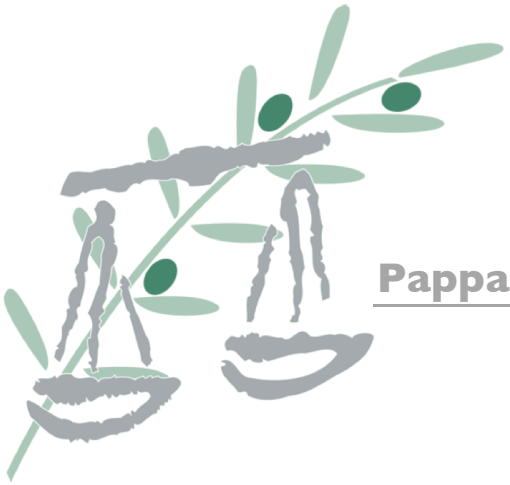

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Editorial

The Dichotomy of Broadcasting: Public vs. Private

Spyros Pappas

According to the PROTOCOL No 29 of the Treaty on the functioning of the European Union "ON THE SYSTEM OF PUBLIC BROADCASTING IN THE MEMBER STATES", in view of the fact that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, the Member States agreed to annex to the Treaty on the European Union and to the Treaty on the Functioning of the European Union the following interpretative provisions that in this way became binding: "*The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfillment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*".

Whereas the reason for the adoption of this Protocol acknowledging the competence of the Member States to support "public service broadcasting" is in principle obvious and legitimate, its implementation, which is subject to the simultaneous respect of the fundamental competition principles, remains problematic and often had to be guided by Solomon solutions given by the ECJ. After many years of an open market in which private broadcasters dominate over the public ones, the question still remains as to whether this distinction make any sense nowadays. It would be as if the Protocol and the public interest it reflects concerns only a minority view, and thus, not attaining its objective as if private broadcasting is completely indifferent to the democratic, social and cultural needs of each society, in addition to the need to preserve media pluralism.

Certainly, it is far from the above stated notion. Nevertheless, the convergence of new technologies and the digitisation have offered endless opportunities to newcomers. More so, the new era of "spectrum" has ushered in, a phenomenon which has an impact that cannot at this point be entirely assessed and measured ranging from the impact of online advertising to privacy issues, interactivity or just information; in one word the "image" and its (ab)use.

Irrespective of the antithesis between the sought goal of democracy and the Protocol's discrimination against private channels – besides the risk to water down "democracy" when financing it- if the underlying objective, after all, is quality of content, the latter can better be achieved via free and open competition. From all points of view, public and private broadcasters offer the same services; what may differ is quality and quality is the only guarantee of the stated objectives. Distinguishing between public and private broadcasting does not safeguard these goals, and in view of the technological and market developments, it is not justified anymore. Broadcasting cannot be but a public service mission whoever the carrier of it may be. Content wise, all have to pursue a high quality of service.

Simultaneously, there is a need of State control, the need of the caring hand of the State to support and monitor this cultural value of quality that is indispensable as the counterweight to a technology that should always remain on the service of content. This State vigilance is particularly required each time there is a transition to a new technological means, exactly as now in the case of spectrum. At least until the first experiences are acquired, the active role of the public authorities is a valuable element, namely in transitional periods, as it is during the changeover from analog to digital and the use of spectrum frequencies. Otherwise, it risks becoming the passage of a civilised world into an

unknown jungle technologically advanced but culturally lost.

Financing Public Television After a Ban on Advertisement: The End of a Long Judicial Story...But the Beginning of a New One?

Damien Thavard

A long story concerning the distortion of competition on the TV advertisement market has come to an end in France with the ban of advertisement on public television. The financial scheme for this measure is now a subject of conflict between the European Commission and France and Spain. The Commission, considering that the telecom operators' tax set out in order to compensate the economic loss of public broadcaster is unlawful, has decided to refer France and Spain to the EU Court of Justice.

A Judicial story

The issue of advertisements on public television is not a new one. Indeed, at least for France, it is a long European judicial history which has began in 1993 when TF1, ten years after the privatization of the French television, drafted a complaint and submitted to the European Commission for distortion of competition by the state aid given to French public television networks.

The main argumentation of the private broadcaster was that the state aid given to France Télévision, the French public broadcaster, was distorting the advertisement market. Indeed, according to TF1, France Télévision was driving the market to an artificially low price level given that advertisement was not their most important resource, and consequently, was dumping on this advertising market.

The Commission did not agree and dismissed the complaint. This decision was brought to Court by TF1, and the Court has confirmed it in the meantime.

