiction of the Treaty of Rome. The ECJ ruled that 'in the absence of express provision to the contrary in the treaty, a television signal must, by reason of its nature, be regarded *a provision of services*'. It added that '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*'.

Then, in 1980, the Court applied this principle to a case of cross-border broadcasting. In the 1980 *Debauve case*,[12] the European Court of Justice established that any discrimination by a Member State

[10] The UK is the global headquarters of Reuters, AFX (the fourth largest global financial news agency); APTV; Camera Press; CNN International; FT Business News; Gemini News; Magnum Photos; The Image Bank (a global leader in production of contemporary imaging); World Radio Network, ABC News Intercontinental; Agence France Presse; ANSA; Associated Press; Australian Associated Press; Bloomberg News; Canadian Press; CBS News; Deutsche Presse Agentur; Dow Jones; EFE (Spanish News Agency); Islamic Republic News Agency; Jiji Press; Kuwait News Agency; NBC Worldwide; New Zealand Press Association; Russian Information Agency—Novosti; Saudi Press Agency; Tass/Itar; UPI, and Xinhua News Agency of China (Bromley, 2001).

[11] Case 155/73 Tribunale civile e penale di Biella [30.04.74, ECR 0409 – 0433].

[12] *Procureur du Roi v Marc J.V.C. Debauve and others*. Case 52/79 [1980] ECR 0833 18 March 1980.

against a broadcasting signal due to national origin is illegal. The ruling related to three French cable broadcasters which were transmitting advertising to cable subscribers in Belgium. Belgium legislation at the time banned advertising,[13] but French law did not. The Court established herewith that the companies transmitting from abroad were liable to their domestic legislations, not to laws in countries of reception.

Based precisely upon these two ECJ rulings the EU passed its *Television Without Frontiers* (TWF) Directive in 1989. From this time onwards, there was a dramatic increase in ECJ court cases dealing with media markets. In every case wherein Member States brought cases against broadcasters violating domestic media law through cross border transmission, the ECJ ruled against them. Member States argued that media policy (as cultural policy) was a domain belonging exclusively to the Member State. The Court did not agree.

The first of these cases was the *Commission of the European Communities v Kingdom of the Netherlands* case of 1991.[14] When the first case was brought to the ECJ in 1989, under Dutch cable law, companies were prohibited from 'transmitting programs offered by foreign broadcasting organisations and broadcasters in foreign countries were prohibited from broadcasting programmes with Dutch advertisements to the Dutch audience' (Korthals Altes, 1993:32). The Court's decision overrode the Dutch media law, stating that:

> Even if such a restriction forms part of a cultural policy intended to safeguard the freedom of expression of the various social, cultural, religious and philosophical components of society by ensuring the survival of an undertaking which provides them with technical resources, it goes beyond the objective pursued, since pluralism in the audio-visual sector of a Member State cannot be affected in any way by allowing the national bodies operating in that sector to make use of providers of services established in other Member States.

The Netherlands subsequently was required to make changes to its national Media Act of 18 December 1991 which provoked a greater sector liberalisation than had been preferred by the Dutch authorities. As Korthals Altes states 'it is European law that opened the Dutch broadcasting system' (1993:329). Even after the enactment of the 1991 Media Act, the Netherlands still represented a comparatively strict regulatory regime. All terrestrial frequencies were reserved for the public stations. Private television (national or transitional) was constrained to the local cable networks. However, *Television Without Frontiers* rendered the Dutch Media Act useless against broadcasters transmitting in the Dutch language from abroad. At present, forty per cent of audience share in the Netherlands comes from foreign broadcasts (CIT, 2001). A large proportion of which goes to the Luxembourg-based channels, RTL 4 and 5.

