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# Background information report

## Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of the European Union and the Council of Europe

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mediadem

**Project profile**

MEDIADEM is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It will investigate the configuration of media policies in the aforementioned countries and will examine the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, will be thoroughly discussed and analysed.

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**TABLE OF CONTENTS**

**The case of the European Union and the Council of Europe**

*Federica Casarosa*[*]

## 1. Introduction

The history of media policy in Europe began at the national level with governments involved to different degrees in the regulation of the press, and then the radio and broadcasting sectors.[1] While the press enjoyed greater autonomy, paving the way for the creation of self-regulation, broadcasting attracted more attention from national governments which resulted in mostly successful attempts to monopolise and control the sector.[2]

From the outset, state intervention in the field of the media was triggered by the capability of the mass media in particular, to influence readers, listeners or viewers in their choices, regardless of whether these were of a commercial, social or political nature. This capability can evidently have positive and negative effects, as the media can have a function of integration in promoting social cohesion and solidarity, but they can also prove harmful by contributing to the breakdown of shared values, social norms and patterns of behaviour.[3] From a democratic politics perspective, it can be acknowledged that the media can provide programmes which support particular social, civil and political values, through the provision of a wide range of programming, including news, current affairs, documentaries, educational programmes, etc., and at the same time offer opportunities for citizens' engagement in public discourse. Thus, the regulation of media sectors has also been driven by the need to create an informed citizenry. Although media regulation has for decades implied that readers, listeners and viewers are passive receivers of the information provided, technological developments have substantially challenged this premise. In recent years, media users appear to have more choice in accessing and selecting and even producing and disseminating information and materials, due to technological innovation.[4] Nonetheless, such technological changes do not occur in a regulatory vacuum. Pre-existing rules and regulation are still applicable. The challenge is therefore to define whether and how the existing rules should be reviewed and perhaps updated.[5]

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[*] Thanks to Fabrizio Cafaggi and Evangelia Psychogiopoulou for useful suggestions on some of the questions addressed in the paper. The content of Paragraph 2 profited from the relevant work of Fabrizio Barzanti and from the useful and rich conversations had in preparation of this part. Responsibility is my own.

[1] See M. Bailey, *Narrating media history* (2009).

[2] See for instance Article 11 of the 1789 *Déclaration des droits de l'Homme et du Citoyen* [Declaration of the Rights of Man and of the Citizens] in France, where it provided that "*The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law*".

[3] For a detailed analysis of the functionalistic approach to the media and its critics, see J. Harrison and L. Woods, *European broadcasting law and policy* (2007), at p. 21 ff.

[4] See the definition of the so-called 'non-linear' services provided by Directive 2007/65/EC, below par. 2. For a wider analysis of the convergence issue see D. Tambini, D. Leonardi and C. Marsden, *Codifying cyberspace: communications self-regulation in the age of convergence* (2008).

[5] Note the process that involved the broadcasting sector in the EU, where directive 1989/552/EC, otherwise known as the Television without Frontiers directive, has been involved in three reviewing processes, finally resulting in the current Audiovisual Media Services directive in 2007. See below par. 2.

So far, the focus has been on the regulation of the content available through the media, either by ensuring that certain types of programmes are made accessible to the public or that access to media outlets is offered to the various segments of society. However, the same results can be pursued through a different type of rules which concern structural regulation of media sectors. In this sense, who owns the media, the *rectius* who also controls or influences the media directly or indirectly, is the focal point. Indeed, the concentration of the power to influence citizens in the hands of few, whether in economic or political terms, seems likely to constrain the possibility for citizens to impart and receive information and ideas. Governments have thus adopted a range of different tools to facilitate the variety (i.e. plurality) of providers of information, such as media ownership rules, licensing and authorisation regimes and competition law.

Given the framework outlined above, it is clear that the two most relevant supra-national institutions at European level could not but be involved in these issues, though on the basis of different perspectives. Such involvement could be justified under two dimensions: practical and political. For the former, the advent of new technologies obliges not to interpret media services only on a national dimension, rather on a cross-national one, (which has already triggered the development of trans-border markets). For the latter, a more comprehensive approach, for instance at EU level, could prevent national political compromises shaped only according to the lobbying activity of powerful media outlets at national level.

As will be developed below, the European Union competence over media sectors has been progressively achieved through the joint (but not always coordinated) activity of the European Court of Justice (ECJ) and the European Parliament and Commission. The expansion of EU competences in the field of media is mainly to be ascribed to the ECJ in confirming its jurisdiction over areas that might not have been thought to be included in the original economic scope of the European Economic Community (EEC) Treaty. In particular, although the cultural dimension of broadcasting could have been perceived as hampering the possibility of bringing it within the scope of the EU competences, the ECJ was able to draw a distinction between its cultural and economic dimension, defining broadcasting as a tradable service, thus, subject to the rules on free movement between the Member States. This economics based approach was the underlying rationale that was then used by the European Commission to push for regulatory intervention in the media sector. Yet it was only through the inclusion of a specific article on culture in the Treaty of Maastricht that the path was opened for more comprehensive interventions,[6] despite the limited competence enjoyed by the EU in the cultural field. The current policy framework recognises both cultural and the economic dimension, and at the same time fosters the protection of public interest values, such as media pluralism and the protection of human dignity in the media sectors.

The history of the Council of Europe's (CoE) involvement in media policy has a different basis, as it dates back to 1950 when the CoE acknowledged the importance

[6] See the recent Commission Communication on Creative Content Online, in the Single Market, COM (2007) 836 final, where the Commission considers that policy makers should still consider the need to promote the dual objectives of competitiveness and cultural diversity in order to manage the systemic changes currently taking place. See I. Maghiros, "Information, telecommunication technologies and media convergence challenges – perspectives on the creative content industries" in C. Pawels, H. Kalimo, K. Donders, and B. Van Rompuy (eds), *Rething European media and communication policy*, (2009), at p. 41.

of freedom of expression and information by declaring it a fundamental right in Article 10 of the European Convention on Human Rights (ECHR). The ECHR gave the CoE the legal means to defend that freedom in practice: although it has been rarely invoked before the 1960s and 1970s, Article 10 of ECHR has since become increasingly important and has been used to make the point in many cases of the European Court of Human Rights that the right to freedom of information takes precedence over the political, legal, and economic imperatives which are sometimes given as reasons for restricting it. In a parallel process, the CoE also devised tools and structures to guarantee and strengthen freedom of expression across the continent. From the 1958 European Agreement concerning Programme Exchanges[7] to the recent Convention on Cybercrime, the CoE's work has encapsulated and regulated an increasingly complex world of information addressing the most relevant issues, such as journalistic freedom[8] and the protection of pluralism. It is should be emphasised that, since 1981, media issues gained such a importance to require a separate expert committee, the Steering Committee on the Mass Media, which was created within the Human Rights Directorate of the CoE. The role of this committee was to develop alone or in collaboration with other Council bodies recommendations and resolutions covering general or specific media issues.[9]

The following analysis will take into account these two different frameworks in order to inquire into the interventions that have developed progressively to address the issue of a free and democratic media system by the EU (in par. 2) and by the CoE (in par. 3). This will provide the basis for a comparative evaluation of the effectiveness of these supranational organisations in supporting media freedom and independence, taking into account the institutions or bodies involved in the process and the type of regulatory instruments used in each context (par. 4). Conclusions will follow.

## 2. EU media policy

The role of the European Union in the field of media policy has become especially pronounced over the last decades. However, EU media policy is closely intertwined with the wider perspective of the regulatory framework for communications. The traditional distinction between regulation of infrastructure (communication) and regulation of content (media), although technological innovations have blurred the boundaries between the traditional telecommunications and media sectors, still resists. Thus, the current analysis will focus on regulation of content, however, where needed, will take into account also the current framework of infrastructure regulation.

From a different perspective, it is acknowledged by academic literature that EU media policy is rooted into industrial policy,[10] and this can be interpreted as one of the reasons why this policy has been mostly focused on regulating capital

[7] See that this Agreement and the following European Agreement on the protection of Television broadcast, in 1960, provided the basis for the programme exchanges within the European Broadcasting Union, allowing television companies to authorise or prohibit cable retransmission or broadcasting in the signatory states. See K. Karaca, *Guarding the watchdog: The Council of Europe and the media* (2003), at p. 13.

[8] See the Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, available at: https://wcd.coe.int/ViewDoc.jsp?id=342907&Site=CM (last visited on 26/10/2010)

[9] See Karaca, *Guarding the watchdog*, p. 15.