New deal

The situation completely changed in 2008 when the French President declared that he was considering the option of the ban on advertisement on public broadcaster. He explained that this suppression would be balanced by a tax on new information and communication technologies like Internet access or mobile phones. Eventually, the definitive scheme was formulated, and finally, the tax was implemented only on telecommunication companies.

France was not the only Member State deciding to implement this measure; Spain followed on the same path. The French charge on telecoms operators was introduced in March 2009. This charge is imposed on authorised telecoms operators providing services in France. They pay 0.9% of their total revenues exceeding €5 million received from subscribers. Equally, in Spain, the law on financing the Spanish public broadcaster RTVE entered into force in September 2009 and imposed a charge of 0.9% on the gross revenues of telecoms operators, for the exact same purpose as the French one, i.e. a compensation for the loss of revenue from paid advertising on the Spanish national public broadcaster.

The European Commission enters the dance

At first, the Commission had to evaluate these schemes from the angle of state aid. On 20 July 2010, the Commission decided that the new financing systems were compatible with EU state aid rules, *inter alia*, because they did not give rise to disproportionate distortions of competition between public and private broadcasters as there would be no over-compensation for the costs of their public service missions.

However, this decision was not a free reign to implement the measure. It was just the recognition that this measure was not contrary to European competition and state aid rules and only that. The compatibility with the rest of European legislation was not checked. Consequently, the European Commission is now considering this measure is illegal regarding the European rules relating to telecommunication and in particular Article 12 of Directive 2002/20/EC on the authorization of electronic communications networks and services.

On 30 September 2010, the Commission requested France and Spain to abolish these specific charges on the turnover of telecoms operators. In both cases, the Commission considered these taxes to be incompatible with EU telecoms rules, which require specific charges on telecoms operators to be specifically and directly related to covering the costs of regulating the telecoms sector. These requests took the form of reasoned opinions under EU infringement procedures.

Since neither France, nor Spain complied with theses request, on 14 March 2011, the European Commission decided to refer France and Spain to the EU Court of Justice. In the Commission's view, the charges in France and Spain are incompatible with EU telecoms rules. According to these rules, in particular Article 12 of the telecoms Authorisation Directive (2002/20/CE), charges can be levied on telecoms operators only to cover certain administrative and regulatory costs (mainly authorisations and regulatory functions) and should be objective, transparent and proportionate.

This question of additional tax on telecom operators is also at stake in Hungary, even if the purpose is not to finance the ban of advertisement on public TV. Indeed, in October 2010, the Hungarian Government introduced a new "special tax" on three sectors of the economy: retail commerce, electronic communications and energy. The scope and rate of the tax is defined individually per industry and per revenue: for telecom operators, tax rates vary between 0% and 6.5%, on the basis of gross revenues.

Here again, the Commission is in the opinion that this "special tax" on telecom operators is levied to cover costs other than administrative and regulatory costs related to the telecoms sector and is therefore incompatible with EU telecom rules, but this procedure is not as the same stage as the French and Spanish one, since it is only the opening of the procedure for infringement.

A debatable assessment

There is no doubt that if one sticks to the Commission's view, these measures are unlawful. However, if one takes a closer look, they can see that the situation is not that crystal clear. Indeed, what the Commission is saying is that a member state cannot implement a tax on telecom operators if it is not for the only purpose of covering certain administrative and regulatory functions.

This analysis is open to doubt. On one hand, it can be noticed that the purpose of the Article 12 is only to impede Member States to implement any administrative charges imposed on undertakings providing a service or a network under the general authorization or to whom a right of use has been granted which will not only be dedicated only to cover certain administrative and regulatory costs. That is to say, this limitation is concerning only the authorization scheme and not fiscal measures. Since measures implemented are of fiscal nature, they are not in the field of the Authorisation Directive.

Nevertheless, one can also respond that these measures, even if they are of fiscal nature target only telecom operators, and as such, they should be considered as administrative burdens on telecom operator, making them unlawful ones, since they are not dedicated to compensate administrative and regulatory functions.

The answer to this question is now under European jurisdiction, but in the case that the outcome would result in an illegality of the telecom tax, it would lead to a difficult situation.

When politics come through

Indeed, a finding of an illegal telecom tax would lead to a difficult political situation in France. If this tax were abolished, the issue of the financing of public TV would come to the forefront again from the backseat is has taken currently. In this case, only two options would be available. The first one would be to raise the TV tax that is paid by every possessor of a TV device. Here, though, the timing of the court decision would be decisive since it could occur just before the presidential election of 2012, and it is certain that it is never a good idea to announce a tax increase during an electoral campaign. So, it could become an electoral argument that for favoring private TV companies, which is the side effect on the ban of advertising on public TV, the current president will raise the tax.