Another ECJ case, decided only six days later, chiselled away at national law. The Greek *Elliniki Radiophonia Tilorassi—Anonimi Etairia v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* case dealt with the Greek Law of No 1730/1987 which banned commercial broadcasters and as the ECJ stated, established a 'public television monopoly.' In 1988, the Mayor of Thessaloniki set up a private television station and began broadcast. A Greek court injunction was issued to restrain transmission and ordered seizure of station equipment. The case was taken to a national court, which referred the case to the ECJ. Although this presented a case of sensitive national policy, the ECJ choose to intervene. It decided that the Greek public service broadcaster had no legal right to monopolise not only *transmission* but also *exclusive rights*. In this respect, the Court ruled that the establishment of a public broadcasting monopoly 'must be regarded as an ostensibly illegal measure by virtue of the combined provisions of Articles 90 and 86, which cannot be justified by virtue of Article 90(2)'. The case is interesting, as the Court did not comment on the fact that the media owner was a prominent politician. The Court of course had no jurisdiction to comment upon this fact, even if it had been requested to do so.

[13] Article 21 of the Royal Decree of 24 December 1966 (Moniteur Belge of 24 January 1967)

[14] Two previous cases dealing with the foreign transmission of advertising also ruled against Dutch cable law: Case-352/85 Bond van Adverteerders [ECR 2085, 1988] and Case C-288/89 Collectieve Antennevoorziening Gouda [ECR I 4007, 1991].

The next case came in 1992, when the ECJ ruled against the Belgian state in *European Communities v Kingdom of Belgium.* The Court decided that Belgium had failed to fulfil its obligations under Articles 52, 59, 60 and 221 of the EEC Treaty on four accounts: by prohibiting cable programmes from other Member States where the programme was not in the language stipulated by Belgian law; by subjecting cable commercial broadcasters from other Member States to prior authorisation, to which conditions might have been attached; by reserving 51 per cent of the capital of the Flemish commercial broadcaster for publishers of Dutch-language daily and weekly newspapers; and by compelling commercial broadcasters to constitute a compulsory part of their programming to cultural interest. The ruling states the 'Belgian government, however, relies upon cultural policy objectives to justify the legislation in question, namely the maintenance of pluralism […] Those arguments cannot be accepted.' Belgium had to make a change to its media law.

As stated in Section III, a number of broadcasting companies have relocated to the UK, away from their original locations. Some of these cases were brought to the European court of Justice. One of these was the *VT4 Ltd v Vlaamse Gemeenschap* case. According to Belgian law, the Flemish Executive can license only one commercial television broadcaster at a time. In 1987 this licence was granted to Vlaamse Televisie Maatschappij NV ('VTM') to broadcast its station VT4 for a term of 18 years. Under the same provisions, only one broadcaster (radio or television) for the Flemish Community may be licensed to transmit advertising. This licence was also issued to VT4 for a term of 18 years in 1987. In Flanders, VTM therefore holds a legal monopoly in commercial television and television advertising. With the 18 year licence intact, VTM was bought by Scandinavian Broadcasting SA (registered in Luxembourg) and VT4's company headquarters relocated to London. VT4 secured a non-domestic satellite service licence from the UK permitting it to broadcast to Flanders under UK regulation (pertaining to non-domestic satellite broadcasts). From there, it blatantly evaded Flemish media law, particularly that relating to advertising and content. The Flemish *Minister of Culture and Brussels Affairs* reacted by prohibiting the retransmission of VT4 programming by cable network operators in Flanders from 16 January 1995. The case ended up in the ECJ, which, as in similar cases, decided *against* the Flemish Minister for Culture and that VTM's evasion of national law was perfectly acceptable. This rendered Flemish broadcasting law completely redundant, as it was to applied only to one market provider—VTM.

A similar case was ruled on the same day against Belgium, again upholding the *TWF* clause. The UK had this time had issued one of its non-domestic satellite licences to UK Turner Entertainment Network International Limited (a subsidiary of the US American Turner Group) which owns the Cartoon Network Limited and Turner Network Television Limited which broadcast programmes via the Astra satellite. On 17 September 1993 Turner International Network Sales Limited concluded an agreement with Coditel, the German cable television company, to distribute Turner programming to Brussels. As there was no legislation at that time governing cable television in Brussels, a Royal Decree was issued the day before the agreement (on 16 September 1993) designed to stop the cable company from taking advantage of the lack of legislation. Coditel was prohibited from distributing 'TNT' and 'Cartoon Network.' Turner International Network Sales Ltd took the case to the Tribunal de Commerce in Brussels for an interim order allowing Coditel to carry out its contract. The order was granted by the tribunal on 26 October 1993 and Coditel began broadcasting. In June 1994 the Belgian State brought third-party proceedings against the interim order (of 26 October).