[10] A. Hartcourt, *The European Union and the regulation of media market* (2004) at p. 9.

investments and provision of services within the internal market as primary objectives.[11]

Since the first interventions, not all media sectors have been addressed by the EU institutions.[12] The focus of the enacted regulations has been on broadcasting,[13] with the landmark Directive on Television Without Frontiers (hereinafter TWF) in 1989.[14] This directive clarified the approach of the EU to the broadcasting sector, as it was predominantly directed at providing the basis for the free circulation of television programmes in the Community and establishing a minimum harmonisation of rules on advertising. Economic consideration was the structure of this regulatory intervention, but it was coordinated with non-economic elements, such as the protection of minors and of human dignity, the introduction of the right of reply throughout Europe,[15] and the protection of cultural diversity.[16] Given the membership of all the EU member states to the European Convention of Human Rights, the European legislator was able to leave the remaining aspects of television programming content to the application of Article 10 of the ECHR.[17]

Only in the 1990s was a legitimate means to develop a more comprehensive policy in the media field defined, through what is now Article 167 of the Treaty on the Functioning of the European Union on culture included in the 1992 Treaty of Maastricht,[18] and the 1997 *Protocol on the System of Public Broadcasting* in the Treaty of Amsterdam.[19] The action of the EU was also enriched with a more interventionist approach of the EU institutions setting the agenda for the development of the information society, which was outlined firstly in the 1993 *White Paper on*

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[11] At the same time the EU could not ignore the fact that media systems are embedded within the national states, due 19th century historical development of such systems. Thus, the European intervention over media system was required to balance also such national elements. See E. Dommering, "General introduction", in O. Castendyk, E. Dommering, A. Scheuer, *European media law (*2008) at p. 11.

[12] See D. Hutchinson, "The EU and the press: policy or non-policy?", in K. Sarikakis, *Media and cultural policy in the European Union*, 24 European Media studies (2007) 183.

[13] The possibility for the EU to develop its media policy in this sector is to be found in the two main decisions of Sacchi and Debauve, and in particular the former which declared that broadcasting as a trade-able service. See Case C-155/73, *Giuseppe Sacchi, Reference for a preliminary ruling: Tribunale civile e penale di Biella*, ECR (1974) 00409 and Case C-52/79, *Procureur du Roi v Marc J.V.C. Debauve and others*, ECR (1980) 00833.

[14] Note that the *Green Paper on the establishment of a common market for broadcasting, especially satellite and cable - Television without frontiers*, COM (84) 300 final, dates back to 1984 and it took five years of negotiations to get the subsequent directive approved.

[15] Note that in some Member States such a right was already enforced, for instance in the case of Italy.

[16] See, for instance, Article 4 TWF Directive on the promotion of distribution of European media products and the production of Television programmes.

[17] See below par. 3.

[18] In particular, Article 167 provides that:

*"1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.*

*2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:*

*— improvement of the knowledge and dissemination of the culture and history of the European peoples,*

*— conservation and safeguarding of cultural heritage of European significance,*

*— non-commercial cultural exchanges,*

*— artistic and literary creation, including in the audiovisual sector".*

[19] See OJ [1997] C340/109. On the content of the Protocol see also, R. Mastroianni, "Il Protocollo sul sistema di radiodiffusione pubblica", Il diritto dell'Unione Europea (1990) 538 and ff.

*Growth, Competitiveness, and Jobs*[20] and in the 1994 Bangemann Report,[21] and then more clearly defined within the media and communication system in the *Green Paper on the Convergence of Telecommunication, Media and Information Technology Sectors, and implications for Regulation* of 1997.[22] The latter document envisaged, in the drafting, the abandonment the public service broadcasting model in favour of a horizontal regulation of the media;[23] however, in the final version the old sector-specific approach was retained, and only in more recent interventions, such as the Audiovisual Media Service Directive (hereinafter AVMS), this shift can be seen in practice.[24]

It is clear from the history of the development of EU media policy that the primary rationale for this policy is to be found in the economic sphere, developing three axes of regulation: regulation of networks (including the fixed telecommunications/IP networks, mobile networks, cable networks, broadcasting networks as well as satellite networks); regulation of service provision (where broadcasting was the most prolific area of regulation); and regulation of content.[25] These three components have mostly envisaged trade liberalisation and market integration in the media sectors; however, this has not excluded indirect interventions to improve the level of freedom and democracy of the media systems at European level. The main rationale that has provided this (in)direct effect has been the introduction in the European debate of the concept of media pluralism,[26] used since 1992.[27] However, this notion has never been defined in clear terms by the European institutions, rather it has been understood from different perspectives, namely cultural and political, and emphasis has been placed on its relationship with competition law.[28]

In order to analyse the direction taken by the EU in this respect, it is useful to clarify briefly the different meanings attributed to media pluralism by the EU

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[20] European Commission, *Growth, competitiveness, employment: The challenges and ways forward into the 21st Century - White Paper*. Parts A and B. COM (93) 700 final/A and B.

[21] Commission Report on Europe and the global information society: recommendations of the high-level Group on the information society to the Corfu European Council [follow-up to the White Paper]. Bulletin of the European Union, Supplement No. 2/94.

[22] Green Paper *on the Convergence of the telecommunications, media and information technology sectors, and the implications for Regulation - Towards an information society approach*, COM(97) 623 final.

[23] In particular, the document proposed a public library model in which the information required was bought in from third-party producers and made available to the public in form of a virtual library.

[24] However, the coordination between this and previous directives, such as the 2000 e-Commerce directive, is not perfectly clear, as it is possible that linear and non-linear services provided by a single platform could be regulated, either simultaneously or successively, by the aforementioned directives, ending in an ambiguous regulatory framework for the service provider. See more on this point in M. Holoubeck and D. Dramajanovic, *European content regulation – A survey of the legal framework* (2007) at p. 122 and ff.

[25] See H. Kalimo and C. Pawels, "The converging media and communications environment", in C. Pawels, et al., *Rethinking European media and communications policy* (2009) 3, at p. 4 and ff.

[26] The notion of 'media pluralism' is frequently nuanced and often assimilated with related concepts such as 'media diversity', 'plurality of the media', 'media variety' and 'information pluralism'. See D. Westphal, "Media pluralism and European regulation", 13 European Business Law Review 5 (2002) 459.

[27] See the Commission Green Paper, *Pluralism and media concentration in the internal market – An assessment of the need for community action*, COM (92) 1980. For a criticism of the 'catch-all' concept of media pluralism with a limited interest in a more clear definition see V. Zeno-Zencovich, *La libertà di espressione – Media, mercato, potere nella società dell'informazione* [*Freedom of expression – Media, market, power in the information society*] (2004), at p. 33.

[28] See Dommering, "General introduction", pp. 22-23.

institutions: first, cultural pluralism can be understood as way of promoting content variety in the different media as a part of a more general cultural policy. In this sense, the rational is partly economic, i.e. a solution for market failure where the market does not produce enough cultural goods owing to high production costs and low demand, and partly non-economic, i.e. for educational purposes. Political pluralism, instead, is part of the governmental media policy focus on increasing the possibilities for all political and social movements to have access to the media. Finally, pluralism can be defined also as a competition law concept, in the sense of facilitating a multiplicity of providers to access the media market. This approach takes into account the need to monitor dominant providers in order to prevent abuses and merger controls, which could potentially result in dominant positions being exploited to monopolise adjacent upstream and/or downstream markets, which should be prevented.

Media pluralism has been interpreted by the EU institutions as a precondition for the existence and the exercise of the fundamental right of freedom of expression,[29] and its derived freedoms to hold opinions, to receive and impart information and ideas, since it ensures the representation and reproduction of the different viewpoints that are present within a democratic society.[30] However, academic literature has underlined that this diversity should not to be evaluated only under a quantitative dimension, rather under its actual qualitative variety and diversity, either for the political or the cultural facet.[31]

The enhancement of pluralism has resulted as an indirect effect of the competition rules, in particular general competition tools to tackle over-dominant positions of providers,[32] while positive obligations fostering the production of European audiovisual products in order to promote variety of content can only be found in cultural based interventions. It should be noted that the two approaches were mostly related to two different institutions involved in media policy, namely the European Parliament and the Commission. The latter was more involved in the media ownership and media concentration dimension as this appeared more closely connected with the internal market perspective, without taking pluralism as an EC objective;[33] whereas the former, through various resolutions has shown the cultural dimension greater attention.[34]

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[29] This link is to be found both in the legal text, such as in the case of Article 11 of the European Charter of Fundamental Rights, and in the jurisprudence of the ECJ, in relation to Article 10 of the ECHR. See more below for further detail.