The second option would be to raise the contribution on advertisement paid by private TV companies. The modification of the scheme could lead to another issue. Indeed, the state aid clearance from Commission has been given because of the proportionality of the measure. At first glance, it seems that it would still be proportionate since the increase of such a tax would not result in an overcompensation of the duties of public services of public broadcasters.

In this case, it would be a return to the original situation; private TV operators instead of having a competitor on the advertisement market, implying less revenue, would simply pay back the new revenues they obtain from the eviction of a competitor in taxes.

Spectrum Management: Shaping the Future of the Media

Argyri Panezi

This article analyses the issue of spectrum management, first, viewing some technical matters in basic terms and, then, looking at the relevant policy implications. We are interested in the allocation possibilities for spectrum, after the switchover from analogue to digital TV takes place in Europe. The importance of the issue lays mainly on the fact that soon to be taken regulatory decisions will be shaping the market structure in Europe and European Media law and policy in general. Media law as a sector goes hand in hand with the right to information, freedom of speech and of the media in specific and promotion of pluralism.

I. Technically speaking: Spectrum Management

A. The European spectrum

Spectrum is a full frequency range that can be used for wireless communication, including radio and TV broadcasting. "Spectrum Management" is a crucially important topic for Europe. This is because we are now in the era of transition from analog to digital.

Spectrum is a public good and thus, traditionally has been allocated by public authorities (frequency allocation). The spectrum auction model is the most common method that Member States have been employing to manage this intangible resource. The reason why State authorities had to take regulatory action in the first place was twofold. First, regulation was needed for matters of safety. The frequencies that the Police, Navy, and/or the Army needed and used for safety and emergencies, were interrupted by amateurs. Second, it was soon realized that spectrum is an essential and profitable resource that the State could allocate on the basis of a regulated market.[1] Today, the importance of allocating spectrum increases, as new uses of spectrum are found. Still, traditionally, two well known and important uses of spectrum are radio and TV broadcasting.

B. The digital dividend

The digital dividend, or else digital bonus, is going to exist and be subject to management after the above-mentioned switchover. The European Union has been clear on its priorities regarding broadcasting: it is the promotion of a multicultural and multilingual television. It wants to give the European citizen a "full spectrum" of choices. Additionally, better quality of services is a goal. In all, the target is to upscale the audio-visual services within Europe and also make Europe technologically competitive in the world market. Also, full realization of the Right to Information and safeguarding pluralism and polyphony is among top priorities.

It is one of the main goals for the European Union to conclude the «switch-over» from analog to digital. Thus, the spectrum will be «freed» from the consuming analog transmissions and there will be more «space», meaning more spectrum or, in other words, more frequencies to be allocated (and thus profited from).

C. An economic critique of licensing

While the spectrum is logically and physically defined, there are scientific views according to which spectrum is not a scarce source. These views go on to becoming a critique of the regulatory default so far. It is, in essence, our technological restrictions that do not allow us to fully utilize spectrum

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[1] R.H. Coase, The Federal Communications Commission, 2 *Journal of Law and Economics* 1-40 (1959)

without the need of auctions and giving out of licences or exclusive property or other economic rights. Theoretically, spectrum could be (or is) «indefinite»[2] - not scarce. For example, until recently only analog transmission was possible but now digital transmission is also possible. We do not know what is going to be possible tomorrow or in the years or decades to come.

Thus, due to technological restraints, we have to operate and think in terms of an imperfect reality, and consequently, an imperfect market. However, we are at a technological choice point in wireless communication that could possibly allow us to revisit this basic structural question. The ultimate goal could perhaps be to have the opportunity to create a more open and decentralized user-owned system.

Coase's critique on the theory of spectrum scarcity is propably the key authority in this area.[3] Coase explains how spectrum scarcity is not different from all other economic goods. The only reason why we do not have a market equal to the other products' market is because with spectrum there are no clear rights to trade.

Since spectrum scarcity is a deeply embedded and intuitive way of thinking about the issue of spectrum management, it is important for it to be acknowledged. Lastly, it can prove crucial at times when we are at a «choice-point», as Europe is today, to have in mind that intuitive conceptions affect regulatory decisions, and that regulatory decisions affect market structure.

II. Economically and politically speaking:

A. Media law and the European Union

It is hugely important to analyze this topic with full conscience of the regulatory framework within which it belongs: media law, freedom of speech and of the press, and new generation of human rights, including the right to information and more specific digital rights.