In November 1994, the Tribunal de Commerce referred the case to the ECJ and banned Coditel from broadcasting until a decision had been made. This decision was reversed at in April 1995 by the Belgian *Cour d'Appel*, which withdrew the case from the ECJ. Meanwhile, the Belgian state began separate criminal proceedings against Paul Denuit, the managing director of Coditel, for ignoring the Ministerial Decree of 16 September 1993. The Tribunal de Première Instance referred the case to the ECJ which ruled in favour of Denuit in 1997 and upheld *TWF.* Again, as in the VTM satellite case, the ECJ agreed that companies have the right to circumvent national legislation by broadcasting from abroad—meaning Belgian media law is inapplicable to foreign broadcasts aimed at Belgian audiences.

In 1995, a similar case was ruled against the Swedish broadcasting authorities. In a decision on two joint cases *KO* v. *De Agostini and TVShop*,[15] the Court interpreted European advertising rules. Sweden has strict rules on advertising and prohibits teleshopping and the targeting of advertising to children under the age of 12. The first Agostini case dealt with advertising targeted at children. The Italian group *De Agostini*, which transmits the channels TV3 to Denmark, Sweden and Norway and TV4 to Sweden via satellite, is licensed in the UK. On TV4 it advertised its children's magazine 'Everything about Dinosaurs' in Sweden. The magazine is printed in Italy and distributed in several languages across Europe. Each issue of the magazine was accompanied with a constituent part of a model dinosaur. The Swedish consumer's ombudsman, the *Konsumentombudsmannen* (KO), brought the case to the ECJ under the EU's Misleading Advertising Directive, which allowed Member States to adopt more stringent advertising rules, than provided in the Directive. In the *TVShop* case, the company TVShop Europe was broadcasting teleshopping and 'infomercials' for skincare products and detergent on TV3 and the Homeshopping Channel in Sweden. The KO argued that this case went against the new advertising rules laid down in the 1997 TWF on 'advertising, sponsorship and teleshopping'. The Court ruled in both cases that Sweden was permitted to apply more stringent rules on advertising—but it could only apply them to domestic broadcasters, and not to those broadcasting from other Member States. The KO argued that the company should be considered 'Swedish' because 'the announcers all speak Swedish, […] the advertisements are exclusively for the Swedish market given the language in which they are prepared and the products which are marketed.' However, the Court found this position untenable. The ruling concentrated on the importance of *establishment*. As TV3 had been established in the UK, it was therefore considered a British company governed by British media law. In this ruling the ECJ legitimises the right of media companies to bypass national laws by establishing their headquarters abroad—even if the country of establishment (the UK in this case) pays little attention to TWF provisions.[16] (For further ECJ cases, see Harcourt, 2004).

Hence, European Union policy has been effective in encouraging European firms to engage in regulatory arbitrage. In its decisions, the ECJ has validated the evasion of national media rules through cross-border broadcasting. However, even thought the Court has enforced the environment for regulatory competition—by carving away at national media laws—it has not been effective in enforcing minimum standards on content and advertising in broadcasting set out in TWF. The UK's satellite policy disregards minimum provisions set out in TWF. Many other Member States disregard TWF provisions and those set out in related Directives. The failure of the European institutions to set a floor for minimum standards in broadcasting (also shown by the failed EC draft Directive on media ownership) prompted fears of a 'race to the bottom' in broadcasting standards and moves towards regulatory co-operation in Europe.

V. A Perceived 'Race to the Bottom' and Political Backlash

Regulatory competition and the erosion of national media laws is precisely what the European Commission had in mind. Those who drafted TWF and other internal market initiatives saw liberalisation as leading to the establishment of a level playing field, increased competitiveness, and the consolidation of markets. This is clear from European Commission reports leading up to the Directive (Booz-Allen & Hamilton, 1992; Sanchez-Tabernero, 1993, Vittet-Philip, 1996), which echo reports from other national and international institutions, such as International Institute of Communications, the OECD, and UK-based think tanks (Veljanovski, 1989; OECD, 1992a; 1992b; 1993; BSAC 1995; Poullet, 1995; MacLeod 1996; Garnham, 1990,1996; Collins and Murroni, 1996). The idea is that an optimum level of regulation