[30] See F. Barzanti, "Governing the audiovisual space – What modes of governance can facilitate a European approach to media pluralism", unpublished, provided by the Author (2008).

[31] D. Westphal, "Media pluralism and European regulation".

[32] See the application of Articles 81 and 82 TEC, *inter alia*, in case Commission, Decision 2004/311/EC of 2 April 2003, *Newscorp/Telepiù* (Case COMP/M.2876), OJ L110/73, 16/04/2004.

[33] Note that the Commission Green Paper *on pluralism and media concentration in the internal market*, clearly expressed the position of the Commission on the fact that preserving pluralism is not in itself an EC objective.

[34] See the several interventions of the European Parliament published mainly in the 1990s: Resolution on media takeovers and mergers, OJ C 68, 19/03/1990, p. 137; Resolution on media concentration and diversity of opinions, OJ C 284, 2/11/1992, p. 44; "Resolution on the commission Green Paper "Pluralism and media concentration in the internal market"', OJ C 44, 14/02/1994, p. 177; Resolution on concentration of the media and pluralism, OJ C 323, 21/11/1994, p. 157; Resolution on pluralism and media concentration, OJ C 166, 3/07/1995, p. 133. See K. Sarikakis, *Powers in media policy: The challenge of the European Parliament* (2004).

Only more recently, through the reference in Article 6.1 of the Treaty of Lisbon,[35] the intertwining connection between fundamental rights and media pluralism has gained more legal substance, as the Charter of Fundamental Rights of the European Union explicitly recognises freedom of expression and information as fundamental rights that belong to everyone, in Article 11. This provision, corresponding to the wording of Article 10 of the European Convention of Human Rights in its first indent,[36] clearly states in paragraph 2 that "*freedom and pluralism of the media shall be respected*". As it appears from the *travaux préparatoires* of the Charter, the second indent was inserted at a later stage in the long drafting process of Article 11. It was indeed included into an amendment originally providing explicitly for cultural and political pluralism to be "guaranteed".[37] However, after further modifications, the final agreed and adopted version eventually included the significant change of the verb "guaranteed" into "respected". Thus, on the one hand, the inclusion in the Charter of the principle of pluralism in the media – though not defined nor articulated – can surely be taken as an indicator of its acknowledged relevance as a principle that results from the constitutional traditions common to the EU member states, and hence the necessity to observe it as a general principle of Community law, as it stems directly from the freedom of expression.[38] However, Article 11.2 shows and reinforces the prevailing attitude of the Community towards media pluralism as a predominantly negative stance, rather than in terms of a proactive approach to guarantee it directly and in practice, and promote it at European level.

The aforementioned reference in the Charter of Fundamental Rights is not the only source of primary EU law where media pluralism is addressed. Indeed, the Protocol on the system of pubic broadcasting in the Member States, introduced as an annex to the Treaty of Amsterdam and which entered in force in 1999, explicitly refers to media pluralism in the context of pubic service broadcasting (PBS). In focusing on PBS, the protocol mainly purported to offer an interpretative aid for the application of EU competition and state aid law to the funding of public service broadcasters, which are set up and organised by each Member State. The Protocol highlights the need to strike a balance between the realisation of the public service remit entrusted upon PSBs and the achievement of the common supranational interest in the efficient and undistorted functioning of the EU's internal (broadcasting) market;

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[35] Note the vague wording of Art. 6 (1) which provides that the Charter has the "*same legal value of the Treaties*", nonetheless interpreted as conferring on the Charter the same legally binding nature of the EU treaties.

[36] See below par. 3, Article10 (1) of the ECHR provides that "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*", while Article11 (1) of the Charter of Fundamental Rights replicates the same text of the first two sentences, but it excludes any reference to the last indent. This does not imply that the EU legislator wanted to limit the possibility for Member States to impose licensing rules on broadcasting, television and media enterprises; rather this gap is filled by the application of Art. 52 of the Charter, that clarifies in (3), "*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*".

[37] B. Klimkiewicz, "Media pluralism: European regulatory policies and the case of Central Europe" EUI Working Paper RSCAS (2005), at p. 4.

[38] Barzanti, "Governing the audiovisual space", p. 19.

and hence to reconcile the latter with the former.[39] In dealing with such a public service task that has a strong political dimension, the Protocol indicates that the reason for paying this special account to PBS 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*". Also in this case, then the negative integration route, founded on the application of the free movement and competition rules and the removal of national barriers to trade prevailed over a positive harmonisation route, based on the adoption of regulatory measures to approximate justified obstacles to trade integration.

Before examining the few positive interventions within the media policy field, the important role of the ECJ in regulating media markets in the EU should be acknowledged, as it "*has represented the only EU institution with the legal resources to assess national media laws and Court decisions, and mandate direct changes to the composition of the media market*".[40] The ECJ's role in media regulation has been crucial. It was indeed the ECJ that established the legal competence of the EU to engage in media policy-making through its judgments in the *Sacchi* and *Debauve* cases.[41] Indeed, the legal definition of broadcasting as a service of economic interest, paved the way not only for the Court to develop its body of media case law; it also placed broadcasting in the realm of economic policy to be decided at the European level, pointing to also the legal basis that could be used for the adoption of the already mentioned TWF directive.

Within the following case law, two main points can be raised highlighting the different perspectives that the ECJ has had on media regulation, in particular taking as a point of reference the media pluralism notion.

First, the safeguard of media pluralism at Member State level has been justified given its connection to freedom of expression, which is mainly protected by Article 10 ECHR.[42] The ECJ has stated that "*fundamental right form an integral part of the general principles of law, the observance of which it ensures*".[43] Accordingly, in ensuring the exercise of fundamental market freedoms, the ECJ has also guaranteed respect for the fundamental right to freedom of expression and the maintenance of media pluralism which connected to it.[44] Thus, in balancing different fundamental

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[39] On the role and importance of PBS, see also I. Katsirea, *Public broadcasting and European law: a comparative examination of public service obligations in six member states* (2008) at p. 167 ff.

[40] Harcourt, *The European Union and the regulation of media markets*, p. 36.

[41] See Case C-155/73, *Giuseppe Sacchi,* and Case C-52/79, *Procureur du Roi v Marc J.V.C. Debauve and others*.

[42] A separate body of judgments based on Article11 of the Charter of European Fundamental Rights is yet to be developed, as no reference to this provision has been made by the ECJ in its most recent case-law. It is possible that the incorporation of the Charter in the Treaty of Lisbon would pave the way for a coordinated reference to the ECHR's and Charter's provisions.

[43] See Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, ECR 1991 I-2925, par. 41.

[44] Note that in many cases the lack of consistency between the interpretation of Art. 10 by the ECtHR and the concurrent interpretation by the ECJ has been emphasised by academics, not only in terms of formality (for instance given the different *locus standi* provided in the two jurisdictions), but also in terms of substantial results, for instance where the ECJ did not refer to the most relevant case law of the ECtHR or to no case law at all. For a detailed analysis of the relevant case law of the ECJ on freedom of expression see L. Woods, 'Freedom of expression in the European Union', 12 European Public Law (2006) 371 and ff.

rights and principles, the ECJ has demonstrated that there is no absolute trade integration taking place at the expense of protected human rights. In other words, trade law should respect in its application wider values such as freedom of expression, and more specifically media pluralism. An example of this approach can be seen in the *Familiapress* case, where an Austrian ban on marketing magazines containing prize crosswords was analysed by the ECJ, and a balance was struck between the free movement of goods, and freedom of expression (on the part of the publisher of the German magazine) and media pluralism (of the Austrian press), on the other.[45]

From a different perspective, the ECJ has elaborated a consistent set of judgements regarding the application of the freedom of movement rules where the presence of national regulations that could result in impediments to trade can be justified, and thus upheld, because they aim to safeguard media pluralism.[46] This approach stems from the reasoning that media pluralism forms part of cultural policy which may constitute an overriding requirement relating to the general interest thus justifying a restriction on the freedom to provide services.[47] However, this possibility was not interpreted in an expansive fashion, as the ECJ conducted assessments of the cases in light of a strict proportionality and necessity test, which resulted in several negative appraisals of the possibility of upholding national regulations.[48] In this line of cases, the ECJ has certainly interfered with Member States' regulation, despite clearly recognising that media pluralism is part of a policy domain reserved to Member States.[49] This was also recently supported by the *Centro Europa 7* judgement,[50] where the Court indirectly, yet manifestly, interfered with Italian policy towards media pluralism, by challenging the compatibility with EU law of governing the process of granting broadcasting licences, for lack of objective, transparent, non-discriminatory and proportional criteria contained within them.