The European Commission, fully aware of the current need to focus on Media Law, organised the *Speak Up!* Freedom of Expression and Media Conference in Brussels on 6 May. Enlargement Commissioner Štefan Füle said in his speech that: "The European Commission will accept no deviation on the part of candidate countries from European Union standards on freedom of expression and the media". Digital Agenda Commissioner Neelie Kroes said that the EU expects its neighbours and potential future members to commit to the principle of freedom of speech. It was once more made clear that freedom of expression and the media are crucial aspects of the Copenhagen criteria, meaning the standards a country must meet in order to accede the Union.

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[2] G. Faulhaber and D. Farber, Spectrum Management: Property Rights, Markets, and the Commons, online available at http://www.ictregulationtoolkit.org/en/Publication.3629.html; Yochai Benkler, Some Economics of Wireless Communications, 16 Harvard Journal of Law and Technology 25 (2002). Especially – and perhaps more radically, according to Benkler, there is no such thing as spectrum: for no given communication can one specify in advance a single amount of spectrum –in the sense of the breadth of bandwidth necessary to convey information from point A to point B, without excluding X and Y. This can only be calculated between two other devices. Thus, it is impossible to price spectrum efficiently.

[3] About Ronald Coase, awarded with the Nobel Prize in Economic Sciences in 1991, *see*: http://www.coase.org/aboutronaldcoase.htm.

B. Audiovisual Media Services Directive

The Audiovisual Media Services Directive establishes the legal, regulatory and administrative provisions related to the provision and distribution of audiovisual media services. The directive mainly deals with the content of broadcasting: protection of minors, accessibity, European works, audiovisual commercial communications, television advertising and teleshopping. It is quite important that it ensures the Right to Information, reiterating that this is the basis and the ultimate goal of all the relevant regulatory framework and policy.

Despite the importance of the issue at hand, the implementation of the above Directive is at this stage poor, in particular in some of the Member States. Others are in a better position of implementation and already fully enjoying the benefits of the digital era.

As regards spectrum, the switchover from analog to digital television in Europe, is to be completed by 2012.

C. Rationale: Polyphony; not Cacophony

Media Pluralism is essential for democracy. Mass media is a huge input to the marketplace of ideas. In order to promote and protect polyphony, we have to understand that media law and policy is not only to be debated in the level of content regulation (freedom of expression, protection of investigative journalism, prohibition of censorship) but also at the technical level. For example, censorship can also occur indirectly as a result of spectrum management regulation. The method of spectrum allocation both for tv and for radio broadcasting (i.e. the policy of licensing) can shape a market of media in such a way that only few players have frequencies to use. These few are powerful by the very nature of their job: they are the ones who own the channels that will inform the people (i.e. the voters) and will, consequently, shape their political opinions.

Thus, the key point with regard to spectrum management, which is discussed here, is that it is also an important policy that shapes media pluralism; the more the spectrum «opens», the more licenses can be granted and the more voices can be heard. In the end, competition and healthy market environment goes hand in hand with promotion of polyphony and quality in the media for the European citizens – which is after all the ultimum rational of European Media law in general. At the same time, let us add that this opening also boosts the European economy – at a time when this is much needed- as the value of the market of «more» spectrum to be allocated is considered to be an important one.

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The Commission is questioning the Implementation of the Audiovisual Media Services Directive In Some Member States: Are the Member States Pressured by the Commission?

Panayota Boussis

Directive 2010/13/EU, better known as the "Audiovisual Media Services Directive", aims to ensure a Single Market for Europe's TV and audio-visual industry by creating a level playing field for both broadcast and on-demand audio-visual media services across frontiers while preserving cultural diversity, protecting consumer - and more particularly children - safeguarding media pluralism and combating any kind of discrimination. EU Member States agreed to implement this Directive into their national law by 19 December 2009, but after a first analysis of the measures taken for the implementation of the Directive into the national law, the Commission decided to request clarifications from 16 Member States.

Background

Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services, well known as "Television without Frontiers" Directive was adopted in 1989 and amended for the first time in 1997. Since then, it has been substantially amended several times. In December 2007, an amending Directive was adopted. On 10 March 2010, in the interests of clarity and rationality of the said Directive, the provisions of the original "Television without frontiers" Directive were merged with the provisions contained in the amending directives to form the codified version of the now called "Audiovisual Media Services" Directive.