[15] Joined cases *Konsumentombudsmannen* (KO) v *De Agostini* (Svenska) *Förlag AB* (C-34/95) and *TV-Shop i Sverige AB.*

[16] Opinion—Joined Cases E8/94 and E9/94, In a similar case to De Agostini the EFTA Court made the same ruling. In *Forbrukerombudet v.Mattel Scandinavia and Lego Norge*, Judgment of 16 June 1995, the EFTA Court gave the opinion that Noway's the Norwegian prohibition on television advertisements specifically targeting children was incompatible with Television Directive if it applied the rules to a broadcaster established in another EEA State.

would be reached at national levels as a result of fair competition in a single European market. Commission policy was consistently reinforced by the Court of Justice as shown in the last section.

A political backlash began to emerge from those concerned with ‘race to the bottom’ scenarios. This came from interest groups (e.g. consumer groups, journalist associations), public service broadcasters, academics and politicians. Fears were expressed that loosely regulated large European media groups would gain excessive influence upon society; that a small number of media groups will control the world’s flow of information, that there would be homogenic tendencies in content production; job losses in journalism, changes in editorial attitudes, and evasion by multimedia groups of national labour practices. The academic literature provides ample discussion of these issues (Murdock, 1982; Bagdikian, 1990; McQuail, 1994:167; Negrine 1994:63; Gibbons, 1997:204; Humphreys, 1996; Williams, 1996) including empirical studies (Abrams, Burton and Settle, 1976; Maddoux, 1990; Kunczik, 1997; Herman and McChesney, 1997; Demers, 1999; Johnston, 2000; Chambers, 2000; Demers, 2002; Doyle, 2002; Curran and Seaton, 2003).

This author is not going to give an opinion of what actually constitutes a ‘race to the bottom’, or review evidence of whether or not a ‘race to the bottom’ is actually occurring. Briefly, some empirical examples of such scenarios given in the literature are: evasion of journalistic standards and labour practice by press companies in Austria and Eastern European markets (see MediaWatch reports),[17] content output of terrestrial television in Italy and Spain, media concentration and conflict of interest problems (i.e. politicians owning media) in Estonia, Greece, Bulgaria and Italy, the rise of voyeur television in the UK and the Netherlands, character defamation of members of regulatory bodies (e.g. in France, Estonia and Slovenia), the rapid rise in pornography watched via satellite in Germany, France, and Scandinavian countries, etc. The purpose of this paper is rather to discuss what consequences political backlash had on the development of regulatory co-operation in the sector.

An increasing number of satellites have ‘European’ footprints (Astra, Hot Bird, EuroBird, Sirius, Thor/ Intelsat, W1, AtlanticBird). At a rough count, this author estimated in 2003, that that these satellites host circa 188 chat channels, 80 teleshopping channels, 36 music channels, 35 religious stations,[18] 13 fashion stations, 7 (continuous broadcast) ‘adult film’ channels (this does not count those channels that include ‘adult content’ as a part of daily programming). This has resulted in a large number of complaints from Member States. This section will give two national examples of political backlash to problems presented by cross-border broadcasting. What is striking is the media groups’ response to political action.

France

The first example is from France. In 2002, a campaign by teachers’ unions and the press targeted the problem of the accessibility of pornography in France. A study conducted by Mediamétrie found French audiences now have access to 900 pornography films a month via satellite.[19] The regulatory authority carried out a survey and found that that 89.6 per cent of boys aged 16 or 17 had seen one or more pornographic films, and 50 per cent of children under 11. The study also looked at content of pornography which was found to be increasingly violent. It quoted sociological studies that linked the present increase in sexually violent crime by teenagers (also a problem in Italy) to exposure to such content. The claim is that adolescents reconstruct these acts. An opinion poll showed that 64 per cent of French viewers were in favour of censorship. The French regulatory authority (CSA) targeted satellite channels broadcasting pornographic films. It drew up changes to national media law, evoking

[17] The Peace Institute in Ljubliana publishes the following research journals: *Mediawatch, Politike, EU Monitor,* and *Intolerance Monitor*.