Turning to the legislation in force at European level concerning media services, the existing pieces of legislation harmonise national rules, mainly in television broadcasting, and introduce in several provisions rules that improve the level of freedom and democracy in Member States' media systems.

However, it must again be noted that the trigger for intervention by the EU legislator is found in the objective of favouring the completion and the effective functioning of the internal market for broadcasting services.[51]

The first point of reference is the TWF Directive that paved the way for the EU audiovisual regulation and policy. The text was elaborated in parallel with the text

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[45] See Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECR 1997 I-03689.

[46] See Case 352/85, *Bond van Adverteerders and others v The Netherlands State*, ECR 1988 2085; and Case C-211/91, *Commission of the European Communities v Kingdom of Belgium*, ECR 1992 I-6757.

[47] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media ("Mediawet I")*, ECR 1991 I-04007; Case C-353/89, *Commission of the European Communities v Kingdom of the Netherlands*, ECR 1991 I-4069; Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*, ECR 1993 I-00487; Case C-250/06, *United Pan-Europe Communications Belgium SA and Others v Belgian State*, ECR I-11135.

[48] See case *Stichting Collectieve Antennevoorziening Gouda.*

[49] See R. Craufurd Smith, *Broadcasting Law and fundamental rights* (1997), at p. 186.

[50] See ECJ C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECR 2008 I-00349.

[51] See B. De Witte, "Non-market values in internal market regulation", in N. Nic Shuibhne (ed.), *Regulating the internal market* (2006) 61.

of the European Convention on Transfrontier Television,[52] and took into account not only the market dimension of the audiovisual services but also their cultural value. This was also clarified by the fact that the Directive introduced some specific and content-oriented measures aimed at promoting wider values, such as the protection of minors, respect for human dignity and protection of the consumer. Moreover, against the background of the cross-sectional clause of Article 167 (4) TFEU, the TWF Directive embodied provisions such as the "European-quota rules" intended to promote the distribution of European television programmes and independent productions.[53] Additionally, the Directive imposed measures to ensure that events which are regarded by Member States as being of major importance for society, could not be broadcast in such a way that a substantial part of the population of that country would be prevented from accessing them.[54]

The successor to the TWF Directive, the recently adopted AVMS Directive,[55] also is oriented in this direction. This is the result of a second and more radical amendment to the TWF Directive, which was necessary to adapt it in accordance with the technological developments taking place in the media sector, and to structure and consolidate at the EU level one of the two poles of the future, and currently under development, "law of convergence".[56] One of the relevant changes is the graduated extension of the scope of the application of the Directive to "all audiovisual media services", moving away from the traditional identification with television broadcasting, to a wider notion that encompass new platforms for delivery, such as satellite and cable television, and new media, such as personal computers and mobile phones. Article 1 (a) of the AVMS Directive distinguishes in particular between linear (television broadcasting) and non-linear (video-on-demand) services, including in the latter definition any service "*provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request*".[57] Thus, this wide definition also permits the inclusion of services provided through the Internet and delivered to any digital device within the Article's application.

Although the language of the provisions seems more exhortative than binding, the Directive also extended the reach of the European-quota rules and added a measure providing for a right to short reporting so as to ensure freedom and plurality of information. In this sense, the Directive, without mentioning directly freedom of expression or media pluralism, promotes them. It is precisely freedom of expression and media pluralism that the measures mentioned above aim at achieving.

In the interim between the two Directives on the broadcasting/audiovisual sector, another attempt were made by the EU institutions to deal with another perspective related to the promotion of free and independent media. The case refers to the proposal to adopt a Directive on "Concentration and Pluralism in the Internal Market", which was mainly aimed at harmonising the disparities between national

[52] See below par. 3.
[53] See Article 4 and 5 TWF directive.
[54] See Article 3, lett a. TWF directive.
[55] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, P. 27–45.
[56] G. Morbidelli and F. Donati (eds) *Comunicazioni: verso il diritto della convergenza* [*Communications: towards a law of convergence*] (2003).
[57] See Article 1 (g) AVMSD.

regulations on media concentrations and at setting common standards for measuring and evaluating them at EU level. This proposal on the one hand advanced the internal market functioning rationale to legitimise the intervention, but on the other hand it referred to the need to promote media pluralism at the European level. However, the proposal did not materialise in a legislative intervention, not even in its less ambitious formulation which was free from direct references to media pluralism.[58] The reason for the failure was primarily related to the lack of a legal basis upon which the Directive could be based.[59] At the same time, national governments and national regulatory agencies resisted the attempts to move the policy arena to the European level. This demonstrated the huge difficulties the EU faces when seeking to including public interest goals in its policy-making, given its reliance on economic instruments for regulating media markets.

If the printed press is examined, EU competences there are substantially limited.[60] The printed press is one of the prime examples of national or even regional competence, and its situation often reflects the varying media traditions in the different Member States, and the common for the Member States resort to self-regulation in the field. Thus, there is no EU legislation specifically on the printed press, nor can there be such legislation under the present state of the Treaty. Nevertheless, the EU institutions, and in particular the European Commission, have always looked favourably on the development of the written press throughout the EU.[61]

The previous discussion of the interventions of the EU shows that, despite the tendency to indirectly promote freedom of the media, through the prism of media pluralism, weak solutions are provided and evident regulatory gaps emerge at the EU level. This is possibly all due to the lack of an explicit competence in this area on the part of the EU. However, the EU institutions have presented differing alternative solutions that attempted to achieve the same goal through soft law and independent studies. Particular mention should be made of the three step process on media pluralism elaborated in 2005 and put into practice in 2007.[62] The process was based on a broadened concept of media pluralism, covering not only media ownership issues but also access to a variety of information (so citizens can form opinions without being influenced by one dominant source) and transparent mechanisms that guarantee that the media are genuinely independent.

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[58] For a wider account of such an initiative see Harcourt, *The European Union and the regulation of media market*, p. 62-89.

[59] See R. Craufurd Smith, "Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship", 29 European Union Law (2004) 652.

[60] Hutchinson, "The EU and the press: policy or non-policy?", p. 191 and ff. See that the latest intervention by the Commission on this issue dates back to 2005 with the Commission staff working paper, strengthening the competitiveness of the EU publishing sector - The role of media policy, SEC(2005) 1287, 7/10/2005.

[61] In June 2009, a European Charter on Freedom of the Press has been presented, drafted by journalists across Europe. The Charter on Freedom of the Press initiated by the European journalist community is an important reaffirmation of the basic values, including freedom of expression and information that underpin Europe's democratic traditions and are enshrined in fundamental legal texts such as the EU Charter of Fundamental Rights. The Charter is therefore an important step towards reinforcing these basic values and rights allowing journalists to invoke them against governments or public authorities whenever they feel the freedom of their work is unjustifiably threatened.

[62] See the Press Release of the overall process, European Commission, "Media pluralism: Commission stresses need for transparency, freedom and diversity in Europe's media landscape", http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/52 (last visited on 25/10/2010).

The process includes the Commission Staff Working Paper on Media Pluralism[63] that provided an account of the essential work undertaken by the Council of Europe on the issue, and offered a concise first survey of Member States' audiovisual and print media markets. This was followed by a study on media pluralism[64] that provided the concrete and objective criteria for measuring media pluralism. The process was then supposed to end with a Commission Communication on indicators for media pluralism in EU member States, to be followed by a broad public consultation, but that is yet to be completed. Although the study, published in early 2009, raised conflicting reactions from academics and policy-makers, the positive aspect of this debate is the attention it attracted at the European level. Far from suggesting regulation, a task for the Member States, the EU Commission was given a monitoring role of media pluralism in the EU Member States.