Furthermore, in light of new technologies in the transmission of audio-visual media services, a regulatory framework concerning the pursuit of broadcasting activities had to take account of the impact of structural change, the spread of information and communication technologies. It was indeed essential for the Member States to ensure the prevention of any acts which may prove detrimental to the freedom of movement and trade in television programs or which may promote the creation of dominant positions, which would lead to restrictions on pluralism, and freedom of televised information.

Moreover, Member States realized that in order to promote a strong, competitive and integrated European audio-visual industry and enhance media pluralism throughout the Union, a regulatory policy in that sector, safeguarding those public interests, was needed. This new regulatory framework enables Member States to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring at the same time that those rules are consistent with general principles of Union law.

Directive 2013/13 EU

As already mentioned, Directive 2013/13 EU concerns the audio-visual media services, i.e. services *"under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programs, in order to inform, entertain or educate, to the general public by electronic communications networks"*. The Audiovisual Media Services Directive concerns all Audiovisual Media Services, including on-demand audio-visual media services, and this, through the inclusion of specific

measures for them. Member States, nevertheless, remain able to require from media service providers, under their jurisdiction, to comply with more detailed or stricter rules in the fields coordinated by this Directive under the condition that such rules are in compliance with Union law.

The Directive is based on the "country of origin" principle, whereby audio-visual media service providers are subject only to the regulations in their country of origin and cannot be subject to regulation in the destination country except in very limited circumstances laid down by Article 3 of the Directive. The main scope of the Directive is to ensure legal certainty for Europe's TV and audio-visual industry by creating a level playing field for both broadcast and on-demand audio-visual media services across frontiers.

It also aims to protect consumers - and more particularly minors - and makes sure that broadcastings, as well as television advertising, do not encourage behaviour prejudicial to health, safety (by prohibiting all forms of audio-visual commercial communications for cigarettes and other tobacco products, all forms of communications on specific medicinal products available only on prescription in the Member State under whose jurisdiction the media service provider falls or even all forms of communications encouraging immoderate consumption of alcoholic beverages) or to the protection of the environment. Another kind of protection foreseen by the Directive is to ensure young people a certain level of civic responsibility. This goal may be reached if Member States implement the Directive and ensure, by appropriate means, that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. All this is possible if Member States take the appropriate measures both in terms of television programs and television advertising. Especially in the field of TV advertising, the Directive foresees a specific regulation concerning the time spent for it as well as the allowed number of interruption of TV programs for advertising. Moreover, the Directive aims to ensure that the insertion of TV advertising or telemarketing during TV programs will not be prejudicial for the integrity of the programs and that they will not affect the responsibility and the editorial independence of the media service provider.

A special attention is also paid to another group of people. The Directive indeed foresees that Member States will encourage the media service providers under their jurisdiction to ensure that their services are gradually made accessible to people who are visually and hearing impaired.

Additionally, this new regulatory framework encourages Member States to support and develop the European audio-visual production, inter alia, through the obligation to contribute substantially to investment in European production, or where practicable, and by appropriate means, by reserving for European works a majority proportion of the broadcasters transmission time.

The scope of that legal framework of the Audiovisual Media Services Directive is very clear: preserving cultural diversity, protecting children and consumers and safeguarding media pluralism. All Members States recognized the importance of a harmonization in that field and agreed to implement the Directive into their national law by 19 December 2009.

Commission seeks information from Member States on their implementation of the Directive

After a first analysis of their implementation measures, the European Commission is seeking information from 16 Member States. This request for further information does not imply that the Directive has been incorrectly implemented by the Member States concerned. This procedure is part of the Commission's efforts to ensure that the national media laws of all Member States correctly implement all aspects of the Directive. The Commission has asked the Member States to reply within 10 weeks to the outstanding questions concerning their implementation of the Directive.

The request for clarifications related to the implementation of the Directive concerns mainly issues like, inter alia, the country of origin principle and jurisdictional issues concerning audio-visual services, the audio-visual commercial communications, the protection of minors, the promotion of European works, the cooperation between regulators, as well as the right of reply of anyone whose legitimate interests have been damaged by an assertion of incorrect facts in a television program, foreseen in Chapter IX of the Directive.

The Member States concerned by the Commission investigation are Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Greece, Ireland, Italy, Malta, The Netherlands, Romania, Spain, Sweden, Slovakia and the United Kingdom. Three Member States (Poland, Portugal and Slovenia) have not yet notified to the Commission measures to implement the Directive into their national law and are currently subject to infringement procedures. Currently the Commission is analyzing the measures notified by the other Member States (Austria, Cyprus, Estonia, Germany, Hungary, Luxemburg, Lithuania and Latvia). Will this analysis be followed by a new turn of "fact-finding" letters from the Commission? It will probably depend on the results of this first attempt.