[18] Religious stations have been accused of hate-speech, particularly against Islamic practice. This has come under much discussion recently in the press. In 2002, U.S. President Bush came under pressure to speak out publicly against anti-Islamic speech practised by television evangelists in the US.

[19] http://www.csa.fr/actualite/dossiers/dossiers_detail.php?id=8864&chap=2094.

Article 22.1 of the Television Without Frontiers Directive, according to which broadcasts may not 'include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.' The CSA also proposed a modification of Article 15 of the Broadcasting law of 30 September 1986 to achieve an explicit ban of programmes that involved pornography or gratuitous violence. However, the CSA was doubtful that these proposals would be passed by Parliament as it recognised that pornography was one of the most profitable sectors in French broadcasting and the government feared that if a law were passed, media groups would simply base their headquarters abroad to bypass French content laws. The CSA proposals were ultimately dropped when national (and international) attention began to focus on the personal reputation of the head of the regulatory authority (CSA), Dominique Baudis. In April 2003, national newspapers (led by *Le Figaro*) accused Dominique Baudis of recruiting a convicted serial killer (Patrice Alègre) to murder two prostitutes to prevent them from revealing details of sado-masochistic orgies organised for the élite of the city of Toulouse (where he was mayor). Following this press campaign, the CSA has not resumed proposals to curb the adult film industry.

Poland

The second example is from Poland. In the 1990s, the French group Canal Plus and US groups UPC and CME were refused licences from the Polish regulatory authority, so set up transmission from Astra to Poland. These are the channels Canal Polska (UPC/CanalPlus/Agora owned), Wizja TV (UPC/CanalPlus owned) and TVN (CME-owned) which were launched in 1998. Wizja TV has a licence from the ITC in London, where, 'among other things, it has not been obliged to comply with the European quota' (Jakubowicz, 2001:218). The 'other things' Jakubowicz refers to are disregard of domestic restrictions on content and advertising. The Fininvest-owned station Polonia 1, also established itself in Rome and broadcast to Poland via satellite when it was refused a domestic license (Goban-Klas, 1997:27).[20]

A Polish draft bill, drawn up in 2002 attempted to apply domestic rules on content and ownership to satellite companies licensed in Poland. The proposals put forth by the regulatory authority, the KRRiTV, were no different than those practiced in other European Member States. However, as in the UK, the debate over ownership evolved into a high level political domestic dispute over national media ownership. Of heated debate was the introduction of cross-media ownership restrictions. The proposal came under much attack from the Agora press group, which wishes to expand into broadcasting markets.[21] Agora published many articles against the proposals in its newspaper the *Gazeta Wyborcza.*[22]

Then, in 2002, a very similar occurrence happened as in France. An article appearing in the *Gazeta Wyborcza* in December 2002[23] attacked the personal reputation of members of the Polish government and the regulatory authority (KRRiTV). Members were accused of attempting to solicit a bribe from the Agora group in return for removal of ownership restrictions in the bill. Among those accused were Prime Minister Leszek Miller, the chairman of the public Polish Television (TVP), Robert Kwiatkowski, and member of the National Radio and Television Council (KRRiTv), Włodzimierz

[20] Nicola Grauso sold it in 1993 to Finmedia SA, (owned by Fininvest) which reestablished the station as Pauline 1.

[21] Polsat's owner Zygmund Solorz was rumoured in 2002 to have been considering selling shares in Polsat, interested buyers being News Corporation and the Polish publishing group, Agora. Polsat is owned by a returned emigrant Zygmund Solorz allegedly received financial backing from Rupert Murdoch (Price, 2001). However, Solorz has since stated publicly that he is not interesting in selling the group. It then emerged that the conflict may have been over the selling off of one of the public service broadcasting channels. No announcement was made, but rumours indicated that Agora wanted to purchase a national channel, as it feared that a public channel would be sold to government allies.

[22] The newspaper reported that the European Parliament expressed a negative opinion on the proposals as they went against European law (*Gazeta Wyborcza*, Warsaw, 11 April 2002 p 18). Interestingly, this criticism chiefly came from the Italian Member of the European Parliament, Jas Gawronski, who is based in Rome, a member of Forza Italia and former spokesman for the Italian PM Silvio Berlusconi.