There is an additional point to the specific situation of new media, and in particular Internet providers that can alternatively or contextually provide access, content and/or services. This group of operators includes not only audiovisual service providers which are web-based (such as a on-line TV channel), but also operators who provide user-generated audiovisual content (e.g. Youtube), and intermediaries in the distribution of content (such as search engines). As mentioned above, the AVMS Directive does not include in its definition of non-linear audiovisual services the second category, in order not to impose the burdens of registration and administrative costs on actors that operate only as platforms which do not undertake any editorial tasks and activities. However, some authors have criticized this legislative choice, arguing that it results in a regulatory gap because the AVMS Directive does not deal with liability for illegal or harmful content (or provide an exemption from which) in the case of content distributors, nor does it contain any clarification of their obligations with regard to audiovisual content that is not edited by them but to which they provide access. Thus, user-generated content portals can only be regulated by the E-commerce Directive (Directive 2000/31/EC) as "information society service providers", and consequently, be subject to the different liability regimes in force in the various Members States.[65]

On a different note, it should be noted that the current distinction between transmission[66] and content regulation with respect to audio-visual services also has difficulties in grasping the third category mentioned above, as search engines and Internet portals that provide access to content edited by third parties do not fall either in the transmission regulation or in the content services provision regulation. Hence, although they can be framed as "gatekeepers" of information and knowledge, they can only be regulated under the e-commerce directive's liability regimes.[67]

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[63] European Commission, Commission staff working document on media pluralism in the Member States of the European Union, SEC(2007) 32, 16/01/2007.

[64] See the K.U.Leuven et al., Independent study on indicators for media pluralism in the Member States - Towards a risk-based approach (2009), available at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf (last visited on 25/10/2010).

[65] See P. Valcke, D. Stevens, E. Lievens and E. Werkers, "Audiovisual media services in the EU next generation approach or old wine in new barrels?", 71 Communications & strategies (2008) 103, at p. 113 ff.

[66] Network operators providing technical transmission services, including conditional access services, are regulated by the Electronic Communications Directives of 2002. See below par. 4, part. fn 108.

[67] See the recent case involving a search engine decided by the ECJ, joined Cases C-236/08 to C-238/08, *Google France, Google, Inc. v Louis Vuitton Malletier* (C-236/08), *Viaticum SA, Luteciel*

Given the importance of new media in the lives of citizens, and in particular the participatory models of Internet-based services,[68] the current regulatory framework seems to still lag behind, as it is not yet able to address the legal issues at the core of the new technological environment. The EU should then to start a careful and profound analysis of the possibilities through which such new media could be regulated, so as to implement freedom of expression.

### 3. The media policy of the Council of Europe

The Council of Europe has a long history of interventions in the field of free and independent media, interpreted as a fundamental basis for the development of a democratic and participatory legal framework for citizens.

The main reference point has been the practical and effective application of the principle of freedom of expression as embedded primarily in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), in Article 10. As a matter of fact freedom of expression has been described by the European Court of Human Rights (ECtHR) as "*one of the basic conditions for the progress of democratic societies and for the development of each individual*".[69] However, it is not only the jurisprudence of the ECtHR where freedom of expression has been affirmed has been affirmed; many other texts of the CoE refer to it, clarifying in each case the limits that it should be subject to. In this sense, the CoE clearly endorses the interpretation of freedom of expression as a "relative" right rather than an absolute one, which should always be balanced in the broader system of human rights in any case of conflict or overlap.[70]

The main documents regarding freedom of expression are: the aforementioned ECHR and related jurisprudence; the European Convention on Transfrontier Television (ECTT); the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML). Although all of them contribute to the definition of the boundaries of freedom of expression, for the purpose of this study only the first two will be analysed in depth. Additionally, this study will take into account the recommendations and resolutions taken by different bodies of the CoE, such as the Committee of Ministers, the Venice Commission, the Steering Committee on Media and New Communication Services and the European Ministerial Conferences on Mass Media policy, that also contributed to the debate on the multiple facets of freedom of expression.

The first provision to be analysed is Article 10 of the ECHR that provides:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not*

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*SARL* (C-237/08), *Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), 23 March 2010, nyr.

[68] See more generally Y. Benkler, *The wealth of networks* (2008).

[69] *Handyside v the United Kingdom*, n. 5493/72, judgment of 7 December 1976, Series A, n. 24 § 49.

[70] See for instance the common case of conflict between the right to freedom of expression and the right to respect for private life, also included in the ECHR under Art. 8 which has been analysed more recently by *Von Hannover v Germany*, n. 59320/00, decision of September 24 2004, 40 EHRR 1. On this case see E. Barendt, "Balancing freedom of expression and privacy: The jurisprudence of the Strasbourg Court", 1 Journal of Media Law (2009) 49.

*prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

This provision distinguishes three main components of freedom of expression: the right to hold opinions, the right to receive information or ideas, and finally the right to impart information or ideas. It is possible to attach each of the aforementioned rights to the position of speakers and listeners. Although these three dimensions are all protected by the same comprehensive principles they can in practice conflict with each other, such as in the clear case of hate or racist speech.[71] One further dimension that instead is not expressly mentioned in the letter of the Article is the right to seek information, which has become, through the case law of the ECtHR, the basis for the protection of the activity and role of journalists.

From the perspective of media regulation, the aforementioned article does not prevent states from defining licensing schemes. However, the second provision of the article sets limits to the core right, listing a number of grounds on the basis of which the right may legitimately be restricted, provided that the restrictions are prescribed by law[72] and are necessary in a democratic society. Under the ECtHR case law the latter element implies "a pressing social need", which is evaluated by each state with some discretion (the so-called "margin of appreciation"). The ECtHR justifies this approach by linking the permissibility of restrictions to freedom of expression with the existence of duties and responsibilities which govern its exercise.[73] Moreover, the latter must be used only when strictly necessary and should always be interpreted narrowly. In other words, the right to freedom of expression is always the norm and any restrictions of it the exception.

It should be noted that the right to freedom of expression may also be limited on the basis of Article 17, ECHR, which can be regarded as a safety mechanism, designed to prevent the ECHR from being misused or abused. In particular, the ECtHR applied it in order to limit the expansion of the protection offered by Article10 to racist, xenophobic or anti-Semitic speech; statements denying, disputing, minimising or condoning the Holocaust, or (neo-)Nazi ideas.[74]

Regarding the relationship between freedom of expression and the democracy enhancing role of the media, it should be emphasized that the ECtHR case-law has continually referred to the so-called "argument for democracy" as a basis for its

[71] A speaker's right to utter racially abusive remarks, for example, would be pitted against a listener's right to be protected from racism. All this would have to be weighed up against third parties' right or interest not to allow racist utterances in public.

[72] According to the Court, the requirement is not only of a legislative provision that should be complied with, rather the law applicable could also be for instance a ministerial ordinance, however it must be sufficiently precise in order to enable the applicant to regulate its conduct. See the case *Gawęda v Poland*, n. 26229/95, judgment of March 14 2002, Reports 2002-II.

[73] See M. Janis, R. Kay, A. Bradley, *European human rights law: text and materials*, 3rd ed. (2008), at p. 292 and ff.

[74] *Norwood v the United Kingdom*, n. 23131/03, judgment of November 16 2004, Reports 2004-IX.

reasoning.[75] In particular, the Court has stressed on many occasions the role of the media as a source of information and as a venue for the presentation of different political positions, with the ability in both cases of enhancing and supporting citizens in defining their own opinions. These two roles are the EctHR's main focus for these activities. Concerning the former, i.e. as a source of information, the main point of reference is that the radio and television "*are media of considerable power and influence. Their impact is more immediate than the other print media*".[76] Concerning the latter, i.e. the provision of a forum for public debate, this was traditionally applicable to the press, but it is yet to be found in the new media technologies that contributed to an active participation of citizens.[77]

From a different perspective, the ECtHR has attributed the function of "public watchdog" to the media, implying their monitoring role over governments and the importance of the publication of any wrongdoing.[78] In particular, the Court has repeatedly presented the press as an "agent of the people",[79] with the ability to enhance the public's "right to know".

Given the relevant importance of this role of public watchdog, journalists have been provided with a privileged protection by the ECtHR. The Court has given legal recognition and protection to specific journalistic practices and realities: the freedom to report and comment on matters of public interest; presentational and editorial freedom (including recourse to exaggeration); protection of sources of information; and intellectual property rights. However, this has not been thought of as a form of disparity of treatment between two classes of speaker, i.e. journalists and those who are not journalists.[80] The differentiation is instead based on a taxonomic approach to free speech,[81] where speech value depends on the type of content it carries. Indeed, the Court has never distinguished the subject expressing her own opinions or ideas, but rather distinguishes three types of content that hierarchically are classified in the following way: political speech, artistic expression, and commercial speech.[82]

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[75] T. McGonagle, "Free expression and respect for others" in Y. Lange (ed.), *Living together: a handbook on Council of Europe standards on media's contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation*, (2009) 5, at p. 11.