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A Lack of Choice or a Lack of Regulation? A Closer Look on Media Pluralism

Stratis G. Camatsos

Media pluralism links to the ideas of ensuring a plurality of media ownership structures, ensuring a diversity of political opinions and viewpoints in the media, and ensuring that the same media have an expression space for the different cultures that make up society. However, it has been a real challenge in Europe to get these objectives to be protected while observing the Union's recognized and enshrined freedoms. Consequently, it has been harder to offer full protection to any pluralism at national level when the requirement to develop strong media groups at pan-European level has become a reality. This puts Member States in a bind to act in a national policy domain, protect these objectives without overstepping Union law.

Media Pluralism

The term "media pluralism" has been tossed around in media circles, in journalistic circles, in social circles, in legislative circles, in business circles, and in political circles. It has been gaining popularity over the years and had reached a climax during the Hungarian Media Law ordeal earlier this year. However, it is a term that is easy to understand, yet hard to define and problematic to implement and enforce on its own. Nevertheless, the European Institutions are committed in aiding to shape Europe's media landscape by fighting against non-transparency, restraint and oppression, and uniformity or homogeneity.

Media pluralism is a complex issue, which is attained by using a diverse set of tools. Although it is difficult to define, a broad notion of media pluralism is to have a plurality, or diverse, of media companies as well as diversity of media types and content offered to the public, i.e. a diversity of media supply. Maintaining media pluralism is an essential condition for preserving the right to information and freedom of expression that underpins the democratic process. While this notion of media pluralism is thought by some to be an end in itself with its own normative justification[4], it is truly a means to achieve communications freedom, which stems directly from the freedom of expression. This can be seen from the Charter,[5] which shows the Community's attitude towards media pluralism as predominately "non-interfering" rather than a proactive one. This is why the response to the continuing political concerns to media concentrations as for the European Commission to set up a task force for the co-ordination of media affairs.

The European Commission Three-Step Approach

It should be noted that approaching the issue of media pluralism solely from the perspective of media ownership concentration is unproductive, but for the scope of this article, it is seen as the most important aspect for attaining pluralism in the media sector. The EU commitment to protecting media pluralism is strong, but this also enshrines the right to information and freedom of expression found in Article 11 of the Charter of Fundamental Rights, and in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, in 2007, the European Commission laid out a three-step approach indicating on how this politically sensitive issue should proceed:

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[4]Just, Natascha. *Measuring Media Concentration and Diversity: New Approaches and Instruments in Europe and the United States.* TTLF Working Papers No. 2, 2008, Stanford-Vienna Transatlantic Technology Law Forum.

[5]Article 11(2) of the Charter of Fundamental Rights of the European Union, "…freedom and pluralism of the media shall be respected".

1. A Commission Staff Working Paper on Media Pluralism outlining the efforts to promote pluralism by third parties and organizations, notably the essential work undertaken by the Council of Europe, and has a concise first survey of Member States' audio-visual and print media markets. This baseline analysis also includes information on national media ownership regulations and the very diverse regulatory models of the 27 Member States.

2. An independent study on media pluralism in EU Member States to define and test concrete and objective indicators for assessing media pluralism in the EU Member States.

3. A Commission Communication on the indicators for media pluralism in the EU Member States, on which a broad public consultation will take place. This could lead to an evaluation of the opportunity for applying the media pluralism indicators, for example through a further study. [6]

The approach makes clear that media pluralism is much broader than media ownership; it covers access to varied information so citizens can form opinions without being influenced by one dominant source, and citizens need transparent mechanisms that guarantee that the media are seen as genuinely independent. A key issue in this process is the functioning of the media as genuinely independent. To take this idea, the Commission has undertaken the following actions from the three-step approach; 1) a Commission Staff Working Paper on Media Pluralism and 2) the independent study on media pluralism in EU Member States to define and test concrete and objective indicators for assessing media pluralism in the EU Member States.

In the second step, the authors of the study formulated a Media Pluralism Monitor. The Media Pluralism Monitor's aim is to objectively measure media pluralism in a Member State. There are 166 criteria, which had been determined to be relevant factors impacting media pluralism. The criteria are grouped into 3 main categories: economic, legal, and socio-demographic; they are further sorted by application areas from political, cultural and geographical variety, ownership structures, and content. No single indicator has the potential to really describe the plurality of any given media landscape. The measurements of all indicators are compiled into summaries describing the general state of pluralism in a given country.