[23] 'Law for a Bribe or Rywin Calling on Michnik', *Gazeta Wyborcza,* 27 December 2002.

Czarzasty (BBC Monitoring Service, 17 January 2003). The bribe was to be delivered to the SLD ruling party via a bank deposit belonging to Lew Rywin, president and member of the supervisory board of Telewizyjna Korporacja Partycypacyjna, a company with controlling stakes in the Canal+ Polska and Cyfra+ satellite platforms. The newspaper article caused a nation-wide scandal and an investigation by Warsaw's Public Prosecutor's Office for Appeals. The scandal threatened to bring down the government and the Prime Minister resigned in May 2004 over the allegations. Needless to state, KRRiTV's ownership proposals have been dropped. Although the Polish case involves high level politics, similarity to the French case, the willingness of press groups to actively seek public opinion, cannot be overlooked.

Europe

Political backlash to national policy erosion has reached the European level with numerous reports submitted to the European institutions. The European institutions are not deaf to the political preferences of Member States and interest groups, but they are limited by the Treaties of the European Union, which do not deal with matters of media pluralism nor cultural policy. For their part, Member States do not wish to relinquish one of the last bastions of national policy (cultural policy) to the European Union. For this reason, the European institutions have had to search for new ways to encompass political concerns.

At the European level, the political backlash has led to some changes. The European Parliament was the first to take on board concerns of protecting pluralism of the media in a number of its reports (see Harcourt, 2004). This led to a debate over media regulation at the European level which in turn has led to changes in European law. One of these changes was to the updated 1997 TWF directive that recognises that companies must be regulated in the country of establishment (i.e. legitimising the UK principle). The revised TWF also recognises the right of Member States to challenge broadcasts from abroad in the ECJ (but it does not dictate the outcome). Changes have also been made to the EU Treaties: specifically the inclusion of the 'Culture' articles (Articles 151 and Article 3q) in the 1992 Treaty of Maastricht and Protocol 30 on public service broadcasting in 1996 Treaty of Amsterdam. This was followed up by the 2001 European Union Charter of Fundamental Rights which recommends that 'the Union shall respect cultural, religious and linguistic diversity.' As the Court has been known to make progressive interpretations of Articles to further European integration (Armstrong and Bulmer, 1998), future ECJ interpretations of Articles 151 and 3q or Protocol 30 in ECJ decision-making could signal a start to balancing national policy erosion.

Up until now the European Court of Justice and the European Commission have been divided on the interpretation of the Treaties. For example, DG Competition has recognised the special role of the public service broadcasters and exempted them from European competition law in its EBU/Eurovision decision.[24] The European Court of Justice took a different view. It decided in five rulings that public service broadcasters should not be treated any differently from commercial broadcasters under EU competition law.[25] There have been some signs that the ECJ may change its approach. In three recent decisions, the ECJ has been asked to decide on if the European Commission should rule on if the public service television should be prohibited to raise funding through advertising (as a digression of state aid rules). The Commission has thus far viewed this matter as one of national concern. In the three decisions raised by private companies in France and Portugal, the ECJ has ruled that the Commission should *indeed* be permitted to judge this issue in the future (*Télévision Française v European Commission* (1999), *SIC v Commission* (2000), *Commission v TF1* (2001)).

[24] EBU/Eurovision system OJL 179/23 22.07.93.

[25] Case C-98/92 *La Cinq vs. the European Commission* 1992 [07-05-1992, ECR II-0001]; Case T-543/93 *Gestevisión Telecinco SA v Commission of the European Communities 1993* [14.12.93, ECR II- 1409]; Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities 1996* [11.07.96, ECR II-0649]; Case C-260/89 *Elliniki Radiophonia Tilorassi—Anonimi Etairia v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas 1991* [31.07.91, ECR 2925].

These rulings allowed the European Commission (DG Competition) to publish its 2001 *Communication on the Application of State Aid Rules to Public Service Broadcasting*[26] in which it recognises PSB importance for maintaining pluralism. The Communication, refers to the 'public service' Protocol of the 1997 Treaty of Amsterdam and quotes the 2000 EC *Communication on Services of General Interest in Europe*[27] which states 'the choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest.'