[76] *Purcell and others v Ireland*, n. 15404/89, decision of April 16 1991, DR70, 262.

[77] See *Castells v Spain*, n. 11798/85, judgment of April 23 1992, Series A, n. 236, where the Court clarified that, "the preeminent role of the press in a State governed by the rule of law must not be forgotten […] freedom of the press affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of their political leaders. In particular, it gives the politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate tin the free political debate which is at the very core of the concept of a democratic society" (ib. § 43).

[78] *Goodwin v the United Kingdom*, n. 28957/95, judgment of March 27 1996, Reports 1997-II, where the ECtHR stated that the "*vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected*" if the press could not protect their confidential sources. See in a different framework, *Jersild v Denmark*, n. 15890/89, judgment of September 23 1994, Series A n. 298 and more recently *Tonsberg Blad as a Haukom v Norway*, n. 510/04, judgment of March 1 2007, 46 EHRR 30.

[79] See D. Carney, "Theoretical underpinnings of the protection of journalists' confidential sources: Why an absolute privilege cannot be justified", 1 Journal of Media Law (2009) 117.

[80] See P. Wragg, "Free speech is not valued if only valued speech is free: Connolly, constituency and some article 10 concerns", 15 European Public Law (2009) 111.

[81] T. Martino, "In conversation with professor Eric Barendt: hatred, ridicule, contempt and plan bigotry", 18 Entertainment Law Review (2007) 48, at p. 51, cited in Wragg, "Free speech is not valued if only valued speech is free", p. 118.

[82] For the supremacy of political speech, see *Lingens v Austria*, n. 9815/82, judgment of July 8 1986, Series A n. 103.

Although useful, rough categorisation has been criticised as difficult to apply in those cases where the boundaries between the different categories is blurred, in particular where the Court has faced the hybrid nature of many types of expression. The consequence of such a difficult inclusion of speech into the "right" category could then result in a different decision based on a higher or lower level of protection accorded.[83]

As already mentioned, the ECtHR has affirmed that speech involving political issues and also political figures[84] serves a central role in the functioning of democratic societies. Therefore, arguments that a restriction of such discussion is necessary in such a society will be harder to maintain.[85] However, the Court did not distinguish the case of protection accorded to civil servants and politicians, in particular when they are under attack through insult and injury, underlining the fact that in both cases they "*must enjoy public confidence in conditions free of undue perturbation if they were to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty*"[86].

Regarding the media, and broadcasting in particular, the jurisprudence of the ECtHR is quite developed. As already mentioned, Article 10(2) provides the possibility for States to regulate broadcasting through licensing schemes; however, any regulatory framework would still have to satisfy the other requirement of the same proviso, namely that the restrictions should be prescribed by law and be necessary in a democratic society.[87]

The main precedent on this issue concerned Austrian legislation on the national public monopoly on broadcasting.[88] The Court held that such monopoly was not necessary to guarantee impartiality, balance and diversity in broadcasting, and also compared the Austrian approach to the regulatory choices made by other European countries on the same issue. In particular, the Court emphasised that other countries achieved the aforementioned objectives by enhancing competition in the broadcasting licensing market, instead of restricting it. It is important to note that in this case the Court combined the analysis of the technical conditions for broadcasting with concentration problems, interpreting both elements in the light of pluralism. The Court acknowledged the common problem of scarcity of frequencies and channels available in the national broadcasting markets, a condition that is shared by all countries in European, however, ruled that such technical condition cannot only be solved through a restrictive solution that limits the access of any competitor to the market. At the same time, "*fears that the Austrian market was too small to sustain a*

[83] See *Thorgeir Thorgeirsan v Iceland*, n. 13778/88, judgment of June 25 1992, Series A n. 239.
[84] See *Feldek v Slovakia*, n. 29032/95, judgment of July 12 2001, Reports 2001-VIII.
[85] See *Bowman v the United Kingdom*, n. 24839/94, judgment of February 19 1998, Reports 1998-I; more recently *Brasilier v France*, n. 71343/01, judgment of April 11 2006.
[86] See *Janowski v Poland*, n. 25716/94, judgment of January 21 1999, Reports 1999-I, § 33.
[87] See Janis, Kay, and Bradley, *European Human Rights Law: text and materials*, p. 303. Note that the ECtHR followed the ECJ's position concerning public monopoly in broadcasting, showing reluctance to declare that they were incompatible with Article 10 ECHR in the 1960s and 1970s, with the change in decisions following technological developments and the changed attitude regarding network industries also at the national level, such as in the cases of France, Germany, Spain and Italy. Only in 1995 did the ECtHR find that the creation of public monopolies was infringing Article 10 ECHR. See P. Ibanez Colomo, *European Communication Law and Technological Convergence – Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications,* PhD Thesis (2010) at p. 47.
[88] *Informationsverein Lentia and others v Austria*, Judgment of November 24 1993, Series A n. 276.

*sufficient number of private stations for concentration and 'private monopolies' to be avoided were groundless, being contradicted by the experience of several European countries, comparable to size to Austria*".[89]

Although the letter of the Article 10 ECHR does only refer to licensing schemes, the ECtHR did not limit its scope and addressed the issue of content regulation for broadcasting channels. The case concerned the refusal of national authorities to grant a licence to a television channel,[90] justifying the decision on the fact that the channel was exclusively devoted to automobiles matters. The Court accepted the reasoning of the Swiss government that required, in order to grant the broadcasting license, the broadcaster to contribute to the development of a pluralistic culture, showing that the restrictions on freedom of expression on the grounds of pluralism could also be justified by the application of Article 10. This is in line with the previous case law that views the state as the "ultimate guarantor" of pluralism in the media sector.[91]

The principle of media pluralism is also acknowledged in other texts adopted within the framework of the CoE activity, also dating back to the 1982 Declaration on the freedom of expression and information. More recently, mention should be made of the ECTT, where pluralism is expressly cited in Article 10 bis showing the relevance of this issue, though the wording of the provision still remains vague. Another important text that became a milestone on this issue is *Recommendation R (99) 1 on measures to promote media pluralism*,[92] which was recently amended and enlarged in its approach by *Recommendation (2007) 2 on media pluralism and diversity of media content* and the *Declaration on protecting the role of the media in democracy in the context of media concentration*. Recommendation (2007) 2 takes into account the development of technology and its effects on structural pluralism and content diversity. In particular it stresses the fact that pluralism of information and diversity of media will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, states should ensure that "*a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public*". This should be provided through specific regulation that takes also into account the current trends of media integration and ownership concentration, increased by digitalisation and convergence. Thus, in terms of structural regulation, the CoE encourages the state to limit "*the influence which a single person, company or group*" has on the media, "*introducing thresholds based on objective and realistic criteria*" in order to make space for "*other media*" as well, "*for example community, local, minority or social media*". While, in terms of content regulation, the Recommendation goes on, suggesting that states should "*adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media*".[93]

The focus on structural regulation and in particular on media concentration is not a new item in the agenda of the CoE. The patchwork regulatory framework at European level concerning ownership rules, and the difficulties in reaching political

[89] Ibid., §42.
[90] *Demuth v Switzerland*, n. 38743/97, judgment of November 5 2002, Reports 2002/IX.
[91] McGonagle, "Free expression and respect for others", p. 15.
[92] Note that this text provided for the first time the definition of "media pluralism".
[93] See the Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content at point II.1, available at: https://wcd.coe.int/ViewDoc.jsp?id=1089699 (last visited on 25/10/2010).

agreement on binding measures on this issue[94] opened the floor for a leading role for the CoE in proposing non-binding standards with the objective of enhancing media pluralism. For instance, the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration[95] lists a set of conditions aimed at avoiding the risk of misuse of the media's power in a situation of strong concentration of the media and new communication services. Although these indications are very general and theoretical, they touch upon the main ways of improving the democratic process and transparency in the media sector, mentioning in particular the need for "*separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence*" and the usefulness of "*regulatory and/or co-regulatory mechanisms for monitoring media markets and media concentration which could permit competent authorities to identify suitable preventive or remedial action*".[96]