However, the Monitor is without problems. It blends different domains as well as different measurement methods and thus tends to compare incomparable things, for example. The study also places entertainment into the mix, which distorts results. The lack of conceptual clarity due to the general deficit of media sciences - which have yet to reflect on the role of culture and entertainment for public value - politics and the opinion ecosystem is to blame for. Consequently, the Monitor was put on hold in 2009 until the new Commission would come into office, and now since this has occurred, the Media Task Force and the Commission have to tackle this step and finalize the final one in the three-step approach.

Media Concentration

As the above shows, the concept of pluralism is a difficult notion to tackle on a legislative level. Although it can be defined both in terms of its function and in terms of its objective, the science behind assessing its implementation value have yet to be determined concretely. In the realm of television, media pluralism can be assessed through the number and types of channels, the number and structure of their owners, the editorial content of the broadcasts and the access of different

[6] European Commission press release: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/52

societal groups to the programming. Nevertheless, as stated before, media concentration has been considered the main threat to media pluralism since it has had the results of skewing the assessment criteria for maintain media pluralism. This is due to the fact that concentration ownership structure of mass media industries usually suggest a state of monopoly/oligopoly or large-scale owners in a given media industry. Concentration of media ownership suggests also the presence of media conglomerates. Therefore, the desire to have a larger number of media outlets does not mean there is pluralism since a diversity of content may not have necessarily been achieved.

Usually, what occurs when media is concentrated, one of more of the following consequences arises:

- Commercially driven, ultra-powerful mass-market media is primarily loyal to sponsors, i.e. advertisers and government rather than to the public interest.

- If only a few companies representing the interests of a minority elite control the public airwaves of all the citizens {of the EU and throughout the world}, then calling them "public airwaves" is only lip service.

- Healthy, market-based competition is absent, leading to slower innovation and increased prices.[7]

As some pundits state, there needs to be media regulation in order to have more pluralism in the media. Critics of media deregulation state that this will only continue to reduce the diversity of information provided, as well as reduce the accountability of information providers to the public. Increased concentrations of media ownership can lead to the censorship of a wide range of critical thought.[8]

Hungarian Media Laws

Despite the need for regulation to curb media concentration and promote pluralism, there was a heavy backlash from the Republic of Hungary's enactment of its "controversial" Media Laws on January 1st of this year. The notion of media pluralism and freedom of expression came back into the limelight, which reminded the EU that these ideas are still relevant. Generally, the criticism for the Laws was that "they exercised state regulation and media censorship whose implementation and enforcement violated the fundamental freedoms enshrined in the ECHR."[9] More specifically, the EU Commission expressed three concerns over the legislation: 1) the obligation for balanced broadcast coverage, including a right of reply, being extended to on-demand services, including blogs with video, which may have been in breach of the right of freedom of expression and information as enshrined in Article 11 of the EU Charter of Fundamental Rights, 2) the "country of origin" principle, which seeks to regulate broadcasts from outside Hungary if they infringe the rules on protection of minors or incitement to hatred, bearing in mind that broadcasts from EU countries are already well regulated, and 3) the requirement to register all media, including press, internet sites and non-private blogs, with the National Media and Communication Authority. For pluralism, it amended the Hungarian Constitution to remove a requirement for Parliament to uphold media pluralism, calling instead for "a citizen's right to proper or adequate information."

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[7] Doyle, Gillian (2002). *Media ownership: the economics and politics of convergence and concentration in the UK and European media*, SAGE, p. 18.

[8] Ibid.

[9] Center for Democracy and Technology, "Legal Analysis of the 2010 Hungarian Media Laws"; February 9, 2011.

Nevertheless, despite the backlash from the enactment of the Media Laws, the Hungarian government defended its decision due to the very fact that media pluralism was non-existent and that healthy market based competition was absent to combat against the few companies expressing the interests of a minority elite. One of the ways to take immediate action to fragment this media concentration was by state regulation. More specifically, it is said that specific public interest groups, together with the opposition political party, own or control the majority of the television networks and other media outlets. Therefore, this was an attempt, by hard regulation, to make journalists and the media to be held accountable for they report and to make them more independent while creating a pluralist media.

However, due to the pressure put on by the EU Community, the Hungarian government agreed to make four changes to the Laws to address the concerns, yet, some still believe that even with the amendments, the freedom and pluralism of the media in Hungary lies in the arbitrary licensing provisions, which are not adequate to protect these ideas. This controversy goes to show that media pluralism, although a hot topic, is not easy to regulate and legislate. Although a universal idea with normative justification, at some point, it will have to be adapted to the individual Member State's internal situation. However, this creates a risk for a Member State to be caught in the EU radar and thus it will have to be diligent enough not to overstep the boundaries of Union law.