Most changes at the European level, however, reflect national efforts: the encouragement of industry self-regulation and the promotion of co-operation and information exchange between national regulatory authorities and courts. This can be seen in a number of fora, but most importantly within EPRA, a regulatory platform for media authorities, to which European Commission is now providing (financial) support. The European Advertising Standards Alliance (EASA) has established a complaint's committee for cross-border advertising complaints. However, the only tangible change at the European level could come if the clause for the protection of media pluralism in the emerging European 'Constitution' were empowered. Article II-11 on freedom of expression and information states that 'The freedom and pluralism of the media shall be respected'. This article however requires an unanimity vote within the Council which is politically impossible.

VI. Conclusion

This paper addressed assumptions in the theoretical literature on regulatory competition with an empirical case of cross-border broadcasting regulation. The paper firstly assessed whether the creation of an internal market in broadcasting by the EU *Television Without Frontiers* Directive induced EC Member States to engage in regulatory competition. The finding is that only two EU Member States, the UK and Luxembourg responded with deregulation. However, it was shown that they were not reacting to capital mobility in the internal market, but responding to demands from domestic economic actors which wished to expand into broadcasting markets via satellite. These actors, BSkyB and CLT respectively, had close political ties to domestic governments at that time. Therefore market forces alone did not produce regulatory competition in this case.

Secondly, in contrast to Barnard's study (2000), this case shows that firms do respond to a lowering of standards by relocating their headquarters abroad. 'Investment flight' towards the UK and Luxembourg is shown to be high. Luxembourg and UK licensed satellite channels which broadcast to markets in all EU Member States. The largest players in Europe have chosen to base digital services in these states. The number of channels broadcasting from the Astra satellite has topped 1000. The UK has been effective in attracting a number of companies to relocated in the UK—away from their national jurisdictions.

Thirdly, the paper showed that, when faced with regulatory competition, further Member States did not enter the game. Other countries did not lower regulatory standards, rather they challenged the evasion of national standards ('cultural policy') in the Court of Justice under the principle of subsidiarity. The tenacity of Member States to retain policy in this area is of course not only due to concerns of cultural policy, but also the importance of political ties to domestic media groups. This considered, the ECJ rulings were bold. The ECJ ruled consistently against subsidiarity claims by Member States thereby forcing deregulation of national broadcasting law.

[26] *Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting*. OJ C 320, 15 November 2001, pp. 5-11 and Commission clarifies application of state aid rules to Public Service Broadcasting Press Release—IP/01/1429 – 17 October 2001.

[27] Communication on Services of General Interest in Europe COM(2000) 580 final, p. 35.

Finally the paper assessed the rise of regulatory cooperation. Even though the Court and the European Commission were successful in driving deregulation at national levels, they have not been effective in enforcing minimum standards on content and advertising in broadcasting. TWF set only very minimum standards for advertising and content and did not set limits on ownership (which are common at national levels). Successive EC attempts at ownership regulation ended in failure (Harcourt 1998; 2004). Even though the regulatory floor for European standards is low, some Member States have bottomed it. The UK was shown to have completely disregarded minimum provisions set out in TWF such as the advertising of tobacco products and advertising during children's programming when issuing non-domestic satellite licenses.

As European Commission efforts at harmonisation failed and the Court has been ineffective (or perhaps unwilling) to enhance minimum standards, fears of a 'race to the bottom' in broadcasting arose. Examples given in the paper of France and Poland showed that national attempts at re-regulation were unsuccessful. This led to attempts at regulatory cooperation. This has been in the form of fostering market self-regulation, transparency of company activities, and bi-lateral co-operation and coordination. The European institutions have reflected these efforts. Unable to introduce greater harmonisation due to limitations in the EU Treaties, the European institutions have resorted to the establishment of European fora, fostering co-operation between regulatory authorities, and softer forms of harmonisation such as recommendations, charters and (minor) changes to European law and the European Treaties. There is some evidence that regulation is converging around certain policy instruments across Europe (Harcourt, 2004). However, satellite regulation continues to differ to domestic policy in the UK and Luxembourg without interference from the Court of Justice. To which extent minimum standards can be maintained through 'soft' forms of regulatory cooperation is debatable as they are a weaker form of governance and have not shown promise at national levels (Harcourt, 2004).

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