The CoE's activity is not only focused on media pluralism, since media pluralism has interpreted it as a component of the wider needs for media governance[97] that can provide the basic condition for a democratic society. Indeed, the CoE's interventions have also emphasised the need for the participation of citizens in political and social debate. In this regard, Recommendation (2007) 11 on promoting freedom of expression and information in the new information and communications environment views access to the Internet as instrumental for accessing information and therefore also as "*participation in public life and democratic processes*". This Recommendation encourages states to increase the provision of online services to citizens in order to streamline and reduce the administrative burdens for participation, in the pursuit of e-democracy.[98] However, the Recommendation does not evade the fact that effective participation in democratic societies requires facing the problem of digital divide, overcoming the still-existing disparity of access to ICTs for a large part of society.[99]

From a different perspective, the CoE considers the media as a forum through which citizens not only gather information but also participate directly in reaction to the information diffused. This is clearly embedded in the right of reply mechanism that can safeguard fairness, balance, impartiality, accuracy and reputational interests. It allows those affected by particular media coverage or statements to respond to claims made, to challenge biases or to correct inaccuracies. The Recommendation (2004) 16 on the right of reply in the new media environment in particular underlines the role of the right of reply in a broader perspective, adding to the corrective function

[94] See the failure of the directive on Concentration and Pluralism in the Internal Market, above par. 2.

[95] Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies, available at: https://wcd.coe.int/ViewDoc.jsp?id=1089615&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited on 25/10/2010).

[96] See also the activity of the Parliamentary Assembly of the Council of Europe, and of the so called Venice Commission that have supported the standard setting measures also through resolutions in respect of specific countries.

[97] M. Puppis, "Media governance: A new concept for the analysis of media policy and regulation", 3 Communication, Culture & Critique (2010) 134.

[98] See in particular point IV of the Recommendation, available at: https://wcd.coe.int/ViewDoc.jsp?id=1188541 (last visited on 25/10/2010).

[99] See also the previous Recommendation No. (99) 14 on universal community service concerning new communication and information services; Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting; Declaration on human rights and the rule of law in the information society (2005).

"*the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information*". However, the first binding document that clearly refers to the right of reply is the ECTT, in Article 8, though it relates only to broadcasting.[100]

The importance of political debate in a democratic society is also taken into account in the context of the right of reply. One of the principles set forth in Recommendation (2007) 15 on measures concerning media coverage of election campaigns states: "*Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply or equivalent remedies under national law or systems should be able to exercise this right or equivalent remedies during the campaign period without undue delay*".

Increasingly, reactions to media output are enabled by online discussion – in which readers, viewers and users can comment – often hosted and moderated by the media themselves. The levels of moderation of such *fora* tend to vary in practice. Similarly, the growing online presence of the media in general has facilitated the practice of sending feedback to the media. The familiar convention of sending "letters to the editor" can now be achieved with the click of a button.

Moreover, it should be noted that the right of reply – and other mechanisms for the promotion of public participation in the media – do not depend exclusively on regulatory measures by state authorities. Relevant Council of Europe standards recognise the usefulness of, and consistently invite consideration of, the desirability of promoting self- or co-regulatory measures in order to achieve these goals.[101] This amounts to an important acknowledgement of the value of sector-specific input into regulatory and policy processes and even their ability in some circumstances to pre-empt traditional, state-dominated regulation. Initiatives and practices nurtured from within the media sector are often those which enjoy the greatest chance of uptake and effective implementation. In such instances, standards can reflect valuable sector-specific expertise and a sense of (part) authorship can bring a feeling of ownership too, thus strengthening commitment to the standards and their application.

A final point should highlight the parallel interests of the CoE and the EU on the definition of the criteria through which press freedom and freedom of expression can be evaluated. As a matter of fact, the *Resolution 1636 (2008) on indicators for media in a democracy*,[102] widens the scope of the similar action taken by the EU with regard to media pluralism indicators,[103] demanding a number of provisions that Member States should apply in order to allow journalists to work freely and to give all political parties access to the media. The text lists a set of basic principles stemming from the well-established activity of the CoE, in order to provide a template for the level of media freedom enjoyed at the national level.

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[100] The recommendation applies to all "*means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services*."

[101] *See for instance Venice Commission, Report on self-regulation within the media in the handling of complaints,* CDL(2008)039, available at: http://www.venice.coe.int/docs/2008/CDL%282008%29039-e.asp (last visited on 25/10/2010).

[102] Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm (last visited on 25/10/2010).

[103] See above par. 2, part. fn 60.

## 4. European media policy-making and its effects on state media policies

When looking at the systems of media regulation of Member States, it is virtually impossible to distinguish clearly between what comes from the traditional national media regulation and what is the outcome of the legal and policy-making processes defined at EU level.[104] Until the 1980s, each Member State developed specific regulatory regimes which although substantively different, nonetheless shared similar basic elements, such as the dual system of public and private service providers in the broadcasting sector. The role of the public service broadcasting was recognised as crucial in each Member State (and still is), as it is the bearer and the guardian of public interest values, which include contribution to the quality of public discourse, the promotion of societal integration as well as national culture and an emphasis on news and education.[105] The functioning of this dual system, however, differs from country to country, as it can be regulated differently in terms of the role of political powers within the PBS, the rules governing the funding of the PBS, the ownership limits applicable to the commercial broadcasters, the level of caps on advertising and the rules on media content.[106] The press market, instead, is less heavily regulated, leaving more space to self-regulatory measures adopted directly by market actors and by journalist associations. The applicable statutory rules in this sector focus mainly on ownership structures with special attention to limitation of shares holding, multiple ownership and cross-media ownership.[107] Content laws for the press are less diffused, while state subsidisation of newspapers, and in particular party political ones, is still an existing practice.

Since the 1980s, a trend towards the convergence of Member State media policies can be acknowledged initially based on the implementation in national systems of the TWF Directive. This Directive represented a milestone in EU audiovisual policy, not only because it was the first legislative intervention in the field, but also because it prompted a significant revision of domestic media laws and regulations that were in conflict with the letter of the directive. The ECJ, on its part, ensured the liberalisation process prescribed by the Directive, imposing changes to national regulations, not only in relation to the formal wither transposition of the Directive's provisions, but also by eroding "*national media legislation by overriding even minimum provisions enacted in the TWF Directive to safeguard the public interest*".[108]

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[104] See M. Moran and T. Prosser, *Privatization and regulatory change in Europe* (1994), at p. 148.
[105] See Harcourt, *The European Union and the regulation of media market*, p. 158.
[106] There are several studies which have analyzed national media systems and their development over the decades, without the intention of being an exhaustive list, see P. Humphreys, *Mass media policy in Western Europe* (1996); I. Nitsche, *Broadcasting in the European Union: the role of public interest in competition analysis* (2001); D.C. Hallin and P. Mancini, *Comparing media systems: three models of media and politics* (2004); Y. Katz, *Media Policy for the 21st century in the United States and Western Europe* (2004); M. Kelly, G. Mazzoleni, D. McQuail (eds), *The media in Europe* (2004); W. Meier, J. Trappel (eds), *Power, performance and politics: media policy in Europe* (2007); J. Harrison, L. Woods, *European broadcasting law and policy* (2007); A. Charles, *Media in the enlarged Europe: politics, policy and industry* (2009); B. Klimkiewicz (ed.), *Media freedom and pluralism: media policy challenges in the enlarged Europe* (2010).
[107] See R. Van der Wurff and E. Lauf (eds), *Print and online newspapers in Europe – A comparison analysis in sixteen countries* (2005).
[108] Harcourt, *The European Union and the regulation of media market*, p. 200. For a more detailed analysis of the case-law, see Harcourt, *The European Union and the regulation of media market*, p. 22 and ff.

This "top-down" mechanism had also an indirect effect: the European Commission acted as a policy entrepreneur, by influencing national policy change through the recommendation of best practices, models and solutions through a "soft law" approach, which included the publication of Commission reports, green papers, etc. These suggestions were evidently formulated at the European level, but they affected policy formation at the national level. In this way, the Commission can be seen to have steered the course of debate over deregulation at the national level.[109]

However, this should not be seen as a one-way process, since national governments also disseminated their own policy recommendations, using the EU as a platform for rule transfer. For instance, France and Italy lobbied for an EU content requirement to protect domestic production,[110] while the UK lobbied for changes to the TWF Directive to encompass its non-domestic satellite policy, excluding the applicability of content rules to such broadcasters.