Radio Spectrum and Media Pluralism

Recently, the respect of media pluralism has also been at the forefront in another area: radio spectrum management. It is beyond the scope of this article to explain radio spectrum, but a brief description will prove useful at this point.

Radio spectrum is an essential resource underpinning one of Europe's most dynamic sectors: wireless communications. The spectrum is a finite resource so its allocation requires effective and efficient coordination at European level. National regulatory authorities administer the allocation and management of radio spectrum in Europe. There are three essential roles in radio spectrum management: i) planning radio spectrum allocation; ii) establishing technical conditions for radio spectrum usage, and; iii) assigning radio spectrum to users

The planning and physical assignment of radio spectrum to users is the responsibility of Member States via their appropriate national authorities. These processes are also subject to the constraints of EU laws on the single market, and international radio spectrum agreements. How the spectrum is partitioned between the different uses (allocation) and how and to whom licenses are given for the use of channels or blocks of spectrum (assignment) are organized and managed by the national governments and their relevant agencies, including the allocation of appropriate frequency bands in their own country. The EU has set a goal for harmonization of the allocation of frequency bands by 2012.

Under Article 56 TGEU, many regulatory measures adopted at national level for governing the broadcasting sector were challenged as obstacles to trade. More specifically, measures managing radio spectrum have also been challenged with many of them to be allegedly adopted on the ground of the maintenance and the respect of media pluralism.

Within its case law, 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.[10] In the occasions where 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) where they come into conflict from the licensing system put in place by a Member State for radio frequencies and television broadcasting, it has been rather consistent. In these set of cases, media pluralism is usually classified as a ground upon which certain national measures resulting in impediments to trade can be justified. The ECJ, while excluding the possibility to read media pluralism within one of the strictly interpreted grounds for justification listed in Article 56 TFEU, 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.[11]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 assess them in the light of a strict proportionality test.[12] Therefore, this results that many of these measures have been found not to be justifiable.

Consequently, this shows that although pluralism can be used to justify licensing and regulatory measures to manage the radio spectrum in a Member State, the Member States will have to be sure to satisfy the free movement of services provision in the Treaty and the realization of the internal market in order to succeed with its justification. Otherwise, the ECJ will interfere in the Member State's policy domain to observe the respect given to media pluralism in the attainment of market integration.

Conclusion

Although media pluralism and diversity of media content has been a constant objective by the EU to achieve a sustainable democratic environment, it has proven a difficult task since the balance between a Member State's policy domain and the striving for a harmonized internal market in the broadcasting sector is not an easy one. Nevertheless, it has been recognized that public system broadcasting 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.[13]

Despite it being a Member State's domain to regulate media pluralism, the EU has consistently stepped in to inadvertently define the landscape of this idea, together with the freedom of expression, in the realm of broadcasting. It seems that Member States are finding it difficult in implementing measures, such as ones regulating the radio spectrum management, without overstepping the boundaries of Union law regarding media pluralism. Reasons given for this intervention seem to be due to soft regulation of media pluralism, weak implementation of anti-concentration provisions, and a concentration of media ownership and increased links between sectors, all on a Member State level. However, as case law shows, even if Member States combat against all of these by implementing regulatory measures to ensure media pluralism, the EU Institutions have consistently found violations to Union law.

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[10]Barzanti, Fabrizio, *Media Pluralism and EU Law: the Limits of the Traditional Approaches Between Respect and Promotion*, (draft paper), p. 4.

[11] For example, see Case C-380/05, *Centro Europa 7 Srl v MinisterodelleComunicazioni e Autorita per le garanzienellecomunicazioni and Direzionegenerale per le concessioni e le autorizzazioni del MinisterodelleComunicazioni,* the Court stated that "…it is clear from the case-law of the Court that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives, on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.

[12]Barzianti, *Ibid.*

[13]Protocol on the system of public broadcasting in the Member States, OJ [1997] C340/109.

Therefore, for a Member State, choices have to be made, not only regarding the degree of intervention, but also which tools and what level of intervention is most appropriate. The following should be investigated in order to decide what sort of acts or policies are the best for any given Member State that want to support media pluralism: size and wealth of the market; diversity of suppliers; consolidation of resources; and diversity of output. Nevertheless, the EU Institutions should also take into consideration these different dynamics that exist in each Member State's media market since a balance needs to be struck between the Member State policy domain and the EU's competence for pluralism. This is why it will be interesting to see what the Commission will produce for the final step in its three-step approach in protecting media pluralism.