The objective of EU regulation was the deregulation of broadcasting and the creation of a single audiovisual market through the legalisation of cross-border broadcasting. However, the advent of digital technology and the intertwined effect of convergence between broadcasting and telecommunication invalidated the traditional argument regarding radio-spectrum scarcity which was used to justify regulatory interventions, including the pursuit of public interest goals, in particular media pluralism. Indeed digital compression of data, visual images and sound allows broadband cables to carry much more capacity that previously possible, thus increasing the possibility for new actors to provide broadcasting services through digital systems. This paved the way since the 1990s for the entry of new competitors on the market, to the creation of strategic alliances, and the undertaking of acquisitions and corporate media mergers. The liberalisation that started with the TWF Directive was then developed further addressing also areas such as internet, e-commerce and mobile phones.[111]

However, the failure of the Commission to achieve sufficient political compromise to enact the directive on media concentration demonstrates the difficulties that the European institutions faced (and still face) in overriding the

[109] However, see P. Humphreys, "The EU audio-visual policy, cultural diversity and the future of public service broadcasting", in J. Harrison, and B. Wessels, *Mediating Europe – new media, mass communications and the European public sphere* (2009) 183, at p. 186 where the Author argued that "*EU 'negative integration' is easier to achieve because the Commission and the European Court of Justice can rule unilaterally on competition related matters, whereas the harmonization of market correcting rules - 'positive integration' - is rendered more difficult to achieve because of the need for agreement in the Council of Ministers and Parliament*".

[110] Note that Article 4 and 5 of the TWFD should be read as a semi victory for the French lobby which insisted on including provisions capable of reducing the cultural and economic impact of US audiovisual imports. Through these measures, the French partially succeeded in transferring their own protectionist cultural policy model to the other Member States.

[111] See the Telecommunications Package of 2002 which included Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services; Directive 2002/20/EC on the authorisation of electronic communications networks and services; Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

resistance of influential Member States, based on the argument that competence for media policy rests with national governments.[112]

In the 2000s, the European policy framework changed to encompass goals relating to the social cohesion and European citizenship, and this renewed concern towards public interest values can be explained by four different reasons which are mainly related to the existing historical and existing economic conditions in Europe:

– the emergence of a liberated media sector within Central and Eastern European states following the end of the Soviet era has generated a public debate about pluralism and media independence which was less evident in Western Europe;

– new technologies enhanced convergence among previously differentiated market sectors triggering the consolidation of existing industry players through vertical integration, facilitated by the emergence of gate-keeping technologies. The opportunities created by these developments in purely economic terms, however, are counter-balanced by the risks of potential abuse of editorial power by media owners and controllers;

– the liberalisation of the broadcasting sector allowed for the emergence of private media entities with the capability of rivalling public sector broadcasters, thus reviving concerns about the influential nature of the media;

– globalisation reopened the debate about the impact of foreign ownership and the prevalence of foreign content on domestic regulation and culture.[113]

Turning to the Council of Europe's influence on national media policies in Europe, it is clear that its main legal tool is the ECtHR jurisprudence concerning Article 10 ECHR. In effect, Article 10 ECHR makes respect for the human right to freedom of opinion binding on all Member States of the Council of Europe. Since the entry into force of Protocol No. 11 to the Convention any citizen of a signatory State is entitled, after exhausting domestic remedies, to lodge a complaint alleging a violation of these human rights with the Court. This has enabled the ECtHR to develop a rich jurisprudence on allegations about breach of Article 10 ECHR. Within the European Union, the rights guaranteed by the Convention, and therefore also by Article 10, qualify as general principles of European law, as expressly acknowledged in Article 6.2 of the Treaty on the European Union.

The judgements of the ECtHR clearly shows that freedom of the media is not only interpreted as part of the individual right to freedom of expression enshrined in Article 10(1) ECHR, but also as a means of promoting freedom of information applied by the Strasbourg Court in connection to Article 10(2). This has permitted the Court to take into account the social/cultural and political/democratic facets of the media and to introduce these into its decisions. For instance, the Court has stressed in

[112] Humphreys, "The EU audio-visual policy, cultural diversity and the future of public service broadcasting", p. 197. The Author argued that this lack of intervention paved the way for a de-regulatory process starting with the deregulation of anti-concentration rules in UK and Germany in 1996, where governments supported the argument that this process was a positive reaction to enhance international competitiveness of national media industries.

[113] See I. Walden, "Who owns the media? Plurality, ownership, competition and access", in D. Goldberg, G. Sutter, and I. Walden, *Media law and practice* (2009) 19, at p. 22.

the judgement concerning the Austrian broadcasting monopoly that the preservation of a plural, culturally diverse broadcasting provision was an aim that could justify restrictions on broadcasters' freedoms. Nonetheless, such pluralism could be achieved by other means than a public service broadcasting monopoly, for example, through a dual broadcasting system, as shown by the regulatory choices of other European countries.[114]

At the same time the resolutions and recommendations addressing media issues have provided European States with a useful toolbox, which in particular includes benchmarking and best practice reports able to steer indirectly the political choices on national governments.[115] In many cases, although these "soft law" instruments impose no legally binding obligation, the CoE has often evaluated the implementation of its recommendations for the purpose of evaluating its own influence and reminding the states to take the analysed issues into account.[116]

## 5. Conclusion

The analysis developed in this contribution shows, in the end, that both the EU and the CoE have influenced deeply the choices of national governments in their media policies. However, it should be noted that while the CoE provides a wider interpretation of the concept of media freedom, focusing on the full interpretation of the freedom of expression, which is enshrined in the ECHR. Instead, the work of the EU can be evaluated as more limited in scope and also much less effective: on the one hand it only addressed the issue of freedom of expression through the lens of media pluralism; on the other, not only the limited competences of the EU to act and the legal basis upon which grounding the legitimacy of legislation, but also the difficulties in achieving sufficient political compromise with most powerful member States, proved the failure of many attempts to develop a full-fledged media policy.

The comprehensive approach taken by the CoE, and in particular the important role performed by the Steering Committee on the Mass Media, provides a useful framework for the evaluation of the policy choices taken by single countries with regards to the enhancement of free and democratic media systems. The recent Recommendation on indicators of media freedom could then be interpreted as a summary of the historical and conceptual development of the principles underlying media freedom, capable of being used in practice to evaluate and eventually improve

[114] See *Informationsverein Lentia and others v Austria*.

[115] See for instance the Report "Public service media in the information society", February 2006, H/Inf (2006) 3, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282006%29003_en.pdf (last visited on 25/10/2010); Report "Methodology for monitoring media concentration and media content diversity", November 2008, H-Inf(2009)9, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%299_en.pdf (last visited on 25/10/2010); Report "Strategies of public service media as regards promoting a wider democratic participation of individuals", November 2008, H/Inf(2009)6, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%296_en.pdf (last visited on 25/10/2010).

[116] Among the most recent reports see the Report "Contribution of public service media in promoting social cohesion and integrating all communities and generations", November 2008, H/Inf(2009)5, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%295_en.pdf (last visited on 25/10/2010); Report "How member states ensure the legal, financial, technical and other appropriate conditions required to enable public service media to discharge their remit", November 2008, H/Inf(2009)7, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%297_en.pdf (last visited on 25/10/2010).

existing national media policies. However, until now the reactions of national governments have not been seen.

However, it should be emphasised that the CoE had the possibility of intervening directly in national policies only on a case-by-case basis, through the claims presented by individuals and organisations at the Strasbourg Court. On the contrary, the EU has a more effective role since, within the ambit of its competence the supremacy of European law is acknowledged by the Members States, through the means of either positive integration or negative integration.

The need to develop a comprehensive approach to media policy at the European level supportive of media freedom and independence comes from a twofold reasoning: on the one hand, the cross-national dimension of audio-visual media services and the consequent development of the related trans-border markets increasingly render national policies and regulatory strategies less apt to deliver meaningful results, and also, if left alone, less incisive and successful in securing highly sensitive and fundamental objectives, other than mere economic objectives. On the other hand, an European intervention could prevent national policies and regulatory solutions, especially if predominantly in the hands of national governments and politics alone, be dangerously influenced by political pressures and then shaped according to contingent and distorted interests.

The methods through which this objective could be achieved could benefit from the comparative analysis of national policies in terms of enhancement of free and democratic media, in order to define the best regulatory strategies which could, not only fit in the existing national regulatory framework, but also improve its potential weaknesses.

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